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THE TITLE INSURANCE LAW JOURNAL

American Land Title Association
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Title Insurance

Insurer Owes Lender Despite Loan Payment in Full

Centerpoint Mechanic Lien Claims, LLC v. Commonwealth Land Title Ins. Co., ___ P.3d ___, 2023 WL 3594420 (Ariz.App. 1 Div. 2023) (permanent citation not yet available).

An Arizona appeals court has used a curious rationale to find a title insurer liable despite the fact that the lender was paid in full from the sale of the property, and has ordered a trial on the question of bad faith and punitive damages.

This case has been litigated for more than a decade. It was the subject of two prior articles in the *Journal*, in November of 2015 and March of 2022.

In 2007 and 2008, Mortgages Ltd., a private lender, made loans for refinance and construction of a residential condominium in Tempe called Centerpoint. A predecessor to Fidelity National Title issued a loan policy to Mortgages. In the amount of $165,200,000.

Two months after making the 2008 loan, Mortgages filed for bankruptcy. The loan was cut into pieces and sold to 10 investors, which the court called the ML Investors.

Loan funding stopped. Dozens of mechanics' liens were filed by unpaid contractors. The loan assignees tendered their defense of the mechanics' lien claims to Fidelity. The insurer accepted the tenders under reservations of rights.

In April 2010, the ML Investors bought the Centerpoint property at a trustee's sale for a credit bid of $8 million. Two of the investors bought a parking lot next door, and Fidelity issued a policy to those investors, called CPI and CPII, for the purchase price of $875,000. CPI and CPII got a $5 million loan from VRCP Funding LP. The VRCP loan was secured by a deed of trust on Centerpoint and the parking lot. Commonwealth issued a $5 million loan policy to VRCP. Also, Universal-SCP 1 LP made a bankruptcy exit loan of $20 million to CPI and CPII, secured by their Centerpoint property rights. Commonwealth Land Title issued a $5

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The Title Insurance Law Newsletter, which is distributed electronically 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

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million policy to Universal.

Fidelity-retained counsel argued that the original 2008 ML Investors deed of trust had priority over the mechanics' liens by equitable subrogation.

ML Investors settled the lien claims. ML Investors, Universal, VRCP, the buyer and the lien claimants reached a global agreement in February of 2011 for the sale of Centerpoint for $30 million. However, rather than simply pay off the mechanic liens, the parties formed a new entity, Centerpoint Mechanic Lien Claims, LLC, wholly owned and controlled by CPII, to buy the mechanics' liens and pursue Fidelity for payment. CMLC paid $13,650,000 for the liens. CMLC then subordinated the liens to the buyer's fee simple interest. Universal and VRCP also subordinated their deeds of trust to the buyer's fee simple title but did not satisfy them. ML Investors agreed to the entry of a stipulated judgment in favor of CMLC for $38 million, about three times the amount it paid for the liens, and a declaration that the mechanics' liens had priority over the insured deeds of trust. ML Investors assigned its policy claims to CMLC and agreed not to execute on its judgment against ML Investors but to limit its recovery to the policy claims against Fidelity. Finally, the settlement agreement said that CMLC was to give ML Investors the money it collected from Fidelity.

In the earlier appeal, the court said that this chicanery did not render the settlement agreement void under *United Services Automobile Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987), which is the Arizona authority on collusive settlements and insurers.

On remand, the trial court granted summary judgment to Commonwealth, because the lenders had been paid in full when the property was sold. The court also ruled as a matter of law that the lenders could not prove punitive damages. The case nonetheless went to trial in 2019 on the lenders' claim that Commonwealth acted in bad faith by not paying its insureds before the property was sold. The jury awarded $5 million against Commonwealth. Both sided appealed.

In this decision, the appeals court reversed the trial court's ruling on summary judgment that Commonwealth was not liable under the policies issued to Universal and VRCP. The appeals court relied on the seeming sophistry that the trial court had confused coverage with liability.

