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The Title Insurance Law Journal



Conveyance News

Mississippi Supreme Court Clarifies Present Interest Requirement for Deeds

Matter of Estate of Johnson, _So.3d_, 2025 WL 2802266 (Miss. 2025)

Why This Case Matters: To be effective, deeds must convey present title interests in land, even if the grantor does not intend for the grantee to take possession until some later time.

Background

Gary Wayne Johnson died intestate in October 2021, owning three lots his mother had deeded to him in 1996. Six years after receiving those lots, Gary prepared and signed an “Article of Agreement” stating two of the three lots would be “shared” with his three sisters “upon sale or my death” pursuant to his parents’ wishes and intentions. His sister, Zoa Ann Manners, later said she witnessed his signing it before a notary and that he gave her the original.

After Gary’s death, Manners filed a creditor’s claim against his estate, arguing the Article of Agreement created an enforceable obligation to transfer the property. She argued he was “contractually obligated” to transfer the properties to his sisters. The chancery court denied her claim, finding the document failed to convey a present interest in land. The Court of Appeals reversed, but the Mississippi Supreme Court reinstated the chancery

court’s judgment, holding the Article of Agreement was testamentary in nature and therefore invalid.

The Critical Distinction: Present Interest vs. Future Conveyance

The Supreme Court first dispensed with Manners’ argument the Article of Agreement was a contract, finding it was not, because it was signed only by Gary and no consideration was exchanged.

The court then turned to the main issue in the case: “whether the Article of Agreement conveyed a present interest in the land, thus rendering it a valid deed.”

The Supreme Court’s analysis turned on a fundamental principle of property law: a deed must “specifically and unambiguously” convey a present interest upon delivery. The Court explained Mississippi has “generated two separate lines of cases dealing with the important distinction between writings

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that create a present interest upon delivery and those that do not.”

In the first line of cases, an instrument “contains its maker’s provision that it makes no present conveyance of an interest in land or otherwise directs that the interest to be conveyed vests in the grantee only upon the death of the grantor.” Such instruments are “regarded as testamentary in nature and are enforceable only if made in compliance with our statute of wills.”

The second line permits instruments that convey “a future interest in land which vests in the grantee effective upon delivery of the deed, though reserving in the grantor a life estate, the effect of which is to postpone only the grantee’s right of possession or occupancy.” These instruments qualify as valid deeds.

The distinction is subtle but crucial: a valid deed can postpone possession until death while still conveying a present interest, but any instrument that postpones the conveyance itself until death is testamentary.

The key is the grantor’s intent. To determine whether the grantor intended a present interest or a testamentary one, courts look to the plain language of the instrument along with the intent of the grantor. (For those who might be interested, the court undertook a detailed and extended analysis of cases from the two lines, discussing the language of the various writings and why the language did or did not convey a present interest.)

Analysis of the Article of Agreement

The Court found Gary’s document fell squarely within

the first category: it was testamentary, not a deed. The Article of Agreement lacked essential elements of a deed. It contained no consideration, no express words of conveyance required by Mississippi law, and no specific reservation of a life estate. Most significantly, the document stated that Lots 12 and 13 “shall be shared” only “upon sale or my death.”

The Court emphasized the document’s ambiguous language. Unlike valid deeds upheld in prior cases—which used phrases like “I convey and warrant” or “specifically reserves unto herself a life estate”—Gary’s writing simply provided a “history on the property and an explanation of how Gary acquired the lots.” The only words suggesting any transfer were “upon sale or my death shall be shared.” These were not terms of conveyance of a present interest.

The Court contrasted Gary’s document with instruments it had previously validated as deeds. In numerous other cases, the Court had found valid deeds despite inartful drafting because those instruments contained consideration clauses, express words of conveyance, express life estate reservations, acknowledgment, recording, and delivery. Each “plainly and unambiguously stated the grantor’s intent” to convey a present interest while retaining possession during life.

The “Upon Sale” Provision

The Court also found fatal ambiguity in Gary’s reference to “upon sale.” This language suggested Gary retained the right to sell the property after signing the document, indicating no present conveyance occurred. Retaining the right to sell property renders a deed invalid because “[a] person

cannot retain the right to sell a property if they convey that property to another.”

Additionally, the word “shall” evidenced a future conveyance rather than a present interest. “The terms ‘shall’ and ‘will’ denote future events, and rights that ‘shall immediately be transferred’ upon the occurrence of some future event are not actually transferred until the future event occurs.” (Internal quotations omitted.)

Actions Confirming the Document’s Nature

The Court noted several facts supporting its conclusion. Gary titled the document “Article of Agreement” rather than “deed” and specifically mentioned “all three lots are under separate warranty deeds,” demonstrating his familiarity with proper deed form. If Gary intended a conveyance, “he could have easily had a new deed prepared.” (The author wonders whether the court’s assumption about Gary’s mental prowess was accurate.)

Zoa Ann never recorded the Article of Agreement nor pursued a quiet title action. Instead, she filed a claim as an ordinary creditor, and her sworn petition stated Gary’s estate “is contractually obligated to transfer” the property—present tense language indicating an obligation to convey, not a completed conveyance. (Again, the author wonders whether the court accurately assumed Zoa Ann’s understanding of the finer points of conveyance law.)

Key Takeaways

This case reinforces that property conveyances require some level of precision. Informal documents, regardless of good intentions, will not suffice when they fail

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to convey a present interest. Practitioners should ensure any

deed contains express words of conveyance, clearly reserves a life estate if intended, and unambiguously conveys a

present interest—even if possession is postponed until death. Without these elements, the writing risks being deemed

testamentary and invalid without compliance with will formalities.

Conveyance News

When “Single” Doesn’t Mean Single: Why Purchase Money Status Can’t Override Spousal Joinder Requirements

Brown v. Towd Point Mortg., __So.3d__, 2025 WL 2967974 (Fla. 4th DCA 2025)

Why This Case Matters: The Florida constitution requires a spouse to join a purchase-money mortgage on homestead property.

Facts

Leticia Brown purchased property in 1999 as sole grantee on the warranty deed. She executed a promissory note and purchase money mortgage for \$105,000 with the original lender. The mortgage incorrectly described her as a “Single Person.” In reality, she had been married to Trevor Brown since 1990. Trevor never signed the note or mortgage and was not present when Leticia signed the loan documents. He moved into the property with Leticia in 1999. The mortgage paid off a prior mortgage in full.

After Leticia died in May 2020, Trevor tried to contact the loan servicer about the mortgage. The servicer refused to discuss the account with him. No payments were made after July 2020. The Trust filed a foreclosure complaint in May 2023, naming Trevor both individually and as personal representative of Leticia’s estate.

Trevor raised three affirmative defenses, including that the mortgage was provided to Leticia without his consent on homestead property. The trial court granted summary judgment for the Trust. Trevor appealed.

