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AMERICAN LAND TITLE ASSOCIATION

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Title Insurance

No Duty to Defend Insured Accused of Participating in Forgery Fraud

Security Title Guar. Corp. of Baltimore v. 915 Decatur St NW, LLC, ___ F.Supp.3d __, 2019 WL 6728449 (2019).

A District of Columbia court has ruled that a title insurer is not required to defend its insured against the true owner's claim that the insured participated in a fraud scheme in which a forged deed was given to the insured. Also, the court dealt with the fact that the insured held title for only a few days, and was no longer the owner when the lawsuit was filed.

The Security Title Guarantee Corporation of Baltimore issued a policy insuring 915 Decatur St. NW LLC's title to property in the District of Columbia based on a deed purportedly given by the owner, Bridget Fordham. Decatur's managing member, Frank Olaitan, says that he toured the property before he bought. Fordham was not present at closing on Dec. 7, 2016.

The next day, Decatur sold the property to Claremont Management LLC. The two deeds were recorded in sequence on December 15. Decatur got a title insurance policy from Security Title.

In 2017, Fordham sued Decatur, Mr. Olaitan, Claremont and others in the Superior Court for the District of Columbia. She alleged that her signature on the deed was forged and that both deeds were fraudulent.

Security Title declined to defend Decatur in the Fordham lawsuit. Decatur and Security Title both filed suits about the title insurance policy. In this decision, issued in the action filed by Security Title, the court considered the competing summary judgment motions filed by the insurer and insured.

The court first dealt with the policy continuation provision, Condition 2. The court summarized that provision in this way:

> *In short, coverage under the Policy only continues so long as Decatur has an interest in the property, has an obligation secured by a purchase money mortgage, or has an obligation due to warranties in any future transfer of Decatur's interest. However, the Policy imposes no temporal restriction on when Decatur must file claims.*

Security Title argued that the policy terminated when Decatur conveyed the property to Claremont. Decatur argued that the policy remained in effect because its loss "occurred during the coverage period," and because the "special warranty in the deed to Claremont extended the coverage period."

The court began by noting that the primary issue was the claimed duty to

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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***.

PRICING

An annual subscription is $200 for ALTA members and $250 for non-members.

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CONTACT US

1800 M Street NW,
Suite 300 South
Washington, DC 20036-5104
p. 202.296.3671
f. 202.223.5843
w. alta.org
e. service@alta.org

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defend. The District of Columbia follows the "eight corners" rule. If the allegations in the complaint state a claim covered by the policy, "the insurance company must defend." However, the insurer may not and need not consider any extrinsic fact that might affect coverage.

The court noted that several of Fordham's claims were so grounded in fraud and tortious conduct that they did not clearly relate to title or any covered risk. However, it said that Fordham's claims alleging forgery and fraud about ownership invoked Covered Risk 2 of this 2006 form ALTA policy, because that coverage includes a "defect in the Title caused by (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation."

In reviewing the issue of whether or not the policy had terminated, the court considered primarily the Maryland decision of *Chicago Title Ins. Co. v. 100 Investment Ltd. P'ship*, 355 F.3d 759 (4th Cir. 2004). Based on that decision's doubtful reasoning, this court said that:

> *For example, rather than determine if an already-suffered loss or damage occurred during the coverage period, the Court must ascertain whether a loss or damage based on the underlying litigation's claims—if successful—would have occurred during the Policy's coverage period.*

Security Title's position was that Decatur's policy was in effect for one day, from December 7 to December 8 of 2016. The court agreed with the accurate statement in 100 Investment that the policy only covers the insured while it is in title, except to the extent that the insured warrants title. Once the insured conveys its title, any problem with that title "would pass to the purchaser and [Decatur] would no longer have risk, nor coverage."

Decatur argued, however, that it could still demand a defense under its policy after it had conveyed the property "*if* those claims are premised on loss or damage incurred *during* the coverage period." In *100 Investment*, the court held that a title insurer had a duty to defend the insured when he was sued for trespass after having conveyed the property. That court ruled that the trespass occurred while the insured was in title, and therefore there was a duty to defend.

This court noted that two Arizona decisions have adopted the "coverage period" rationale of *100 Investment*, although it essentially negates the statement in Condition 2 that, after an insured conveys the property, the policy continues only as to a breach of warranty claim. The court accepted the "coverage period" analysis of *100 Investment*. It said:

> *If Decatur can demonstrate that the claims in the underlying lawsuit would result in losses or damages incurred by Decatur during the time that Decatur owned the property, the continuation of coverage clause would not bar those claims or, as a result, Security Title's obligation to defend Decatur for those claims.*

The court then considered whether the acts alleged by Fordham occurred during the policy period. It ruled that most of the acts occurred before the policy date, because they concerned the way in which Decatur got its ownership of the property. As to those claims, the court rejected Decatur's plea that the fraud occurred simultaneously with closing, which was based entirely on its own version of the facts, not the allegations in the complaint.

However, the court found that two claims alleged acts that occurred while Decatur was the owner, a claim that Decatur profited from its resale of the property to Claremont and a claim for conversion. Those claims would create a duty to defend, the court said, unless an exclusion applied.

Before it reached Exclusion 3(a), however, the court addressed Decatur's alternate claim, that Fordham's complaint triggered the continuation provision as to breach of warranty. Decatur argued that the allegations made by Fordham would invoke the limited warranty it made to Claremont. In analyzing this claim, the court got the issue partly right. It said that, to "extend the coverage period," the insured's warranties "must make Decatur liable for covered risks."

Then the court went a bit off track. It said that, under Section 42-605 of the District of Columbia Code, a special warranty deed protects the grantee against only a claim made by the grantor. The court said that any claim that Decatur could make against Claremont would not be covered by the policy, because of Exclusion 3(a). Therefore, it said, the warranty given by Decatur was "not covered" by the policy, and the continuation provision was not invoked.

Of course, a title insurer would analyze this issue differently. Claremont did

not sue Decatur, and it made no claim that Decatur had breached its limited warranty. Thus, a title insurer would conclude that there was no continuing coverage.