The trial court had based its ruling on Conditions (8)(a)(ii) and 10(b) of the policies. Condition 8 says that the "extent of liability" of the insurer is the least of policy limits, diminution, or "the Indebtedness." Condition 10(b) says that release of the insured security instrument terminates "all liability" under the policy. The Universal and VRCP loans had been fully repaid. Both lenders released their deeds of trust. Thus, the trial court reasoned, Universal and VRCP could not demonstrate a loss. (In fact, the release of the deeds of trust terminated the policies.)

The appeals court said the trial court had confused liability and coverage. It quoted several dictionary definitions of each term to show how they differ. The court admitted that "there is great interconnection between the two concepts, since if there is no coverage, there will also be no liability on the part of the insurer," citing several Arizona Supreme Court decisions that have so held. However, it betrayed its purpose in emphasizing the distinction by acknowledging that Commonwealth could not be liable to pay the stipulated judgment unless there was policy coverage. It stated that, "for purposes of this case, the fact and amount of Commonwealth's liability are resolved and may not be relitigated, since [Commonwealth] is bound by the *Morris* Judgment."

The court bolstered its conclusion as to coverage with certain facts. It noted that the Universal and VRCP policies "expressly insure the priority" of those deeds of trust over the mechanic's liens. Also, it said, Commonwealth's claims handler acknowledged to FNTG leadership that he could not identify any coverage defenses based on the policies themselves." The court said "[o]ur coverage inquiry ends here."

Having remapped the entire case, the court said that Commonwealth could not now assert Conditions 8(a)(ii) and 10(b) "because it failed to timely appeal from the *Morris* Judgment, which decided all questions of liability in CMLC's favor." It said:

> Because the *Morris* Judgment is final and binding against Commonwealth as to both the fact and amount of damages, our inquiry is limited to the question of coverage. … In other words, the *Morris* Judgment renders conditions 8(a)(ii) and 10(b) inapplicable because they constitute defenses to liability and not to coverage. Commonwealth

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> may not relitigate the existence and extent of its payment *liability* for any covered occurrence "in the guise of a coverage defense."

The appeals court directed the trial court "to award contract damages to CMLC in the amount of $10 million, pursuant to the limits of the combined Universal and VRCP policies."

Next, the court took up CMLC's argument that the trial court should not have allowed the jury to hear evidence of the repayment of the Universal and VRCP loans due to the collateral source rule. CMLC argued on appeal that evidence of payment from sources other than Commonwealth should not have been admitted as an offset against Commonwealth's bad faith tort liability.

The appeals court said the collateral source rule did not apply. It observed that the rule is usually applied in personal injury cases. Also, Arizona has adopted the formulation of the rule in the Restatement (Second) of Torts § 920A, which states that payments made by a tortfeasor to the injured person reduce liability but payments made from other sources do not. The court agreed with the trial court that the loan repayments "were not the result of the intrusion of a stranger into Commonwealth's and CMLC's relationship." Rather, the payments were "intrinsic and integral part of the same transaction underlying Commonwealth's policies." The court also noted that CMLC had cited no Arizona authorities supporting its position, and that both Utah and Colorado have held that the collateral source rule does not prevent crediting a payment to the insured by a third party against the insurer's liability. The court concluded:

> We are persuaded that these authorities correctly express the law applicable here. Universal and VRCP received full repayment of their loans, including through the eventual sale of the Centerpoint Property made possible by settlement with the buyer and mechanics' lien claimants. None of the payors here can be said to be wholly independent from Commonwealth's relationship with Universal and VRCP. And with Commonwealth's liability for its bad faith remaining an outstanding question, evidence of the settlement was properly submitted for consideration by the jury, so that it could properly inform itself when weighing damages.

Finally, the court addressed the directed verdict granted by the trial court that there was no evidence that Commonwealth acted with the requisite "evil mind" to support a punitive damage award. The court observed that, in Arizona, every insurance contract includes an implied covenant of good faith, which requires the "insurer treat its insured fairly in evaluating claims." *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 507 (1992). Also, the insurer owes the insured fiduciary-like duties, including "equal consideration, fairness[,] and honesty." *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 ¶ 8 (App. 2011).