Legal Analysis

The Fourth District reversed, holding that Article X, Section 4(c) of the Florida Constitution required Trevor’s

joinder on the mortgage despite its purchase money status.

Article X, Section 4(c) states that a homestead owner “joined by the spouse if married, may alienate the homestead by mortgage.” Florida courts have consistently interpreted this provision as requiring spousal joinder for any mortgage on homestead property to be enforceable in foreclosure, even when only the signatory spouse appears on the deed.

The 1985 constitutional amendment changed homestead’s definition from property owned by the “head of a family” to property owned by a “natural person.” After this amendment, the alienation restrictions in Section 4(c) apply to any natural person owning homestead property and protect any spouse married to that natural person.

A mortgage on homestead property signed by only one spouse is not void, but it is “ineffectual as a lien” until either the spouse joins in the alienation or the property loses its homestead status. When a purchase money mortgage lien is ineffective due to spousal nonjoinder, the note holder is entitled to an equitable vendor’s lien on the property.

The trial court erred by relying on a Florida statute, which provides that mortgages “executed by a married woman without the joinder of her husband ... are as valid

and effective as though the husband had joined.” This statute was last amended in 1983, predating the 1985 constitutional amendments. Because constitutional provisions must prevail over conflicting statutory language, the statute cannot constitutionally be applied to homestead property. The statute only applies to non-homestead property.

The Trust argued its purchase money mortgage status gave it superior rights under Article X, Section 4(a) of the constitution, which exempts homesteads from forced sale except for “obligations contracted for the purchase, improvement or repair” of the property. Purchase money mortgages take priority over all prior claims or liens through the mortgagor and are “recognized as being senior to the claims of dower and homestead.”

The court rejected this argument, explaining that the Trust conflated two distinct constitutional provisions. While Section 4(a)’s forced sale exemption does not apply to purchase money mortgages, Section 4(c)’s spousal joinder requirement for executing mortgages on homestead property must still be satisfied for the mortgage lien to encumber the property and be enforceable in foreclosure. Both provisions can be harmonized. Section 4(c)’s

prohibition on alienating homestead property without spousal joinder applies to both the “initial acquisition of homestead property through a purchase money mortgage and any other alienation of homestead property.”

Practical Implications

This case provides important guidance for lenders and title insurers. Purchase money mortgage status does not excuse compliance with spousal joinder requirements on homestead property. When taking a mortgage on Florida homestead property, lenders must obtain both spouses’ signatures regardless of who holds title or whether the mortgage finances the purchase.

The marital status representation on loan documents deserves careful scrutiny. Here, describing the borrower as “Single Person” created a false record that ultimately prevented foreclosure.

Key Takeaways

Article X, Section 4(c) requires spousal joinder on all homestead mortgages, including purchase money mortgages. Purchase money status under Section 4(a) does not override Section 4(c)’s joinder requirements. Without proper joinder, lenders may pursue equitable remedies but cannot foreclose the mortgage.

Conveyance News

Cattle Grazing for Fire Prevention is Not an Agricultural Use: California Court Limits Agricultural Lease Restriction

Pacho Ltd. Pship. v. Eureka Energy Co., Cal.Rptr.3d __, 2025 WL 3001828 (Cal. Ct. App. 2025)

Why This Case Matters: California statutory law bars leases for agricultural purposes of more than 51 years, but courts will look to whether the use is truly agricultural and whether applying the statute would lead to an absurd result.

In a significant ruling on California's agricultural lease statute, the Second District Court of Appeal reversed a trial court's decision that would have terminated a 99-year lease worth \$39 million because cattle grazed on the property. The court held Civil Code section 717's 51-year limitation on agricultural leases does not apply when cattle grazing serves primarily to suppress wildfires rather than to produce livestock for commercial purposes.

Brief Procedural History

The lessees, Pacho Limited Partnership and San Luis Bay Limited Partnership, sued lessor Eureka Energy Company seeking declaratory relief and to quiet title in their leasehold interest in 2,400 acres of coastal property in San Luis Obispo County. Eureka cross-complained, arguing the lease was subject to section 717's 51-year maximum term because the property had been leased for agricultural purposes. After a court trial, the Superior Court entered judgment for Eureka, ruling the lease expired after 51 years. The lessees appealed.

Facts

The Marré family acquired Wild Cherry Canyon in the early 20th century as part of a 9,000-acre ranch. The property remained undeveloped and was used for cattle grazing for over 100 years. In 1968, the Marré family's company leased the property to Diablo Canyon Corporation for 99 years with an option to renew for an

additional 99 years. The lease provided that the premises could be "used and improved by Lessee for any lawful purpose."

Eureka acquired the property at a sheriff's sale in 1995 and became the successor lessor. Pacho and San Luis Bay became the successor lessees, with HomeFed Corporation later becoming their managing general partner. HomeFed purchased its interest based on the expectation that the lease would run until 2166.

The property was continuously subleased to the Mello family for cattle grazing. However, the evidence established that the primary purpose of the grazing was fire suppression, not livestock production. Richard Marré, a credible witness who was an officer of the original lessee corporation, testified that the family continued the grazing program "just to keep the grass down" for "fireproofing." He stated they put cattle on the property "to eat the grass, not because there was any money in it."

Expert testimony confirmed that the property could support only approximately 111 head of cattle and that such a small operation "is not a viable economic entity." The sublease rent was a nominal \$2,400 per month for 2,400 acres—an amount that indicated the grazing was not for revenue purposes. Multiple witnesses testified that fire suppression was the principal benefit of the cattle grazing.

Legal Analysis: The Forfeiture Question

Civil Code section 717 provides no lease "of land for agricultural ... purposes for a longer period than 51 years, in which shall be reserved any rent or service of any kind, shall be valid." The statute aims to prevent long-term leases from unduly hindering the use, development, and marketability of real property for future generations.

The majority opinion emphasized that this case "must be analyzed through the lens of time-honored anti-forfeiture rules." The court quoted established principles: "Forfeitures are not favored by the courts, and if an agreement [or a lease] can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it." (Internal quotations omitted.) The trial court's ruling would have resulted in a \$39 million forfeiture for the lessees and a corresponding windfall for the lessor—an outcome the parties did not anticipate when negotiating the lease.

The majority acknowledged cattle grazing generally constitutes "agricultural purposes" within the meaning of section 717. Dictionaries from the late 19th and early 20th centuries defined "agriculture" to include "the raising and feeding of cattle or stock," and case law supported this broad interpretation.

However, the court concluded that under the particular circumstances of this case, the lease was not for agricultural purposes.

The key factors were: (1) the lease permitted use for "any lawful purpose," (2) the parties understood the grazing would reduce wildfire risk rather than produce livestock, (3) the operation's small scale made it economically unviable as a standalone cattle business, and (4) the nominal sublease rent confirmed the grazing was not for revenue.