Finally, the court addressed the question of whether or not the two claims made by Fordham that it had found to involve events that occurred during the "coverage period" fell under Exclusion 3(a). The court said that all of the claims invoked Exclusion 3(a), and therefore Security Title had no duty to defend Decatur. The court compared the allegations in the complaint to the exclusion in this way:

> *Ms. Fordham specifically alleges that Decatur and Mr. Olaitan "intentionally created a false deed and forged [her] signature on the deed." … She further alleges that each defendant, including Decatur, "agreed, explicitly or tacitly, to participate with other Defendants in" the allegedly fraudulent acts and that their acts "aided the other Defendants and was in furtherance of a common scheme to wrongfully divest Plaintiff of title to her home for Defendants' financial profit." … Because this claim is about what is essentially an alleged title defect due to forgery, it might be covered within the initial substantive scope of the policy.*
>
> *But the Court need not determine whether it is covered as, upon examination of the Complaint under the eight corners rule, this claim falls within the exclusion for defects "created" or "agreed to" by Decatur. An illustrative case considering a nearly identical exclusion provision is Stevens v. United General Title Insurance Co., 801 A.2d 61 (D.C. 2002). In Stevens, the District of Columbia Court of Appeals explained that the language "created ... by the insured claimant" in policies such as this one has generally "been defined to reflect conscious and deliberate or intentional conduct." Id. at 69. The complaint in Stevens alleged fraudulent conduct, and because the allegations "clearly specif[ied] intentional, conscious, and deliberate conduct by" Stevens, the court could not look beyond the four corners of the complaint at extrinsic evidence. …*
>
> *So too here. Count One of the Complaint alleges that Decatur specifically created the defect at issue by playing a role in the fraudulent conveyance. The allegations squarely fall within the policy's exclusion for defects or matters created by Decatur. See Fogg v. Fid. Nat. Title Ins. Co., 89 A.3d 510, 515–16 (D.C. 2014) (finding that claim alleging that insured knew of defect was not covered for duty to defend purposes under identical exclusion provision).*

The court brushed off Decatur's claim that the fraud had been conducted by someone else, and that it was a mere victim. The court said it could not even consider those assertions in determining the duty to defend, under the eight corners rule.

The court struggled the most with Fordham's negligence claim, in which she alleged that Decatur "failed to exercise the normal standard of care in ensuring that the transaction was not the result of forgery or fraud." The court said this claim did not clearly invoke a covered risk or Exclusion 3(a). It noted that, in *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780, 784 (6th Cir. 1986), the court said that an allegation of "mere inadvertence or negligence" did not invoke the word "created" in the exclusion. However, the court said that the negligence claim interwove allegations of intentional conduct by Decatur, which might invoke the exclusion. The court concluded that, whether or not there could have been coverage, the negligence claim concerned events that occurred before the policy period, and therefore the claim was not covered.

Therefore, the court concluded that Security Title had no duty to defend Decatur against any of the claims alleged by Fordham. The court said it was too early to reach the issue of whether Security Title could have a duty to defend Decatur.

This decision certainly suggests that Condition 2 of the ALTA policies should be clarified.

Aaron Drew Neal and Mark W. Schweitzer of McNamee, Hosea, Jernigan, Kim, Greenan & Walker, P.A., Greenbelt, Maryland represent Security Title.

Title Insurance

No Duty to Defend Insured Because Policy Terminated; Insured Has No Malpractice Claim Against Insurer's Claims Counsel

Westcor Land Title Ins. Co. v. Alicea, 2019 WL 6724311 (D.N.J.) (unpublished).

A title insurer had no duty to defend its former insured in a lawsuit brought by the true owner that alleged that the insured lied on a title affidavit. The former insured also had no legal malpractice claim against the title insurer's claims counsel.

Asia Smith owned a house in Newark in 2004, and granted a mortgage to U.S. Bank. There was a problem with the mortgage, however, that caused it not to be discovered when Smith sold the house to Alexander Alicea in 2009. Alicea got a First American policy when he bought the house. The policy did not contain an exception for the mortgage because of its recording problem. Alicea later married Bryna Morales-Alicea.

In 2014, the Aliceas learned that the mortgage existed. Mr. Alicea made a claim on his policy. The First American claims counsel, Sean Ardes, allegedly said that "there was nothing to be concerned about [and] that they would handle [it]." However, Smith defaulted on the loan and U.S. Bank filed a foreclosure action in 2015, naming the Aliceas.

In 2016, with the foreclosure action still pending, the Aliceas sold the house to Temeka Foreman. The Aliceas gave a limited warranty deed that protected only against the grantor's own acts. Mr. Alicea signed a title affidavit

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that said that, to the best of his knowledge, "[n]o other persons have legal rights in this property," and that "[t]here are no pending lawsuits or judgments against us or other legal obligations which may be enforced against the property." Westcor issued a policy to Foreman that did not except the Smith mortgage or the foreclosure action.

Westcor then paid $234,700 to get rid of the U.S. Bank mortgage. It sued Alicea for making false statements in the title affidavit. The Aliceas made a claim on the First American policy issued to Mr. Alicea, which First American denied. The Aliceas filed a third party complaint against First American, alleging claims of negligence, breach of contract and violation of the New Jersey Consumer Fraud Act. They also brought a claim against U.S. Bank and a legal malpractice claim against First American's claims counsel Sean Ardes.

First American and Ardes filed motions to dismiss. The court granted those motions.

In their brief, the Aliceas admitted that their negligence and Consumer Fraud Act claims had "little merit," as did non-insured Bryna Morales-Alicea's breach of contract claim. The court dismissed those claims without further discussion.

The court said that the Aliceas failed to state a claim against First American for breach of contract for two reasons. First, the Policy terminated when they sold the property. Second, the policy gave no protection against Mr. Alicea's false statements on the Westcor title affidavit.

The court's analysis of policy termination was very straightforward. It said:

> *The Policy's coverage terminated when the Aliceas sold the Property on February 9, 2016. … The Policy's Continuation Terms states that coverage continues "only so long as the insured retains an estate or interest in the Land ... or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title." … The Aliceas no longer retain the Property. Therefore, for coverage to continue, the Aliceas must have liability by reason of warranties set out in the Foreman Deed. … The Foreman Deed contains no such warranties. Rather, the deed contains a "covenant as to grantor's acts," which promises only that a grantor of a deed "has done no act to encumber" the deeded land. … N.J. Stat. Ann. 46:4-6. This covenant is not a "warrant[y]" as contemplated by the Continuation Terms, and does not enable coverage to continue "by reason of warranties."*

The court supported its ruling that the policy had terminated by referring to *Shotmeyer v. N.J. Realty Title Ins. Co.*, 948 A.2d 600 (N.J. 2008), and 11 Couch on Insurance 3d, § 159:5 (1998). For its ruling that there was no warranty coverage, it cited *Chicago Title Ins. Co. v. 100 Investment Ltd. P'ship*, 355 F.3d 759 (4th Cir. 2004) and *Washington Temple Church of God in Christ, Inc. v. Glob. Properties & Assocs., Inc.*, 2012 WL 5187556, at *3, 6 (N.Y. Sup. Ct. Oct. 18, 2012) (no policy warranty liability when insured gave special warranty deed, because such a deed contains no warranty of title). The court also cited Joyce Palomar, 1 Title Insurance Law § 8:23 (2019 ed.) (noting that the continuation provision is invoked only when title is conveyed with a general warranty of title).