However, punitive damages may not be awarded "unless the evidence reflects 'something more' than the conduct necessary to establish the tort" of bad faith. *Rawlings v. Apodaca*, 151 Ariz. 149, 161 (1986). The court acknowledged that the "standard is high." Punitive damages may be awarded only when a plaintiff can prove that the "defendant's evil hand was guided by an evil mind." *Rawlings*, 151 Ariz. at 162. The Arizona supreme court has recently clarified that an "evil hand" is established by proving "that the defendant engaged in tortious conduct of any kind, intentional or negligent ...." *Swift Transp. Co.*, 253 Ariz. at ¶ 22. Establishing an "evil mind," however, requires a plaintiff to show by "clear and convincing evidence that the defendant's actions either (1) intended to cause harm, (2) were motivated by spite, or (3) were outrageous, creating a 'substantial risk of tremendous harm to others.'" *Id.* (quoting *Volz v. Coleman Co., Inc.*, 155 Ariz. 567, 570–71 (1987)). An evil mind can be inferred if the conduct is sufficiently "oppressive, outrageous or intolerable." *Rawlings*, 151 Ariz. at 162–63.

The court said that the trial court should not have concluded that there was no clear and convincing evidence that Commonwealth acted with an evil mind. It began with the fact that "Commonwealth knew about the mechanics' liens recorded against the Centerpoint Property at the time it issued policies to Universal and VRCP in 2010." Then, it said:

> Despite this knowledge, Commonwealth refused to settle with Universal and VRCP when they submitted claims based on the impairment of the priority of their deeds of trust in the Centerpoint Property caused by these mechanics' liens. Instead, Commonwealth refused to withdraw its reservation of rights, without a legitimate basis for doing so. Indeed, the February 2011 memo indicates Commonwealth failed to negotiate a settlement in good faith in order to manufacture defenses against Universal and VRCP and/or a more favorable settlement position. … We cannot say as a matter of law that a reasonable jury could not find by clear and convincing evidence that Commonwealth exhibited the requisite evil mind, given these facts.

The appeals court remanded the case with the direction that the court "hold a limited trial concerning Commonwealth's liability for punitive damages."

ALTA Calendar

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Title Insurance

Evidence or Discussion of Title Insurance Policy Not Allowed When Purpose Is To Prejudice Trier of Fact

Rahn v. Gonyea, 2023 WL 2522810 (Conn.Super.) (unpublished).

A Connecticut court has ruled that a party is barred by the rules of evidence from discussing the fact that the opposing parties has a title insurance policy, and that if they lose the quiet title action, they will be paid by the insurer.

Peter and Valerie Rahn sued their neighbors, Cynthia and Daniel Gonyea and Naomi Haltiner, to quiet title and for trespass, concerning some land in Milford, Connecticut. They alleged that a deed had been forged.

The parties moved for summary judgment. The Gonyeas moved to strike part of the Rahns' brief and supporting affidavit, because they referred to the Gonyea title insurance policy. Section 4-10 of the Connecticut Code of Evidence addresses admissibility of proof of insurance. It says:

> Evidence that a person was or was not insured against liability is inadmissible upon the issue of whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

One of the reasons for this rule is that exclusion of a person's insurance coverage "prevents the jury from improperly rendering a decision or award based upon the existence or nonexistence of liability coverage rather than upon the merits of the case."

The Rahns' brief was pretty blatant. The court said:

> In the present case, the plaintiffs introduce evidence of the defendants' title insurance to argue that the balance of equities favor them because the defendants will be made whole by their insurance company. "It should not be forgotten that the ... Defendants have recourse here in the form of the title insurance they purchased on the Property.... They can be made whole if this Court determines title in the Plaintiffs' favor. The Plaintiffs, on the other hand, have no such recourse.... If this Court were to determine title in the ... Defendants' favor, the Plaintiffs will have lost the entire value of their Property, as well as the Property itself, as a result of ... Haltiner's forgery." Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, p.12 (citations omitted). This line of argumentation is precisely what § 4-10 prohibits. Evidence of the defendants' title insurance has little probative value, but a high risk of unfair prejudice.