The court emphasized the public policy implications: "It would be absurd to penalize [the lessees] for taking measures to prevent wildfires and limit their spread." The legislature "surely did not intend to deter tenants in plaintiffs' situation from using cattle grazing to reduce the volume of flammable vegetation."

The Concurring Opinion

Justice Cody's concurrence offered an alternative analytical path that focused on the lease terms rather than forfeiture principles. He emphasized that section 717's "target is restrictive leases, not tenants who use leased property for agricultural purposes."

The concurrence noted that the 1895 amendment to section 717 changed the statute from applying to leases "of agricultural land" to leases "for agricultural purposes." This amendment "directed the statute away from the actual or intended use of the land and toward the terms of the lease." Under this analysis, section 717 governs whether lease "terms prevent 'future

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generations’ from using the property for non-agricultural purposes”—not how the property is currently used.

Because the lease allowed use “for any lawful purpose,” the lessees retained “the opportunity to expand the use of Wild Cherry Canyon to other lawful nonagricultural purposes.” The concurrence concluded the analysis should have ended there: “Section 717 is not a tool for property owners with lessor’s remorse to wrest ‘any-purpose’ leaseholds from long-term tenants who use the land for agricultural activities.”

Practical Implications

This case presents a matter of first impression regarding when cattle grazing constitutes “agricultural purposes” under section 717, particularly where grazing serves fire suppression rather than livestock production.

For title and escrow professionals, the key takeaways include:

Lease Drafting: The “any lawful purpose” language proved critical. Leases that restrict use to agricultural purposes face greater risk under section 717 than those allowing flexible use.

Purpose vs. Use: When evaluating whether section 717 applies, examine both the lease

terms and the actual purpose understood by the parties, not just the physical use of the property.

Fire Prevention: Properties in wildfire-prone areas may benefit from framing cattle grazing explicitly as a fire suppression measure rather than an agricultural use.

Anti-Forfeiture Principles: Courts will strain to avoid forfeitures where applying section 717 would result in windfalls and outcomes not contemplated by the parties.

Red Flags: Watch for long-term leases of undeveloped property in agricultural zones where the economic viability of agricultural operations is marginal.

Key Takeaways

The court reversed the trial court’s ruling, holding a lease permitting cattle grazing primarily for fire suppression rather than livestock production is not a lease for “agricultural purposes” under Civil Code section 717. Courts will apply anti-forfeiture principles to avoid absurd results that penalize wildfire prevention efforts. The concurring opinion suggests focusing on whether lease terms restrict future non-agricultural uses rather than on the property’s current use.

Equitable Subrogation

Why Equitable Relief Cannot Fix Preventable Title Defects

MidFirst Bank v. Mantooth, S.E.2d_, 2025 WL 2836945 (Ga. Ct. App. 2025)

Why This Case Matters: Equitable remedies like equitable subrogation cannot be used in Georgia to encumber portions of property not owned by a borrower even when a refinance transaction fully pays off a loan encumbering the property.

The Georgia Court of Appeals delivered a stark reminder to lenders and title professionals: equitable remedies cannot rescue a transaction where basic due diligence would have revealed fatal title defects. In *MidFirst Bank v. Mantooth*, the court rejected three separate attempts by a lender to use equity to encumber portions of property its borrower never actually owned.

Procedural History

MidFirst Bank appealed from the trial court’s denial of its motion for summary judgment. The bank sought equitable reformation, equitable subrogation, or an equitable lien to encumber property its predecessor-in-interest, Village Capital & Investment, LLC, had attempted to secure in a 2013 refinancing transaction. The

Court of Appeals affirmed the trial court’s denial, holding the bank was not entitled to any form of equitable relief as a matter of law.

Facts

The property’s ownership history reveals a series of transfers creating a complex title situation. In 2002, John Gilreath obtained fee simple title to the property and then conveyed an undivided one-half interest to his wife, Helen, through a quitclaim deed. Both deeds were recorded.

On April 22, 2009, Helen Gilreath executed a warranty deed (later recorded) purporting to convey her one-half interest to herself and John as “tenants by the entirety” (a form of joint tenancy for married couples). This attempted conveyance is where the problems began. Under Georgia law,

all estates are presumed to be tenancies in common unless they satisfy the specific statutory requirements for creating a joint tenancy with right of survivorship. The 2009 warranty deed did not satisfy those requirements. Consequently, rather than creating the intended tenancy by the entirety, the deed created a tenancy in common in which John owned a three-quarter interest and Helen owned a one-quarter interest.

Also on April 22, 2009, John and Helen executed a deed to secure debt to MERS as nominee for Guaranteed Home Mortgage, Inc., securing a loan to both of them.

Helen died intestate in 2011. Her one-quarter interest immediately vested in her heirs at law under Georgia’s intestacy statutes—John and her heirs (Helen’s children

from a prior relationship).

In September 2013, John refinanced the property with Village Capital. He executed a deed to secure debt to MERS as nominee for Village Capital, which was recorded. The refinancing paid off the 2009 loan. Critically, the 2013 deed to secure debt purported to convey a security interest over the entire property, not just John’s portion. None of Helen’s heirs were parties to the 2013 transaction or executed the deed to secure debt.

John died in 2021. MERS assigned the 2013 deed to secure debt to MidFirst Bank in 2022. In January 2023, the bank sued Helen’s and John’s heirs, seeking three alternative forms of equitable relief to encumber the entire property: equitable reformation, equitable subrogation, and equitable lien.

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Continued From Page 6**Legal Analysis**

The court's analysis reinforced fundamental principles limiting equitable relief. Under Georgia law, equity is "ancillary, not antagonistic, to the law" and "follows the law where the rule of law is applicable." While equity seeks to do complete justice, "it must do so within the parameters of the law."

Equitable Reformation

The bank first sought reformation of the 2013 deed to secure debt based on mutual mistake. Georgia law provides that "[i]f the form of [a] conveyance is, by accident or mistake, contrary to the intention of the parties in their contract, equity shall interfere to make it conform thereto." This statute applies to security deeds.

The court rejected this claim for a simple reason: John Gilreath had no authority to convey a greater interest than he held. When he executed the 2013 deed to secure debt, he did not own—and therefore could not convey—an interest in the entire property. Even if Helen's heirs mistakenly believed John held the entire interest, their belief could not change the legal reality.

Moreover, the appellee heirs were not parties to the deed the bank sought to reform. The court refused to reform the deed to allow John to convey property interests "outside the parameters of the law."

Equitable Subrogation

The doctrine of equitable subrogation allows a new lender who pays off an existing encumbrance to step into the shoes of the prior lender if the new security is not a first lien and the new lender is not chargeable with culpable or inexcusable neglect. However, equitable subrogation "goes to the superiority of competing, valid interests in property, and it has no application where one party has good title, and the other has no interest at all."

The court found this was not a priority dispute but rather a case where the 2013 deed conveyed no interest whatsoever in Helen's heirs' portion of the property. Like co-tenants in prior Georgia Supreme Court decisions (equitable subrogation cannot be used against co-tenants), the heirs were not parties to the refinancing loan and did not sign the deed to secure debt. Subrogation was not allowed.