The court also said that, even if the policy had not terminated, "it would not provide coverage to the Aliceas for their allegedly fraudulent or negligent misrepresentations." The court said the Westcor complaint did not invoke a covered risk, because the policy "contains no terms which could indemnify those fraudulent or negligent misrepresentations." It cited *Penacova Builders, Inc. v Ambrosio-Farias*, 2013 WL 11521806, at *16 (N.J. Super. L. Aug. 28, 2013) for the principle that "monetary claims that do not result in defect, lien or encumbrance upon title are not covered events under title policies." The court also said the false title affidavit fell under the post-policy exclusion. It cited *Princeton South Investors, LLC v. First American Title Ins. Co.*, 437 N.J.Super. 283, 97 A.3d 1190 (N.J.Super.A.D. 2014) for its holding that title insurance does not insure against future events.

The court also dismissed the legal malpractice claim against claims counsel Sean Ardes. The first element of such a claim is proof that there was an attorney-client relationship between the plaintiffs and the lawyer that created a duty of care. The court said the Aliceas could not prove that Ardes was their attorney.

The Aliceas had pled that Ardes "was the attorney assigned to represent Alicea in the foreclosure action," and that he had assured them that "he was working with the foreclosing attorneys and that Alicea should not be concerned about a default and/or a default judgment." The court said that the fact that Ardes had been assigned to the Alicea claim was not proof of an attorney-client relationship, particularly since he worked for First American. The Aliceas had not pled that they paid Ardes, that they had signed an engagement letter, or that they had the right to either hire or fire him as their supposed counsel. The court also found no allegation that would suggest to Ardes that he should have known that the Aliceas could claim he was their attorney, in order to support a claim of an implied attorney-client relationship.

This court's analysis of policy termination and claimed warranty liability is conventional and clear-cut, in marked contrast to the approach taken in the *Security Title* decision that is also reported in this issue. The court's rejection of the attorney malpractice claim should also prove quite useful to title insurers and their claims counsel.

ALTA Calendar

Digital Closing & eMortgage Boot Camp
April 8-9
Atlanta, Ga.

Spring Title Counsel Meeting
April 27-28
Charleston, S.C.

ALTA Advocacy Summit
May 11-13
Washington, D.C.

Please visit *alta.org/events*

Escrow Matters

Escrowee Entitled to Recover Attorneys' Fees from Escrow Principals

Halprin v. Federal Deposit Ins. Corp., ___ F.Supp.3d ___, 2020 WL 411045 (W.D.Tex. 2020) (not yet released for publication).

An escrowee that was sued for its role in closing transactions tainted by the sellers' fraud was entitled to collect from the sellers, including their actual attorneys' fees. The court also dismissed the buyers' claims against the escrowee.

As was reported in the November 2018 issue, involving an earlier decision in the same case, HTG Real Property Management, the Padilla Property Corporation, Maria Del Rosario Padilla, Mauro T. Padilla III, Mauro Joe Padilla and Carlos Miguel Padilla contracted to sell rental property investments to 37 people, including Gregory Halprin.

The agreement was that the Padillas would build apartment buildings on all of the lots it sold to the buyers, which are located in Texas. The buyers delivered down payments to escrowee LandAmerica Lawyers Title of San Antonio, Inc. The Padillas deeded the lots to the buyers and started constructing the buildings.

Not long afterward, however, the Padillas asked the buyers to deed the lots back so that the Padillas could get construction financing. The Padillas also asked the buyers to subordinate their rights to those of the construction lender. The buyers did so, after which it appears the buyers held no recorded interests in their parcels.

The Padillas got the construction loan, but used the money "to pay personal and/or corporate debt." They did not finish the apartment buildings. The lender foreclosed, wiping out the investors.

The investors sued the Padillas. They also sued American Title Group Inc., the successor to LandAmerica Lawyers Title of San Antonio, for its escrow acts. The buyers asserted claims of common law and statutory fraud, violations of the Deceptive Trade Practices Act, civil conspiracy, assisting and participating, negligence, and breach of fiduciary duty.

American Title sued some or all of the Padillas to recover its attorneys' fees in defending against the buyers' claims. It moved for summary judgment against Mauro T. Padilla on its claim based on the Deceptive Trade Practices Act. Section 17.555 of the DTPA allows a person who has been roped into an action under that law to obtain indemnity from the person who caused the problem, including the attorney's fees incurred by the non-guilty party.

The court granted judgment to American Title against Mauro Padilla. American Title said that Mauro Padilla had been sentenced to prison for his role in this imbroglio, and he did not respond to American Title's motion. The court had already entered a final judgment against Mauro Padilla on the plaintiffs' claims, including their DTPA claim. The court then determined that the amount of the attorneys' fees sought by American Title, of about $500,000, was reasonable.

In this decision, the court also dealt with certain claims between the plaintiff buyers and American Title. It dismissed the plaintiffs' claims against American Title based on the DTPA. It refused to find that that claim had been brought in bad faith, however.

Also, the court denied American Title's motion for summary judgment against the plaintiffs seeking payment of attorneys' fees under the indemnities they had given to the title company when they deeded the parcels back to the Padillas. Of the 37 plaintiffs, 24 had given indemnity agreements to American Title. In the 2018 decision, the court held that the indemnities did not bar the plaintiff buyers from suing American Title, because in Texas an indemnity protects the indemnitee against third party claims, but is not a release of claims by the indemnitor against the indemnitee. In this decision, the court said that American Title could not recover from the buyers the same attorneys' fees for which the court awarded judgment against Padilla. Rather, American Title's "potential relief is limited to the attorney's fees and costs that it has not already been awarded… ."

Escrow Matters

Escrow Indemnity Provision Does Not Negate Escrowee's Liability for Breach of Instructions

R&J Oil v. R.C. Rodgers, ___ F.Supp.3d ___, 2020 WL 201053 (W.D.Ky. 2020) (permanent citation not yet available).

An indemnity provision in escrow instructions that said the principals would indemnify the escrowee against even his own negligence is unenforceable as a defense to the claim that the escrowee disobeyed his duties.

Keith and Nikkoll Johnson signed a "refurbishing contract" with Ronnie Charles Rodgers and a company owned by Rodgers. The contract said that Rodgers would transfer to the Johnsons his mineral rights in a 67-acre parcel in Tennessee, along with an oil and gas lease and an oil well, and that Rodgers would refurbish the oil well.