The Rahns' first argument in response was that the evidence code applies only to liability insurance. They said, correctly enough, that title insurance is an indemnity contract. Thus, they reasoned, the evidence rule should not apply. The court disagreed, saying:

> Section 4-10 was not intended to distinguish between different types of insurance, however. The majority of jurisdictions that have considered this issue have held that their analogous rules of evidence apply equally to all kinds of insurance. See, e.g., *Larez v. Holcomb*, 16 F.3d 1513, 1518 (9th Cir. 1994) ("[i]t has long been the rule in our courts that evidence of insurance *or other indemnification* is not admissible" [emphasis added]); *Garnac Grain Co. v. Blackley*, 932 F.2d 1563, 1570 (8th Cir. 1991) ("While it may be true that the fidelity bond is not technically insurance against liability ... the bond is insurance. Consequently, if the jury learns of the fidelity bond, it might improperly reduce [the plaintiff's] damages should [the plaintiff] prevail. This is the kind of prejudice Rule 411 [the analogous federal rule to § 4-10] was intended to eliminate." ... *Matosantos Commercial Corp. v. SCA Tissue North America, LLC*, 369 F. Supp. 2d 191, 195 (D.P.R. 2005) ("the Court finds that the rationale behind Fed. R. Evid. 411 will be best served by suppressing at trial evidence of the indemnity agreement"); *KeyBank National Assn. v. Southwest Greens of Ohio*, LLC, 988 N.E.2d 32, 51 (Ohio App. 2013) ("[t]he scope of Evid. R. 411 [the analogous state rule to § 4-10] has been expanded beyond liability insurance policies to include indemnity agreements").

The Rahns also argued that they had not introduced the evidence of title insurance to prove that the defendants acted negligently or wrongfully, as described in the rule. The court said this missed the point:

> This argument ignores the fact, however, that one of the primary rationales behind § 4-10 is to prevent the trier of fact from "improperly rendering a decision or award based upon the existence or nonexistence of liability coverage rather than upon the merits of the case." The evidence has little to no probative value and a high risk of unfair prejudice.

The court concluded with an exhaustive recitation of the decisions that have considered the admissibility of a title insurance policy, and for what purpose:

> The cases to which the plaintiffs cite are equally unhelpful, as they all involve either one of the explicitly mentioned exceptions to § 4-10; the presence or absence of title insurance was directly relevant to proving or rebutting a claim or defense; or they do not actually discuss the admissibility of title insurance. See *First Federal Savings Bank of Wabash v. United States*, 118 F.3d 532, 534 (7th Cir. 1997) (evidence of title

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insurance admitted when insurer's negligence was relevant to whether court should equitably subrogate insured's interest in property over lienholder's interest); *Lee v. Duncan*, 88 Conn. App. 319, 324, 870 A.2d 1, cert. denied, 274 Conn. 902, 876 A.2d 12 (2005) (evidence of title insurance admitted as proof of agency); *Gahura v. Callahan*, Superior Court, judicial district of Litchfield, Docket No. CV-15-6012289-S (July 9, 2018, *Moore, J.*) (not discussing admissibility of title insurance); *Mortgage Electronic Registration Systems, Inc. v. Walpuck*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4004068-S (February 2, 2007, *Jennings, J.*) (letter to plaintiff advising of intervening defendant's title insurance claim admitted when plaintiff claimed no notice of competing claims to property); *Shuster v. Lyons*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-91-0036302-S (August 7, 1997, *Corradino, J.*) (evidence of title insurance admitted when plaintiff claimed that defendants' actions rendered property unmarketable); *Reynolds v. Palmbaum*, California Court of Appeal, Docket No. C086623 (July 28, 2021, *Hull, J.*) (same); *Chanda v. Federal Home Loans Corp.*, 215 Cal. App. 4th 746, 752-53, 155 Cal. Rptr. 3d 693 (2013) (evidence of title insurance admitted when lenders alleged that mortgage broker had taken no action to mitigate risk of loan fraud, but mortgage broker had obtained title insurance covering loan fraud); *Keever v. Dellinger*, 291 Ga. 860, 861, 734 S.E.2d 874 (2012) (evidence of title insurance admitted to show that adverse possessor believed he owned property); *Overlock v. Component Properties*, Inc., 71 Mass. App. Ct. 1127, 888 N.E.2d 386 (2008) (evidence of title insurance admitted to show bias). Those cases are all plainly distinguishable from the present case.