Equitable Lien

Finally, the bank sought an equitable lien. Georgia law permits such liens "whenever the rules of equity require this remedy." But again, equity must operate "within the parameters of the law." The law did not permit John to convey interests in property belonging to others. Given that neither reformation nor equitable subrogation applied, the court found no basis for equity to require encumbering the appellee heirs' property.

Practical Implications

This case offers important lessons for lenders, and title and escrow professionals:

Red Flags. The failed 2009 attempt to create a tenancy by the entirety should have been a glaring red flag.

Spousal Interest Verification. It's best not to assume a borrower owns the entire interest in property simply because they previously co-owned it with a deceased spouse.

Refinancing Due Diligence. Refinancing transactions require the same diligence as purchase transactions. The fact that a prior lender had a lien on the property does not mean the current borrower can encumber the entire property. Verify current title before closing.

Equity's Limitations. Do not rely on equitable remedies to fix problems caused by inadequate due diligence. Georgia courts have consistently held equity cannot override basic property law principles. As this case demonstrates, courts will not use equity to help lenders who fail to confirm a borrower actually owns what they purport to convey.

Key Takeaways

A borrower cannot convey security interests in property they do not own, and equity will not remedy this defect when proper due diligence would have revealed the problem. Failed attempts to create joint tenancies with right of survivorship create tenancies in common with different ownership percentages. When a property owner dies intestate, title vests immediately in all heirs at law—obtain signatures from all current owners in refinancing transactions. Equitable reformation, equitable subrogation, and equitable liens all require operation "within the parameters of the law" and cannot override fundamental property principles.

Native American Rights

Washington Supreme Court Bars Adverse Possession Claims Against Off-Reservation Tribal Land

Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians, 577 P.3d 382 (Wash. 2025)

Why This Case Matters: Tribal sovereign immunity is not limited to suits involving reservation land. Tribes cannot be sued over off-reservation tribal land unless they waive sovereign immunity or Congress abrogates it.

Under federal law, Native American tribes may only be sued when they waive sovereign immunity or when Congress "unequivocally abrogates" their sovereign immunity.

The Washington Supreme

Court has closed the courthouse door on adverse possession claims against off-reservation tribal land, holding in a matter of first impression that the common law immovable property exception to sovereign

immunity does not apply to Indian tribes. The unanimous decision in *Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians* carries significant implications for title companies, escrow professionals, and anyone involved in real estate

transactions where tribes acquire property outside reservation boundaries.

Facts

The Stillaguamish Tribe

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purchased a parcel along the Stillaguamish River in 2021 using federal and state conservation grant funds. The Tribe designated the parcel as “conservation” land. The purchase was conditioned on the Tribe’s protecting the land in perpetuity for salmon recovery—a purpose directly tied to the Tribe’s treaty fishing rights. Before the Tribe’s purchase, Snohomish County had owned part of the disputed strip since 1995.

Flying T Ranch, which has owned adjacent property since 1991, claimed it had adversely possessed a narrow strip of land through continuous maintenance of a fence and livestock grazing since at least 1962. After the Tribe acquired the land, Flying T filed a quiet title action. The Tribe moved to dismiss based on sovereign immunity. Before the trial court ruled, Snohomish County transferred its portion to the Tribe, making the Tribe the sole owner of the disputed parcel. The superior court dismissed the case with prejudice, and the Court of Appeals affirmed.

The Immovable Property Exception Argument

Native American tribes are “separate sovereigns pre-existing the Constitution.” (Internal quotations omitted.) They even enjoy broader sovereignty in some instances than do foreign sovereigns.

Flying T’s central argument rested on a claimed common law immovable property exception to sovereign immunity. Before Congress enacted the Foreign Sovereign Immunities Act in 1976, foreign nations enjoyed immunity based largely on State Department recommendations and principles of comity.

The FSIA later codified an exception stating that foreign states lack immunity when “rights in immovable property situated in the United States are in issue.”

Flying T argued this common law exception predated the FSIA and should apply to tribes acquiring off-reservation land, even though everyone agreed the FSIA itself does not extend to tribes. Flying T urged the court to focus on the “product” of political branch decisions over time—the patterns emerging from individual cases—to define tribal immunity’s scope in the real property context.

The Supreme Court rejected this approach. The court explained that foreign sovereign immunity historically operated through executive branch deference, not territorial sovereignty principles. Before the FSIA and the 1952 Tate Letter, the State Department could request immunity for foreign nations acquiring land within states, regardless of the state’s preferences. The FSIA codified international practice, not American common law practice.

More fundamentally, the court emphasized that tribes are not foreign nations. They are “domestic dependent nations” with a unique government-to-government relationship with the federal government. Sovereign immunity concepts applicable to foreign nations do not apply identically to tribes. Only Congress and tribes themselves retain power to determine when tribal immunity may be waived. There is no common law “immovable property exception” for tribes.

In Rem Jurisdiction Does Not Equal Subject Matter Jurisdiction

Flying T also argued

Washington superior courts have in rem jurisdiction over land within state boundaries, which should allow them to adjudicate title disputes even when tribes are involved. The court distinguished between these concepts.

While in rem jurisdiction grants courts authority over land within their boundaries, this does not automatically confer subject matter jurisdiction to adjudicate claims against sovereigns. Tribal sovereign immunity is itself an issue of subject matter jurisdiction. Without either congressional abrogation or tribal waiver, courts lack subject matter jurisdiction over tribes regardless of where the property sits.

The court examined and effectively overruled prior Washington cases that had relied on other authority to find in rem jurisdiction sufficient.

The Prior Ripened Adverse Possession Theory

Flying T attempted another route, arguing that once adverse possession elements are met, original title vests without court action. Therefore, the Tribe acquired nothing because Flying T already owned the disputed strip through adverse possession before the Tribe’s purchase.

The court found this argument unpersuasive. While both Washington State and the United States have statutorily waived their immunity to allow adverse possession claims, tribes have not. The fact that explicit waivers were necessary for state and federal governments suggests similar explicit waiver is needed from tribes.

Additionally, formally establishing adverse possession typically requires a quiet title

action. A court must have subject matter jurisdiction to decide such actions against tribes. The court cited multiple federal circuit court decisions holding that tribal sovereign immunity precludes subject matter jurisdiction regardless of whether claims are characterized as in rem or in personam. In rem jurisdiction allows states to adjudicate disputes involving land in their territory; it does not confer jurisdiction over the parties.

Practical Implications

This decision creates important considerations for real estate professionals:

Title Examination Challenges: When tribes purchase off-reservation property, title examiners cannot rely on adverse possession claims to clear potential boundary disputes or encroachments. Even long-standing, apparently hostile uses by neighboring landowners provide no basis for challenging tribal title through the courts.