The Johnsons and Rodgers also signed an escrow agreement, appointing attorney Elmer George as escrow agent. The Johnsons would deposit $105,000 with George, who was not to release the money until he received the fully-signed refurbishing contract, the documents necessary to transfer the mineral rights, and an assignment of the existing oil and gas lease. If George did not get all of the documents within thirty days, he was to return the money to the Johnsons.

George knew that Adventure Enterprises Inc. had an interest in both the oil well and the oil and gas lease. George talked to

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Adventure's attorney about an assignment of its rights to Rodgers. Adventure's lawyer told George that the assignment should refer to both the oil well and the lease, and it did. George drafted that assignment, which conveyed Adventure's rights in both the well and the lease to Rodgers.

However, Rodgers did not assign Adventure's rights to the Johnsons. The Johnsons and Rodgers signed a document entitled Assignment of Oil and Gas Lease. Despite its title, however, the assignment conveyed only an 87.5% working interest in one well and did not assign the oil and gas lease. Nevertheless, when George got the signed assignment and refurbishing contract, he disbursed the Johnson money to Rodgers.

The Johnsons say that Rodgers did not refurbish the well as required under the contract. To the contrary, the drilling permit was lost and the well was eventually filled with concrete.

The Johnsons sued George for breach of the escrow instructions because he released their money without receiving an assignment of the oil and gas lease to the Johnsons. The Johnsons moved for summary judgment. George's defense to the motion was based on the indemnification clause he had inserted, which read:

> *[The Johnsons] agrees to indemnify and hold harmless the Escrow Agent from any and all claims, liabilities, losses, expenses, actions, suits, or proceedings at law or in equity, or any other expense, fees, or charges of any character or nature whatever that it may incur by reason of acting as the Escrow Agent under this Escrow Agreement except for the Escrow Agent's gross negligence, bad faith or willful misconduct.*

The court said that this provision was not a waiver of the right to sue George for breach of contract. It noted that Black's defines "indemnify" as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default." There was no third party in this action. The Johnsons had merely sued George for not obeying their instructions. The court said that "the concept of indemnity does not fit here." While the court said that there was no Kentucky decision squarely on point, it could not accept George's interpretation of the indemnity provision because it would render the escrow agreement an illusory contract. It cited an Illinois decision and a number of other authorities for the principle that a "party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract."

Next, the court addressed the question of whether or not George breached the escrow agreement. It cited perhaps the entire universe of Kentucky decisions on the subject of escrow in saying that:

> *Kentucky law recognizes that escrow agreements are created when parties make known to a depositary that they wish the depositary to hold something in escrow until satisfaction of a certain condition or conditions. Home Ins. Co. of N.Y. v. Wilson, 275 S.W. 691, 693 (Ky. 1925). "There is no question of the liability of an escrow holder if he violates the requirements of the contract." Southern v. Chase State Bank, 61 P.2d 1340, 1342 (Kan. 1936); see also Vaughan v. Vaughan, 170 S.W. 981, 983 (Ky. 1914).*

The court said the evidence was clear. George was required to hold the money until he had documents assigning all interests in the oil well and the lease to the Johnsons. George drafted the assignment of Adventure's rights to Rodgers, and knew what rights existed. Still, he released the money to Rodgers without having obtained an assignment of those same rights to the Johnsons.

Finally, the court came back to the issue of the indemnity provision in ruling on the Johnsons' claim that George breached a fiduciary duty to them. While George was not entitled to use the indemnity to bar the claim for breach of contract, the court noted that Kentucky will in some cases enforce an indemnity covering the indemnitee against his own negligence. However, Kentucky says that "every presumption" should be made against interpreting an indemnity to cover the indemnitee's negligence. Such provisions are not enforceable in business transactions, as a matter of public policy. Also, if the indemnitor is in a clearly inferior bargaining position, the provision is not favored. *Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 344 (Ky.App. 2008).

The court held that George could not enforce the indemnity provision because the Johnsons were in an inferior bargaining position and because doing so would be bad public policy. George is an attorney. His role was as an escrowee. Concerning public policy, the court said:

> *Escrow agents are utilized for many types of real estate transactions, and upholding this indemnification provision would allow escrow agents to absolve themselves of nearly any liability resulting from the performance of their duties. … As discussed above, it is inconceivable that Plaintiffs would have agreed to entrust George with their retirement savings if they understood that George would not be held responsible in the event he failed to perform his duties. Such unlikelihood weighs against enforcement of the indemnification provision.*

In addition, the court said, enforcement of the indemnification provision would be "wholly inconsistent with George's fiduciary duties as an attorney serving as an escrow agent." The court cited *Jaffee v. Davis*, No. 2001-CA-000817-MR, 2003 WL 2002783 (Ky.App. May 2, 2003), in which the court held that the plaintiff could assert a breach of fiduciary duty claim against an attorney escrowee despite a contract provision that said the escrowee was only liable for gross negligence or willful bad faith. The court also cited the pronouncement that a lawyer serving as an escrow agent is "subject to an expectation of a greater degree of integrity than the average nonprofessional person acting in the same capacity." *Fisk v. People's Liberty Bank & Tr. Co.*, 570 S.W.2d 657, 660 (Ky. 1978). The Kentucky Supreme Court has held that an attorney acting as an escrow agent is subject to the laws governing fiduciaries. *Ky. Bar Ass'n v. Dixon*, 373 S.W.3d 444, 447 (Ky. 2012). Therefore, the court said:

> *Kentucky law is clear that a fiduciary owes more*

than an ordinary duty of care, and George cannot relieve himself of this duty by inserting a clause into the Escrow Agreement purporting to hold him to a lesser standard. For these reasons, the Court concludes George cannot require Plaintiffs to indemnify him against their claims for his own tortious conduct.

Having dispensed with the indemnity provision, the court was able to conclude with little effort that George had breached his fiduciary duty as a matter of law. George's "most basic responsibility" was to hold the money in escrow until the oil and gas lease had been assigned. George "did not comply with the terms of the Escrow Agreement which he drafted, and in failing to do so breached the trust Plaintiffs reposed in him as escrow agent." The court said that it was "noteworthy" that George prepared the transfer of Adventure's rights in the lease to Rodgers, and it was "unclear why this same interest was excluded from the conveyance from" Rodgers to the Johnsons. The court said that "George seems to fault his staff for the mistake." It said that did not excuse George from complying with the escrow instructions.

This is a thoroughly-researched decision. It sets a reasonably high standard for escrow conduct, and limits exculpatory clauses in escrow agreements, but the result is certainly not shocking or drastic.

Escrow Matters

Law Firm Owed No Duty to Non-Client Investors for Wired Money

Meisels v. Fox Rothschild LLP, ___ A.3d ___, 2020 WL 97718 (N.J. 2020) (permanent citation not yet available).