Risk Assessment: Title companies insuring property adjacent to tribal holdings face unique risks. Boundary disputes that would normally be resolved through quiet title actions may have no judicial forum if the tribe asserts immunity. This could affect insurability or require special exceptions.

Due Diligence: Escrow officers and title companies should identify tribal purchases early in transactions. Properties neighboring tribal land may require enhanced boundary surveys and careful review of any historical uses that could create competing claims—claims that cannot be judicially resolved against the tribe.

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Congressional Action Required: The court made clear that creating an immovable property exception to tribal immunity requires congressional action. Until Congress acts, the tribal

immunity baseline applies to off-reservation land purchases.

Key Takeaways

The *Flying T Ranch* decision reinforces that tribal sovereign immunity remains robust even for off-reservation property. The immovable

property exception applicable to foreign sovereigns under the FSIA does not extend to tribes through common law. Real estate professionals must recognize that tribal land acquisitions—wherever located—carry sovereign immunity that only Congress

or the tribes themselves can waive. This reality demands careful attention during title examination and risk assessment whenever tribes participate in the real estate market.

Foreclosure and Equitable Subrogation

Foreclosure Abuse Act's Retroactive Reach and the Limits of Equitable Claims

GITSIT Solutions, LLC v. Azcuy, __N.Y.S.3d__, 2025 WL 2922205 (N.Y. App. Div. 2d Dep't 2025)

Why This Case Matters: Under New York law, a lender's voluntary discontinuance of a foreclosure action no longer revokes acceleration, which has enormous implications for the statute of limitations, since the statute for foreclosing on a mortgage expires six years after acceleration. Further, the statute of limitations for equitable subrogation starts running when the mortgage is executed, not when problems are discovered.

The New York Appellate Division's recent decision in *GITSIT Solutions, LLC v. Azcuy* demonstrates how the Foreclosure Abuse Prevention Act (FAPA) has fundamentally altered the landscape for mortgage foreclosures while reaffirming strict limitations periods for equitable claims. The case serves as a cautionary tale for lenders seeking to revive stale foreclosure actions through alternative theories of recovery.

Facts

In November 2005, defendants Christopher Azcuy and Susan Gayle Cohen executed a note and mortgage in favor of HSBC Mortgage Corporation for property in Haverstraw. HSBC commenced a foreclosure action in August 2012, electing to accelerate the entire mortgage debt in its complaint. The 2012 action was voluntarily discontinued in March 2016.

Federal National Mortgage Association filed a second foreclosure action in April 2016, which was dismissed in October 2019 for failure to prove statutory conditions precedent to foreclosure. In March 2022—nearly ten years after the initial acceleration—

plaintiff GITSIT Solutions commenced the current foreclosure action.

The defendants raised the statute of limitations as an affirmative defense and counterclaimed to cancel and discharge the mortgage. When plaintiff failed to timely reply to the counterclaim, defendants moved for summary judgment dismissing the complaint and for default judgment on their counterclaim. Plaintiff cross-moved to extend its time to reply and for leave to amend its complaint to add claims for equitable subrogation and unjust enrichment.

The FAPA Game-Changer

The court's analysis centered on whether the six-year statute of limitations had expired. Before FAPA's enactment in late 2022, the answer would have been different. Under prior law, a voluntary discontinuance of a foreclosure action constituted a revocation of acceleration, effectively resetting the statute of limitations clock.

FAPA changed that. A voluntary discontinuance “shall not, in form or effect, waive, postpone, cancel, toll, extend,

revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute.”

Importantly, the court held FAPA applies retroactively to all actions where a final judgment of foreclosure and sale has not been enforced.

Applying FAPA, the court determined that HSBC's voluntary discontinuance of the 2012 action did not de-accelerate the mortgage debt or reset the statute of limitations. Because plaintiff commenced the current action in March 2022—more than six years after the August 2012 acceleration—the action was time-barred.

This holding carries important practical implications. Lenders can no longer use voluntary discontinuances as a strategic tool to buy time and restart the limitations clock. It would seem that once acceleration occurs through the filing of a foreclosure complaint, the six-year clock runs without interruption unless the lender obtains a judgment.

The Equitable Subrogation Dead End

Recognizing its foreclosure claim was doomed, the lender

sought to amend its complaint to add a claim for equitable subrogation. The court rejected this attempt, holding the proposed amendment was “patently devoid of merit” because it was time-barred.

A cause of action for equitable subrogation is governed by a six-year statute of limitations. The limitations period begins to run when the mortgage and note are executed—not when the lender discovers problems or seeks to enforce the lien. Here, the mortgage and note were executed in November 2005. Plaintiff's equitable subrogation claim, asserted in 2023, was nearly 18 years too late.

This ruling underscores a critical point for lenders and their counsel: equitable subrogation must be pursued promptly. Waiting until a foreclosure action fails due to statute of limitations problems is far too late. If a lender believes it has an equitable subrogation claim—for example, because loan proceeds were used to pay off a prior lien—that claim must be asserted within six years of loan origination.

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The Voluntary Payment Doctrine Bars Unjust Enrichment

Plaintiff also sought to add an unjust enrichment claim based on two theories: (1) defendants' use of the mortgage proceeds to extinguish a different mortgage lien, and (2) plaintiff's payment of various expenses between January 2012 and April 2023, including taxes and property insurance.

The court held both theories failed. The first theory was time-barred because the alleged wrongful act occurred in November 2005 when the mortgage was executed.

An unjust enrichment claim accrues when the alleged wrongful act occurs, giving rise to the duty of restitution. Like the equitable subrogation claim, this theory was nearly two decades stale.

The second theory failed under the voluntary payment doctrine. This doctrine bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law. Because plaintiff had not alleged it paid the expenses accidentally or mistakenly, or was induced to do so by fraud, the voluntary payment doctrine barred recovery.

This aspect of the decision

holds important lessons for servicers and lenders. Simply because they advance funds to protect a security interest does not mean they can recover those advances through an unjust enrichment claim if their foreclosure action fails. The voluntary payment doctrine creates a high bar for recovery, requiring proof of mistake or fraud.

Key Takeaways

First, FAPA fundamentally changes foreclosure practice in New York. Voluntary discontinuances no longer reset the statute of limitations clock. Lenders must act decisively once they file a foreclosure complaint, as the

six-year limitations period continues to run regardless of dismissals or discontinuances.

Second, equitable claims like subrogation and unjust enrichment are not available as fallback positions when foreclosure actions become time-barred. These claims carry their own strict limitations periods that begin running at loan origination or when the alleged wrongful act occurs.

Third, servicers cannot count on recovering advances for taxes, insurance, and similar expenses if their foreclosure fails. The voluntary payment doctrine bars such claims absent proof of mistake or fraud.