The New Jersey Supreme Court has ruled that a law firm that represented one of two intended real estate purchasers did not owe a duty to the non-client second purchaser simply because his money was deposited in the firm's trust account.

In 2007, Eliyahu Weinstein and Moshe Meisels signed an agreement, in which both men agreed to pay $2.5 million toward the purchase of property in Irvington, New Jersey. Weinstein hired Fox Rothschild LLP and its then-partner, Anthony Argiropoulos, as his attorney. Meisels was not a client of the law firm.

Meisels arranged for Rightmatch Ltd., an entity located in London, to wire $2,414,163.50 to the Fox Rothschild attorney trust account. Meisels says that Rightmatch was a conduit for the transaction and that the money belonged to him. Rightmatch made the deposit as two wire transfers, which were routed through Cambridge Mercantile Group. The wire confirmations were sent to Rightmatch, "[f]or and on behalf of Cambridge Mercantile Corp.," with a line that said "Attn: Moshe Meisels."

Meisels says the purchase of the Irvington property did not close. He now claims that Weinstein instructed the law firm to distribute the money "for purposes other than the agreed-upon real estate transaction." He also claims that Weinstein defrauded him and others.

The Supreme Court said that, before this lawsuit was filed, "the firm was admittedly unaware of Meisels's existence." Meisels admits that he never communicated with Argiropoulos or Fox Rothschild. When the money was sent, Meisels did not give Fox Rothschild any instructions.

Meisels and related parties filed suit against Fox Rothschild and Argiropoulos in September 2012, alleging several claims. The law firm filed a summary judgment motion, which the court granted. The judge found that Meisels had not proven that the money wired to the firm belonged to him, that there was any legal relationship or contact between the firm and him to support his claims, or that there was evidence that the firm wrongly handled the money.

The appellate division reinstated Meisels' conversion claim in a 2018 decision. 2018 WL 3077960.

The New Jersey Supreme Court accepted the case. It also allowed the New Jersey State Bar Association to file an amicus curiae brief.

The high court summarized its ruling dismissing the fiduciary duty claim as follows:

> *...[T]he firm did not breach any fiduciary duty where the firm was not made aware, nor did it have any basis on which it reasonably should have been aware, of plaintiff or of a claim by plaintiff to the funds. As such, there was no relationship between the firm and plaintiff on which a fiduciary duty was owed.*

The law firm and the bar association emphasized that the New Jersey Rules of Professional Conduct require an attorney to obey its client's instructions. Imposing a duty to any other party could force the lawyer to obey an instruction from a non-client that contradicted the client's instruction. Meisels countered by citing the professional conduct rule that says that an attorney has a duty to safeguard property in his or her possession, including property received from a non-client third party. A 1984 comment in a report about the Rules said that a "lawyer should hold property of others with the care required of a professional fiduciary."

The court said that the professional conduct rule cited by Meisels did not support a fiduciary duty to him, since the law firm did not know he existed, there was no communication between them, and the firm made no representations to Meisels. The court said that Meisels' claim based on the property of another rule also failed because the money was sent by Rightmatch, not Meisels.

The high court also ruled that there was no evidence that the law firm acted as an escrow agent. It rejected Meisels' legal argument premised on cases interpreting a lawyer's duties when he or she holds money as an escrowee. The court said in particular that those decisions should not be used to support the notion that a law firm that receives money should "inquire into the origins and possible third-party interests of every source of funds that flows into a trust account for purposes of closing on a transaction." It said this "impractical burden" would "frustrate closings and potentially promote malpractice actions due to the delay such investigatory obligations would require."

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The high court reversed the appellate division's ruling that reinstated Meisels' conversion claim. It summarized its ruling on that issue this way:

Defendants cannot be found to have engaged in conversion in this matter. The firm acted in conformity with its client's instructions about funds lawfully held in the firm's trust account; plaintiff did not have the funds wire-transferred to the firm with any direction or instructions; and plaintiff made no demand for the funds until years after the transaction was concluded, far too late to alert the attorney that there was a contrary claim. Where, as here, a law firm lawfully holds in trust wired funds for its client's real estate transaction, which funds are received with no limiting direction or instruction and for which the firm receives no demand from the non-client, the firm's disposition of the trust funds in accordance with the client's instructions does not give rise to a claim for conversion.

The high court was clearly troubled by the reasoning of the appellate division in reinstating the conversion claim, because it held that Meisels could pursue that claim even though he did not inform the law firm that the money was his, or demand its return, until years after the law firm obeyed its client's instruction to deliver the money to him. The appellate division excused Meisels from having to make a demand by labeling the act futile.

The Supreme Court concluded that this ruling created an unworkable exception to the existing legal standard for the tort of conversion. It agreed with the position of the New Jersey Bar Association, that conversion requires proof that the guilty party exercised dominion and control over someone else's property, and that a law firm should never be found to have exercised dominion or control over money held in its trust account that it disbursed according to its client's instructions, especially when no other party stepped forward in time to make a competing claim to the money.

Conversion and the related common law action for trover are well-established in New Jersey. A party is guilty of conversion when it takes possession of someone else's property and then refuses to return it on demand, typically by keeping the property. When conversion is applied to money, the person claiming conversion must prove that the money was his or hers, and that the party holding the money knew that fact. When the possession of the money was initially lawful, holding the property becomes wrongful only when it conflicts with the owner's rights. Typically, that change occurs only when the owner demands the return of the property and the holder refuses. Thus, before the owner can sue for conversion, he or she must have made a demand for the return of the property that was wrongly refused. The owner plaintiff has the burden of proving the demand and refusal.

The Supreme Court said that the law firm held the money in its trust account for its client, who was "in the midst of a commercial real estate transaction." Having received no limiting instructions or conditions from Rightmatch or Meisels, the court said it could not find that the firm exercised independent dominion or control over the money by simply obeying its client's instructions on how to disburse the money. "In sum, Meisels cannot prove that the firm itself exercised independent dominion and control over his funds," so his conversion claim failed.

The court also said that the lack of independent dominion and control by the firm "renders more serious the lack of demand" for the return of the money. The court observed that money is fungible, so the only way for Meisels to alert the firm to his claim that the money was his property was to make and explain such a demand. That demand, the court said, "would have triggered the firm's obligation to reasonably inquire further, and perhaps seek judicial assistance, before embarking on fulfillment of a client's direction." The firm's violation of that demand might have supported a claim of conversion. As it was, however, "the firm was denied the opportunity, until five years after this transaction was complete, to address a dispute about the monies." The court reached the following conclusion regarding conversion in the context of money held by a lawyer in a client trust account:

Only when an attorney misdirects or misappropriates funds, or when an attorney has acted contrary to a known, competing claim—or a competing claim that reasonably should have been known—can there be an independent dominion or control over the funds by the firm to the repudiation of the rights of the proper owner.

This is a significant ruling, and adopts a workable standard for law firms holding money in client trust accounts. The standard adopted by the court mirrors the principle espoused in most jurisdictions concerning escrows, that an escrowee does not owe a duty to a party whose sole role is the delivery of money into the escrow account, and which party does not sign escrow instructions or give limiting instructions about its money.

Escrow Matters

Escrowee May Sue Escrow Principal on Post-Closing Tax Payment Escrow

Stewart Title Ins. Co. v. New York Title Research Corp., 178 A.D.3d 618, ___ N.Y.S.3d ___, 2019 N.Y. Slip Op. 09373, 2019 WL 7173755 (N.Y.A.D. 1 Dept. 2019).

A title agent that agreed to insure the buyer's title based on an escrow in which it held money to pay delinquent real estate taxes is entitled to sue the seller for failing to deliver the payoff letter that was needed in order to pay the taxes.

New York Title Research Corporation is an agent of Stewart Title Insurance in New York. Newburgh Commons LLC owned property in the Town of Newburgh. The principal of Newburgh

Commons is Abe Goldberger.

PDH Realty LLC contracted to buy the property from Newburgh Commons. New York Title was engaged to close the sale and write a Stewart Title policy for the buyer. There were delinquent taxes on the property. Apparently, the exact amount owed had not been determined as of the closing date. Buyer, seller and New York Title signed an escrow agreement under which $75,000 was to be held by the title company. New York Title agreed to "pay the escrow deposit upon receipt of a payoff letter from the Receiver of Taxes of the Town of Newburgh."

The sale closed. PDH received a Stewart Title policy. No one obtained a tax payoff letter. Orange County foreclosed on the taxes, extinguishing PDH's title. Stewart Title paid PDH on the policy.

Stewart Title sued New York Title for breach of the agency contract and negligence. New York Title brought third party claims against Newburgh Commons, Goldberger and their lawyer for contribution, common-law indemnification, and contractual indemnification. It based those claims on the assertion that Newburgh Commons was supposed to deliver the payoff letter to the title company but never did, and the indemnity provision of the escrow agreement, which said that the seller "indemnifies and holds harmless New York Title Research Corporation as agent for Stewart Title Insurance Company from all loss, cost or damage, including attorneys' fees, by reason of the non-payment of the delinquent taxes."

Stewart Title and New York Title settled. The court dismissed all claims against the seller's lawyer and the contribution claim against all defendants. In 2018, the trial court dismissed all remaining claims. See 2018 WL 4199095. In the current decision, the appellate division reinstated some of the claims, but affirmed dismissal of others.

The appeals court said that New York Title's claim for common law indemnification was properly dismissed. Under the New York standard for that type of claim, New York Title would have to prove that it was *vicariously* liable to Stewart Title for the acts of Newburgh Commons, "without proof of any negligence or actual supervision on its own part." New York Title was liable to Stewart Title directly, under the agency contract, so that claim failed. The court also affirmed the dismissal of all claims against Goldberger, because he was not a party to the escrow and the title company had not made allegations sufficient to pierce the corporate veil.

The court said the claim for contractual indemnification should stand. The central fact issue was whether New York Title was supposed to obtain the tax payoff letter, or if the seller was supposed to have gotten the letter and delivered it to New York Title. Because the escrow agreement was ambiguous and the parties disagreed on the facts, New York Title had pled a valid claim. The court also held that the indemnification claim based on the escrow indemnity provision was not defeated by Newburgh's claim that New York Title had been negligent, because "under the escrow agreement … Newburgh agreed to indemnify against 'all loss'."

The court also rejected Newburgh's argument that the contractual indemnification claim was no good because the escrow was really for the benefit of Stewart Title, and New York Title signed that agreement only as the insurer's agent. The court said that New York Title had alleged that the escrow was for its benefit, that it served as escrowee, and that all of Newburgh's dealings were with the agent. This was adequate to show that New York Title sought to enforce the indemnity in its own right.

This is one of only a few decisions about a post-closing escrow taken by a title agent to induce it to insure title. Such escrows are too common, are fraught with danger for the agent and insurer, and sometimes get bungled precisely because they are post-closing obligations for which the agent has no settled process.

Escrow Matters

Buyer Not Required to Prepay Loan Until Closing Consummated

295 Collins, LLC v. PSB Collins, LLC, ___ So.3d ___, 44 Fla. L. Weekly D2900, 2019 WL 6519242 (Fla.App. 3 Dist. 2019).

When the purchase contract said the buyer was required to prepay an existing loan as part of the closing, and the money was wired to the closer to make the prepayment, the seller breached the contract by refusing to sign closing documents because payment had not been delivered to the lender *before* closing.

Dhruv Piplani and Jason Halpern are both large-scale developers. They formed an entity together to own property in Miami Beach on which they would build a condominium. They got a $26 million construction loan from Stonegate Bank. Jason Halpern personally guaranteed the loan and gave an environmental indemnity agreement to Stonegate.

The operating agreement allowed either member to propose to buy out the other at a stated price. The other member then had the right either to sell at that price or to buy the offering member's interest at that same price. Halpern proposed to buy out Piplani for about $43 million. Piplani responded by agreeing to buy out Halpern at that price.

Piplani was ready to close. He got a new loan that would be used to pay off Stonegate Bank and to cause that bank to return the personal guaranty and indemnity signed by Halpern. Closing was scheduled to occur at a Chicago Title office in Florida. Piplani came to closing. His lender wired the loan money to Chicago Title and was present at closing.

Halpern's lawyers also came to closing. They explained that Halpern refused to sign the closing documents based on five new conditions, one of which was that his personal guaranty and indemnity had to be handed over to him at the closing table. After explaining these conditions, the lawyers left the closing room without signing anything.

Piplani's entity sued Halpern's entity for breach of contract. The trial court ruled on summary judgment that Halpern had breached the contract by refusing to close. The appeals court affirmed.

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Halpern argued that Piplani had breached the contract by failing to prepay the Stonegate loan "before" closing. The court said this was a misinterpretation of the term "prepay." The Stonegate loan had not matured as of the closing date. The court said that payment of the loan from closing was thus a prepayment of the loan. It said:

> *That reading is supported by the sentence within section 8.7(g) specifying that the Buyer's payoff of the Stonegate loan must include any "prepayment penalty" or "prepayment premium." We acknowledge the Seller's argument that "prepay" means "to pay in advance," but we reject the tortured construction added in the argument, "to pay in advance of closing," versus the contextually obvious, "to pay in advance of the maturity of the loan, as part of closing."*
>
> *In this case, the summary judgment evidence establishes that the payoff funds were only awaiting the Seller's execution of the transfer documents. The Stonegate loan would have been prepaid at the closing, had the Seller (through its principal, Mr. Halpern) performed as specified in the Agreement.*

Halpern also made the related argument that he was not obligated to close on the sale because the Stonegate mortgage and certain other liens remained on the title to the property. The court rejected that argument, because the buyer and new lender both stated that they were prepared to close, and that all liens would have been released if closing had occurred. Thus, the court concluded, title was not cleared solely due to Halpern's refusal to close.