Water Law and Sixteenth Section Land

Navigable Waters Never Leave the Public Trust: Mississippi Supreme Court Rules on Sixteenth Section Lake Dispute

Dew v. Greenwood Leflore Consol. Sch. Dist., __So.3d__, 2025 WL 3018877 (Miss. 2025)

Why This Case Matters: Navigable waters are not part of "sixteenth section" land whereby a state, upon entering the union, agreed to set aside the sixteenth township section for schools.

Procedural History

When it was admitted to the Union, Mississippi agreed (as did other states) to be bound by the United States' system of surveying land into townships and sections, whereby townships were divided into 36 sections of 640 acres each. Mississippi also agreed (as did other states) to reserve the sixteenth section in trust for public schools.

The Greenwood Leflore Consolidated School District filed a complaint to quiet title to a portion of Mossy Lake, claiming exclusive ownership of the fraction lying within the sixteenth section of Township 17, Range 2 West. Kyle Dew, a littoral landowner, counterclaimed that the lake was a public waterbody and the public waters trust superseded any

sixteenth section interest. After a hearing and site visit, the chancery court granted the school district's motion for declaratory judgment, finding the sixteenth section trust superior to the public waters trust. Dew appealed.

The Supreme Court held Mossy Lake remained in the public waters trust and never accrued to the sixteenth section land.

Facts

Mossy Lake is an oxbow lake (formed before Mississippi's founding) spanning approximately 926 acres across multiple sections near Swiftdown, Mississippi. The school district leased the portion of the lake within the sixteenth section to Mossy Brake Hunting Club for hunting and fishing. On January 8, 2023, Dew

was found on the lake with a boat. The school district alleged trespass; Dew argued he had lawful access as a littoral landowner to a public waterbody.

The township was originally surveyed in 1832, when the lake was called Cypress Lake. The original survey showed the lake crossing through multiple sections, including section 16. Evidence established the lake supports boating activities and is navigable in fact.

Legal Analysis

The Court examined two distinct trusts. Under the sixteenth section trust, Mississippi agreed to reserve section 16 in each township for public school support when it entered the Union in 1817. Title to these sections vested when the survey numbering the sections was complete,

because only then could the sixteenth section be identified.

The public waters trust arose from the equal footing doctrine. When Mississippi entered the Union "on an equal footing with the original states," it retained the same sovereign rights the original thirteen states held, including title to all navigable waters. The Court emphasized this was a constitutional imperative: "waters which are public by virtue of the Constitution and the Equal Footings Doctrine may not—by legislative enactment or judicial decree—be withdrawn from public use."

The Court explained that when surveyors divided federal lands into townships and sections, they drew meander lines along the edges of

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water bodies. These meander lines served to calculate the quantity of upland granted, not to convey the water itself. The government measured the price by upland acreage only, making no charge for lands under water. The waters themselves formed the “real boundary,” not the meander lines.

This surveying practice proved decisive. When the township at issue was surveyed and the United States sold the land, the waters were

not part of the section sold. Because Mossy Lake was a navigable waterway at Mississippi’s inception, it was part of the public waters trust. The lake never accrued to the sixteenth section when originally surveyed because the meandered waters were excluded from the land grant.

The Court found no need to determine which trust was superior because no conflict existed. The sixteenth section trust covers land “held in trust for the benefit of the public schools,” but this has never included water bodies in the

public waters trust.

The Court also noted that when public waters change course through avulsion, they do not lose their public character. As an oxbow lake formed before statehood, Mossy Lake retained its public status.

Finally, the Court reaffirmed that a littoral landowner who can legally access part of a public lake may access the entire lake for boating and fishing, subject only to reasonable regulation and the like rights of others.

Practical Implications

School districts leasing sixteenth section lands must verify whether surveyed boundaries exclude navigable waters through meander lines.

Key Takeaways

Navigable waters existing at statehood remained in the public waters trust and were excluded from section land grants through the meander line survey system. Littoral landowners may access the entirety of public lakes their property fronts, regardless of who owns underlying uplands.

Lien Priority

Tax Liens Share the Spoils: Kentucky Supreme Court Settles Priority Dispute Among Certificate Holders

Smith v. Apex Fund Servs. etc., _S.W.3d_, 2025 WL 2998628 (Ky. 2025)

Why This Case Matters: Despite the normal race-notice and first-in-time rules, all tax lienholders—including third-party certificate purchasers—hold interests of equal rank requiring pro rata distribution when tax sale proceeds cannot satisfy all claims.

When a property sold for just \$2,500 at a master commissioner’s auction, three parties holding tax liens found themselves fighting over the meager proceeds. The Kentucky Supreme Court’s resolution of this dispute clarifies, as a matter of first impression, how proceeds from tax foreclosure sales must be divided when multiple certificate holders compete for insufficient funds.

Facts

After property owners in Clay County died, no one paid the ad valorem taxes on their property located on North Highway 421 in Manchester. Clay County sold certificates of delinquency for tax years 2011 and 2012 to third parties, while retaining certificates for all subsequent tax years.

Mid South Capital Partners bought the 2011 tax lien for \$432.58 on April 16, 2012, when the property had an assessed value of \$25,700. Mid

South assigned this certificate to Keith and Jessica Smith on July 9, 2013, and the Smiths recorded it three days later on July 12, 2013.

Apex Fund Services purchased the 2012 tax lien for \$467.21 on April 15, 2013, and recorded it on October 16, 2013.

Five years after acquiring its certificate, Apex sued to foreclose on its tax lien. Apex named the deceased owners’ heirs, the Smiths, and Clay County as defendants, as required by statute. The Smiths answered and filed a cross-claim, requesting their 2011 tax lien be adjudged “‘first, prior, and superior to all other liens’” based on the common law principle of “first in time, first in right.”

The circuit court initially entered an in rem judgment and order of sale granting Apex a judgment of \$7,194.26, which included the tax amount, costs, and attorney fees. At the December 2, 2022 auction,

the property—now appraised at only \$1,000—sold to the Smiths for \$2,500. The master commissioner’s costs totaled \$1,287.

The Smiths then moved to alter, amend, or vacate, seeking credit toward their purchase price based on their earlier lien. The circuit court granted this motion, finding that although tax liens are “‘of equal rank’” by statute, the Smiths’ lien should receive priority under the “first in time, first in right” principle because they recorded first.

Legal Analysis

The Court of Appeals reversed, holding Kentucky statutes mandate pro rata distribution among all tax lienholders when proceeds are insufficient to satisfy all claims. The Kentucky Supreme Court affirmed.

The Court began by acknowledging Kentucky’s longstanding adherence to the “first in time, first in right” doctrine, subject to race notice rules. The first creditor to file its

lien enjoys the first right to the debtor’s property.

A prior interest in property has priority over a subsequent interest that was taken with actual or constructive notice of the first.

However, the Court recognized that the General Assembly has authority to create statutory liens and establish their priorities. The resolution turned on interpreting three key statutes: KRS 134.420(4), KRS 134.546(5), and KRS 426.690.

KRS 134.420(4) provides: “The lien of any city, county, or other taxing district shall be of equal rank with that of the state.” The Court of Appeals had previously interpreted this language to mean that third-party purchasers of certificates of delinquency hold liens equal in priority to those retained by governmental taxing bodies.

The critical question was whether “equal rank” simply

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meant the state has no priority over third-party purchasers, or whether it created an exception to the race-notice rule requiring pro rata distribution among all tax lienholders.

The Court found the answer in KRS 426.690, which requires that when “several debts are secured by one (1) lien, or by liens of equal rank,” and all are due, “the court shall order the sale for the pro rata satisfaction of all of them.”

KRS 134.546(5) reinforced this interpretation. That statute provides that if there is no purchaser at a foreclosure sale, the master commissioner shall deed the property to the certificate holders, who “shall

have a pro rata interest in accordance with the amount of their respective certificates.”

The Court found it illogical to require pro rata division of property ownership when no sale occurs but allow race-notice priority when property sells. In either circumstance, the tax lienholders’ interests are identical—only the format differs. The Court concluded this approach “seamlessly harmonizes” Kentucky’s applicable statutes.

The Court also noted that pro rata distributions within certain classes have a long history in Kentucky law, including perfected mechanic’s liens on the same project and maritime liens of equal rank.

Practical Implications

This decision carries significant consequences for third-party purchasers of tax certificates. Certificate holders can not rely on early recording to secure priority over later tax liens. Instead, all tax lienholders—whether counties, cities, or third-party purchasers—share equally when proceeds prove insufficient.

Tax certificate purchasers should conduct thorough due diligence before acquiring certificates. Check for other outstanding tax liens, assess realistic property values, and calculate whether potential pro rata recoveries justify the investment and litigation costs. Properties with multiple years of delinquent taxes

and degraded values present heightened risks.

Key Takeaways

Kentucky statutes create an exception to the “first in time, first in right” rule for tax liens. All tax lienholders—governmental bodies and third-party certificate purchasers—hold interests of equal rank requiring pro rata distribution when sale proceeds cannot satisfy all claims. Third-party purchasers cannot secure priority through early recording. Certificate purchasers should carefully evaluate the total tax debt and realistic property values before investing.

Easements

Good Intentions Meet Bad Timing: The Perils of Premature Easement Creation

Humphreys v. Huls, __ P.3d __, 2024 WL 6860552 (2025)

Why This Case Matters: Easements are invalid when purportedly created at a time when the dominant and servient estates are under common ownership. They will not spring to life when ownership is severed absent clear language and intent.

The Oregon Court of Appeals delivered a sobering reminder about easement creation in *Humphreys v. Huls*: recording a document does not make it valid, and timing matters as much as intent. The court reversed a trial court judgment, holding that two recorded easement declarations failed to create any express easement benefiting the plaintiffs’ property because of common ownership problems and inadequate language in subsequent deeds.

Facts

Leroy and Marlene Boehm owned approximately 20 acres in Lane County, which they divided at various times into four tracts. In December 2004, when they owned three tracts (tract AC, tract B, and tract D, the latter jointly with their

son), the Boehms recorded a “Declaration of Private Access Easement.” The declaration stated its purpose was “to allow access to [tract B] across [tract AC] and [tract D] from Stephens Road.”

Several months later, in March 2005, while still owning tracts AC and B, the Boehms recorded another declaration. This one stated they were “in the process of partitioning” tract AC into two parcels and that the easement was “being prepared to allow access to the future [parcel A] across [tract B] and [future parcel C] and [tract D].” The easement was to be in the same location as the 2004 easement.

The Boehms sold tract B to the Huls in 2006. The deed contained only generic language: “This property is free from encumbrances, EXCEPT:

All those items of record, if any, as of the date of this deed, including any real estate taxes due, but not yet payable.” The deed made no specific mention of any easements.

The Boehms later partitioned tract AC into parcels A and C in 2011. In 2016, after her husband died, Marlene Boehm sold parcel A to the Humphreys. The Humphreys sued, seeking a declaration they held an express easement over tract B (now owned by the Huls), parcel C, and tract D to access Stephens Road. The trial court agreed and entered judgment for the Humphreys.

Legal Analysis

The Court of Appeals reversed, addressing two critical easement principles that often trap unwary grantors and their successors.

The 2004 Declaration and Reciprocal Easements

The court first rejected the trial court’s interpretation of the 2004 declaration. The trial court had found the declaration created reciprocal easements—one burdening tracts AC and B for tract D’s benefit, and another burdening tract D for the benefit of tracts AC and B.

The appellate court disagreed, finding the declaration’s language unambiguous. It stated its purpose twice: to allow access “to [tract B]” and “to serve [tract B].” This language created only a one-way easement benefiting tract B, not any reciprocal rights benefiting what would later become parcel A. The court

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emphasized that even if the Boehms subjectively intended something different, courts must look to “the intention ... expressed in the deed and not some secret unexpressed intention which the parties refrained from incorporating within the instrument of conveyance.”

Thus A did not have an easement over B under the 2004 Declaration.

The 2005 Declaration and Common Ownership

The court then addressed the more fundamental problem with the 2005 declaration. Although this declaration did purport to benefit future parcel A with an easement over tract B (as well as C and D), it suffered from a fatal defect: the burdened and benefited estates were in common ownership when the declaration was recorded.

An easement, by definition, is “a right in one person to

do certain acts on land of another.” When the same person owns both properties, no easement can exist—it “lacks a characteristic fundamental to easements—it provides no interest in land of another.” (Internal quotations omitted.) The 2005 declaration was therefore invalid when created.

The Critical Role of Subsequent Deeds

An invalid or extinguished easement can be recreated through a subsequent conveyance—but only if the later deed clearly shows the grantor’s intent to do so. The court explained a “mere later reference” to an invalid easement “‘does not in itself recreate the easement.’” Instead, the deed must “‘clearly evince the grantor’s intent to recreate the easement de novo.’” (Internal quotations omitted.)

The 2006 deed from the Boehms to the Hulses failed this test. Its generic language about items “of record” was insufficient. The deed did not

specifically reference the 2005 declaration or make clear the Boehms intended to convey tract B subject to an express easement for the benefit of future parcel A.

Practical Implications

This case offers several critical lessons for real estate practitioners:

First, do not record easement declarations while properties remain in common ownership, even in anticipation of future subdivision. Such declarations are invalid when created and create confusion in the chain of title.

Second, if circumstances require preparing for future easements, the subsequent deed that actually divides ownership must contain clear, express language creating the easement. Generic references to “items of record” will not suffice.

Third, when examining title, consider tracing the ownership history carefully to determine whether the burdened and benefited estates were in

common ownership when the easement was purportedly created.

Fourth, avoid interpreting easement language to create reciprocal rights unless the text clearly supports such an interpretation. Courts will enforce the unambiguous terms as written, regardless of the parties’ subjective intentions.