This is another decision holding that a buyer or seller may not refuse to close based on loans or liens that will be resolved or paid off through closing, by the proper use of the closing money. See the very similar case of *Snowdon Farms v. Jones*, 8 Neb.App. 445, 595 N.W.2d 270 (Neb.App. 1999), reported in the July, 1999 issue, in which the court held that sellers could not get out of a purchase contract by asserting that there was an unreleased mortgage on their title. In *Muniz v. Crystal Lake Project*, LLC, 947 So.2d 464 (Fla. App. 3 Dist. 2016), reported in the December 2006 issue, the court held that a seller was not excused from closing based on its claim that the buyer's specific performance suit had clouded its title. The court said that any problem with title would be solved when the seller finally closed. The cautionary decision is *Roberts v. Clark*, 2002 WL 220838 (Tex.App.–Tyler) (unpublished), reported in the March 2002 issue, in which the court held that the sellers were not required to come to closing until the buyers proved that the purchase money had been delivered to the title company closer.

Agent Focus

Personal Guaranty of Agency Contract Enforceable After Cancellation

Chicago Title Ins. Co. v. Brookwood Title Agency, LLC, ___ N.Y.S.3d ___, 2020 WL 356176, 2020 N.Y. Slip Op. 00398 (N.Y.A.D. 2 Dept. 2020).

A New York court has held that a title agency owner's personal guaranty of the agency contract covers payment of a claim caused by the agent, was not terminated when the agency contract was cancelled, and the suit was timely filed.

Brookwood Title Agency LLC signed a policy-issuing agency contract with Chicago Title. Mendel Zilberberg, Brookwood's manager, signed a personal guaranty that said:

> *the undersigned ... hereby guarantee the full and faithful performance of the obligations of [Brookwood] under the Issuing Agency Contract, as amended; and the undersigned do hereby agree to fully indemnify [Chicago Title] and save [Chicago Title] harmless from any and all loss resulting from delinquent remittances and any shortage in the escrow accounts of [Brockwood].*

In late 2006, Brookwood issued a loan policy. Chicago Title later paid a claim on the policy, because the deed to the borrower was declared void and the mortgage was cancelled. In 2015, Chicago Title demanded that Brookwood reimburse it for the claim payment. The agency refused.

In April 2018, Chicago Title sued Brookwood and Zilberberg under the agency contract and personal guaranty. Brookwood and Zilberberg moved to dismiss, which the trial court denied. They appealed, and the court affirmed the denial of the motion to dismiss.

The court held that the guaranty language quoted above was sufficient to make Zilberberg liable for the policy loss. New York law says that the terms of a guaranty are to be strictly construed, and the guarantor is not liable beyond the express terms of the guaranty. However, the court said that Zilberberg had guaranteed Brookwood's performance of its obligations under the agency contract, and that contract included a claim provision obligating the agent to indemnify Chicago Title for claim losses. Therefore, the "indemnification obligation was covered under the guaranty."

The court also held that the termination of the issuing agency contract did not extinguish the indemnification obligation of the contract or of the guaranty. It cited several New York decisions that have held that indemnification provisions in various types of contracts survive the termination of those contracts.

Finally, the court said the lawsuit was not barred by New York's six-year statute of limitations for recovery under a guaranty. It cited several New York decisions that have held that the limitations period begins to run when the principal defaults. The court said:

> *Here, the breach of guaranty cause of action did not accrue until February 19, 2015, when Brookwood failed to indemnify Chicago Title for the payment Chicago Title made on the claim. Since this action was commenced less than six years later, that cause of action was timely asserted.*

Conveyance News

Tardy Mortgage Satisfaction Class Action Suit Done

Rimmer v. CitiFinancial, Inc., 2020-Ohio-99, ___ N.E.3d ___, 2020 WL 242489 (Ohio App. 8 Dist. 2020) (permanent citation not yet available).

The final order may have been entered in a 15-year class action suit claiming that a lender violated Ohio's law requiring that a mortgage be satisfied of record within 90 days of payment in full.

In 2000, Karen Rimmer got a $5,000 loan from Bank of Yorba Linda secured by a mortgage on her house in Ohio. The loan was assigned to Associates Financial Services, Inc., which then merged into CitiFinancial Inc. Less than a year later, Rimmer paid off the loan. About 125 days later, Citi satisfied the mortgage.

Four years later in 2005, Rimmer filed a class action suit against Citi, alleging that it had failed to record the mortgage satisfaction within 90 days of full payment of the loan, in violation of Ohio R.C. 5301.36. Rimmer claimed the statutory penalty of $250, plus interest and costs as allowed under R.C. 5301.36(C).

The lawsuit has been wending its way through the court system ever since. As early as 2006, Citi conducted a review of almost 100,000 loans paid off in the six-year span the court determined was the class period. It produced a spreadsheet showing that most of the mortgages were satisfied within 90 days of payment. A class was certified. Several later decisions tweaked the class statement. There were several appeals.

In 2015, the trial court ordered Citi to identify and provide notice to the class members. Citi produced a spreadsheet showing 2,814 mortgage loans belonging to class members. Citi gave the list to a title company, which searched the real estate records to determine which satisfactions had been recorded past the 90-day mark. The title company identified 275 class members. On April 14, 2016, Citi presented the results of the title company's search to Rimmer and the trial court. Citi sent the class notice to those 275 class members.

Rimmer filed a motion to expand the class notice. The trial court denied Rimmer's motion. In May of 2017, Citi submitted a stipulated judgment, which conceded Citi's liability to each class member of $250 in statutory damage, for a total liability of $68,750. The trial court issued an order based on that stipulation, and ordered Citi to notify the class members of the judgment within 30 days. After some more fooling around, the trial court entered a judgment of $68,750 in favor of the class and awarded $27,500 in attorney fees, to be subtracted from the total judgment amount of $68,750, on Dec. 11, 2018.

Rimmer appealed from the judgment. In the decision listed above, the court rejected all of Rimmer's arguments on appeal, and directed the trial court to "carry this judgment into execution."

The decisions in *Rimmer* provide a very orthodox reading of Ohio's mortgage satisfaction law. Every state has such a law. The penalties vary considerably, from the nominal to the extreme. Ohio's law is fairly typical, in that the penalty is so low that a lawsuit is viable only if brought by a class of borrowers. The *Rimmer* decisions also show, however, that the cost of prosecuting such a suit is prohibitive, even when the court forces the lender to do all of the heavy lifting in identifying the class members and statutory violations.

Conveyance News

Easement Containing No Legal Descriptions Does Not Impart Notice

MAC Properties L.P. v. D.D. Dunlap Companies, Inc., 2019 WL 6222191 (Ariz.App. 1 Div.) (unpublished).

A recorded cross-access easement did not impart constructive notice to a buyer of the burdened property because the schedules that were supposed to include the legal descriptions of the parcels were not attached.

In 1999, the owners of two adjacent parcels in Phoenix signed a cross-easement allowing each owner to use designated areas on the two parcels for access and parking. The cross-easement agreement was recorded. However, the recorded version did not contain the three exhibits referenced in the instrument, which were supposed to be the two legal descriptions and a site plan that depicted the driveway and parking areas. In 1999, the parcels were owned by SKD Exchange LLC and Power Road Investors LLC.

In 2005, D.D. Dunlap Companies Inc. bought the SKD parcel. Its title insurer, First American, did not discover the 1999 easement instrument in its title search.

The Power Road parcel was transferred several times. In 2005, MAC Properties Limited Partnership contracted to buy the Power Road parcel. Fidelity National Title was engaged to issue a policy to MAC. Escrow was to close in September. In July, MAC's real estate broker sent Fidelity National Title an unrecorded version of the easement and an unsigned amendment that attached legal descriptions. MAC and its attorneys also got copies of those documents.

Fidelity National Title ran three title searches, using the legal description, the tax parcel number and the buyer and seller names. None of those searches turned up the easement. MAC also reviewed the current leases on its parcel and got an updated survey. The scope and location of the easement was not disclosed on those documents.

The court said that a grantor/grantee index search using the names on the 1999 easement did turn up the easement. However, the court said, because the schedules were missing, an inspection of the instrument still did not reveal what parcels were benefitted or burdened by the easement,

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or the location of the easement path. Also, it appears that this search was not run before closing, but only after this dispute arose.

The sale to MAC closed in September 2005. Shortly thereafter, Dunlap demanded the use of the easement over the MAC parcel.

In 2013, MAC sued Dunlap, asking the court to declare that the easement was not enforceable. The trial court said the issue could not be decided on summary judgment. After a four-day bench trial, the court ruled for MAC, concluding that the easement as recorded was "insufficient to create any permanent easements binding the MAC parcel." The court also awarded MAC $125,000 in attorneys' fees and about $44,000 in costs.

Dunlap appealed; the court affirmed.

Dunlap's legal theory was that the easement was valid, so that the trial court erred when it declared that the instrument "does not meet the requirements for an express grant of easement under Arizona law" and "is not a valid or effective grant of easement."

The appeals court said that the dispositive issue was whether or not the easement was binding on MAC as a subsequent purchaser. If not, the court was required to analyze the secondary question of whether MAC conducted appropriate due diligence when it learned of the easement before closing.

Under the Arizona Statute of Frauds, a conveyance is effective when it is in writing, signed, acknowledged and delivered. A.R.S. § 33-401. A conveyance becomes binding on purchasers of real estate when it is properly recorded and indexed. A.R.S. § 33-416.

Dunlap argued that the easement was binding on MAC because it qualified under the Statute of Frauds. It argued that that law does not require an easement to include a legal description of the encumbered or benefitted parcels.

The court responded that this argument failed because the easement was "facially inadequate to bind subsequent purchasers." The Arizona Supreme Court has explained that, to be binding on a subsequent purchaser, a recorded instrument "must identify with reasonable certainty the easement created and the dominant and servient tenements .... The description requires a certainty such that a surveyor can go upon the land and locate the easement from such description." A person searching the record must be able to, "from the instrument, identify the land involved." If the instrument is not indexed, "the easement is void as to third parties because of vagueness." *Dunlap Investors Ltd. v. Hogan*, 133 Ariz. 130, 132 (1982). The appeals court held that the easement did not identify the parcels because the schedules were left off. Further, the recorded easement did not even recite street addresses, tax parcel numbers "or any other information identifying the property or that could be used to do so."

The court then shifted its focus to the question of what inquiry notice was imparted to MAC when it received actual knowledge of an unrecorded version of the easement. MAC admitted that "it was on inquiry notice regarding possible easements for parking and ingress/egress before it purchased the Power parcel." Arizona follows the customary rule that an buyer is "chargeable with the knowledge which the inquiry, if made, would have revealed ..., and must exercise due diligence to ascertain the facts upon which the claim is based." *Luke v. Smith*, 13 Ariz. 155, 162 (1910). A party on inquiry notice is charged with "knowledge of all of the facts a reasonably diligent inquiry would disclose." *Hall v. World Sav. and Loan Ass'n*, 189 Ariz. 495, 500 (App. 1997). In some cases at least, inquiry notice includes those facts that would be discovered by an inspection of the property. A party "may not willfully ignore information at hand," but it need not "seek out the information on which the duty of further inquiry as a matter of law is invoked." *Valley Nat'l Bank of Ariz. v. Avco Dev. Co.*, 14 Ariz. 56, 61 (App. 1971).

Dunlap argued that MAC did not perform a diligent inquiry. It argued that MAC was required to conduct a grantor/grantee index search under the owner names listed in the easement, call the lawyer who drafted the easement, and inspect the property for evidence of use by Dunlap. It claimed that such further inquiry would have disclosed its rights.

The appeals court disagreed. The trial court had ruled that the title searches conducted by Fidelity before closing were proper, met the standard of care, and did not disclose the recording of the easement. The leases, site plans, survey and other documents also did not show the easement. The appeals court agreed, holding that Dunlap had not shown that MAC failed to undertake a reasonably diligent inquiry, or that it had reason to know that there was "a valid, enforceable easement encumbering the MAC Parcel."

The appeals court also affirmed the grant of attorneys' fees to MAC, and awarded fees incurred on the appeal.

This is a well-reasoned decision that upholds the principles underlying Arizona's recording laws, which in turn are the foundation on which title insurance policies are issued. Dunlap was ably represented by Patrick J. Davis and Jamey A. Thompson of Fidelity National Law Group.

Title Coverage and Escrows Explained

The Title and Escrow Claims Guide explains how to handle claims on title policies, CPLs and closing mistakes. Suitable for attorneys and non–lawyers, the guide provides more than 1,400 pages of practical analysis that is valuable for:

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