Key Takeaways

Easements cannot exist between properties in common ownership; such declarations are invalid when recorded. Invalid easements can be recreated through subsequent deeds, but only with clear, express language showing the grantor’s intent—generic references to items “of record” are insufficient.

It is sometimes possible to create a springing easement that takes effect when the common ownership is severed, but pay close attention to drafting these to avoid a merger problem like the one at issue in this case.

Escrow Matters**Seller’s Principal Was Not “Initial Transferee” of Escrowed Funds**

In re Window Select LLC, _B.R._, 2025 WL 2946082 (Bankr. E.D. Wis. 2025)

Why This Case Matters: The court explains the conditions for a bankruptcy trustee’s avoidance of a transfer of a debtor’s funds to “initial transferees” in the context of an escrowed purchase transaction.

A Wisconsin bankruptcy court recently held a title company acting as closing agent was a mere intermediary—not an initial transferee—when it disbursed funds according to escrow instructions tied to specific closing conditions.

The Fraudulent Transfer Trap

Window Select LLC operated a home improvement business whose principal, Justin Kiswardy, drained company funds for personal use. Among his expenditures: purchasing a \$2 million residence from

the Frank Cannella Trust. Window Select transferred \$726,000 to Fidelity Title, which acted as closing agent. After Window Select’s bankruptcy, the liquidating trustee sued to recover the funds from the defendant seller.

The seller sought summary judgment, arguing he was merely a subsequent transferee because Kiswardy—not the seller—was the initial transferee who first exercised “dominion” over the funds while they sat at Fidelity Title. Under Bankruptcy Code Section 550, initial transferees

face strict liability for avoided transfers, while subsequent good-faith transferees who give value are protected. The distinction determines whether recovery is possible.

The Dominion Test

Federal courts apply the “dominion test” to identify initial transferees. The Seventh Circuit defined dominion as “‘the right to put the money to one’s own purposes.’” Critically, dominion focuses on control over funds *after* they leave the debtor—not who has control over the *debtor* before the transfer.

The bankruptcy court rejected the seller’s argument that Kiswardy exercised dominion through a letter agreement between his counsel and Fidelity Title. That agreement required Fidelity Title to hold funds in trust and prohibited disbursement until three conditions were satisfied: Fidelity Title was prepared to issue title insurance, the seller delivered required documents including a signed deed, and Kiswardy’s counsel provided written authorization

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to disburse per the closing statement.

Escrow Instructions Matter

The court found these conditions decisive. The agreement required Fidelity Title to hold “Buyer’s Funds” specifically to complete the real estate purchase—not for Kiswardy’s arbitrary use. Although the agreement

required written authorization from Kiswardy’s counsel before disbursement, this merely gave counsel “the right to grant final approval” on disbursing funds to the seller and other closing parties “pursuant to the Closing Statement.”

The seller argued Kiswardy could have prevented the closing and redirected the funds to himself. The court disagreed, finding no evidence supporting this “counterfactual” scenario. Nothing in the

agreement authorized Fidelity Title to disburse funds at Kiswardy’s whim. The escrow instructions contemplated only two outcomes: closing with disbursement to the seller, or deal termination with unspecified consequences.

Notably, the seller did not contend Fidelity Title was an initial transferee as opposed to merely an intermediary (“an entity that held the funds for the purpose of making them available to another”).

In sum, Fidelity Title was merely an intermediary, not an initial transferee. Further, Kiswardy was not an initial transferee. Kiswardy did not have dominion and control of the funds once Fidelity Title received them. None of the escrow instructions could be understood to require Fidelity Title to disburse the funds to Kiswardy at his request “or [to] buy mirth, merriment, and music.”

Escrow Matters

Escrow Agents Have Property Interest in Escrowed Funds, Can Be Victims of Wire Fraud

United States v. Baker, 155 F.4th 1188 (10th Cir. 2025)

Why This Case Matters: Title companies and escrow agents possess a property interest in funds they hold in escrow, making them potential victims under federal wire fraud statutes. Further, a creditor’s “right to collect” on a debt constitutes a property interest for wire fraud purposes.

Facts and Procedural History

Matthew Baker owed his brother Shane \$445,000 in loans. In 2017, Matthew and one of his companies were charged with federal health-care fraud, in which the United States sought to recover more than \$1 million.

After arranging a real estate transaction involving property in Ashton Springs, Matthew stood to receive a \$767,000 assignment fee. He created an LLC (Cap Fund) and listed Shane as manager, ostensibly to shield assets from the government and repay Shane.

When the assignment fee was wired to Old Republic National Title Company’s escrow account, Matthew asked for the proceeds to be wired to his personal account. Old Republic’s escrow officer refused because the fee was payable to Cap Fund, and Shane—not Baker—appeared as Cap Fund’s manager on the state business registry.

Baker then lied to the escrow officer, claiming Shane

had assigned the fee to him. When the escrow officer asked for documentation, Matthew altered Cap Fund’s online registration to replace Shane’s name with his own as manager. Old Republic discovered the changes and concluded “the new documents ‘just didn’t jive with what [Old Republic] had.’”

Ultimately, Old Republic filed an interpleader action. Matthew was subsequently convicted of wire fraud resulting from the transaction: one count for the phone call with Old Republic in which he lied and one count for changing Cap Fund’s registration information online).

Matthew appealed.

The Court’s Analysis

Among other things, Matthew argued “he did not attempt to deprive Old Republic of any property.”

The Court of Appeals rejected this. The court held, “Old Republic had a property interest in the escrowed funds,” relying on *Shaw v. United*

States, 580 U.S. 63 (2016). In *Shaw*, the Supreme Court held banks have property rights in customer deposits either as owners or as bailees with possessory rights.

Applying *Shaw*, the Tenth Circuit found Old Republic possessed property rights in two respects. First, the escrow instructions permitted Old Republic to obtain “collateral benefits” from escrowed funds deposited in banks, such as “bank services, accommodations, interest, loans or other business transactions” without accounting to the parties. Second, Old Republic had “the right to possess the deposited funds against all the world” except the parties to the escrow agreement.

The court emphasized that after funds entered escrow, neither party could obtain possession except under the agreement’s terms. Utah law required funds be paid from escrow accounts only according to escrow agreement terms.

The court also held that Shane’s right to collect the debt Baker owed him constituted property. The court noted that “the right to be paid money has long been thought to be a species of property.” Baker’s scheme to conceal assets and prevent Shane from collecting the debt was therefore a scheme to defraud Shane of property. Mere failure to pay a debt, however, does not constitute wire fraud absent a fraudulent scheme to frustrate collection.

Practical Implications

This decision potentially expands wire fraud liability in real estate transactions. Title and escrow professionals should recognize that their possessory interests in escrowed funds receive explicit federal criminal law protection. The ruling may also provide additional grounds for prosecution when parties attempt to manipulate escrow distributions through fraud.



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