Thus, the court granted the defendants' motion to strike.

Compare this excellent decision to the less satisfying Pennsylvania decision of *U.S. Bank, N.A., as Trustee v. McAfee* on this same rule, also reported in this issue.

Title Insurance

Admission of Evidence of Title Insurance Okay for Limited Purpose

U.S. Bank, N.A., as Trustee v. McAfee, 2023 WL 3478455 (Pa.Super.) (unpublished).

Admission of a title insurance policy as evidence at trial was permitted, despite a rule declaring that evidence of insurance may not be admitted, because the policy was used for the limited purpose of serving as proof of a laches defense.

This case was brought by Wells Fargo, as loan assignee, seeking a remedy to fix its mortgage, which had been signed by only one spouse. The trial court refused to grant an equitable lien on the property or any other remedy that would allow the lender to foreclose. The borrower had not been making loan payments since 2014.

Wells Fargo appealed. One issue it raised was the trial court's denial of the lender's motion *in limine* to exclude evidence of its title insurance policy. Under Pennsylvania Rule of Evidence 411, a party's insurance coverage is generally inadmissible. The courts have explained that such evidence is irrelevant and prejudicial. *Stepanovich v. McGraw*, 78 A.3d 1147 (Pa. Super. 2013); *Estate of Hannis by Hannis v. Ashland State Gen. Hosp.*, 554 A.2d 574 (Pa. Cmwlth. 1989)). Wells Fargo said that the court's review of its title insurance policy unfairly prejudiced it, presumably because the court assumed that the lender could recover from the insurer rather than by foreclosing on the house.

The appeals court rejected the argument. It noted that, while evidence of insurance is not admissible to prove whether a person was negligent or acted wrongfully, it may be admitted for other purposes. The purposes listed by the court have no relation to title insurance, however: proving a witness's bias or prejudice, or proving agency, ownership, or control.

Therefore, the court had to resort to the rule that "the mere mention of the word insurance does not necessitate a new trial unless the aggrieved party can demonstrate prejudice." *Allied Elec. Supply Co. v. Roberts*, 797 A.2d 362, 364 (Pa. Super. 2002). The trial court had admitted the title insurance policy as part of the evidence that the lender had waited too long to correct its mortgage. The appeals court said that "the court's decision was not based on the defense of laches and the court did not rely on these exhibits in rendering the non-jury verdict." The appeals court affirmed, saying this:

> Based on our review of the record, we discern no abuse of discretion in the trial court's decision to admit evidence of title insurance. … Appellees [the property owners] did not present evidence of title insurance for the purpose of proving that any party acted negligently or otherwise wrongfully. Instead, Appellees offered evidence of their title insurance in support of their affirmative defense of laches. … Therefore, the trial court did not abuse its discretion in admitting evidence of Appellant's title insurance claim for that purpose.

This decision merely illustrates the usual issue regarding admission of a title insurance policy: the evidence rules are written for liability policies. However, an action seeking an equitable lien or to quiet title is not premised on negligence or tort liability. Perhaps the only solution is for title insurers to seek a separate evidence rule tailored to title insurance policies.

See the article in this issue concerning the Connecticut decision of *Rahn v. Gonyea*, which barred admission or discussion of a title insurance policy when the purpose in discussing the policy was plainly to influence and prejudice the trier of fact.

Title Insurance

Judge Faces Disqualification for Accusing Doma of Conducting a Shell Game

North American Title Co. v. Superior Court of Fresno County, ___ Cal.Rptr.3d ___, 2023 WL 3560761 (Cal.App. 5 Dist.) (permanent citation not yet available).

A judge in Fresno County has been instructed to reinstate Doma Title's petition to disqualify him for accusing North American, Lennar Title and Doma Title of conducting a shell game to avoid a looming class action suit judgment.

North American Title Company was sued in a class action whose plaintiffs are made up of employees who claimed that North American committed wage and hour employment law violations. There were two classes, made up of salaried and hourly employees.

In October 2016, after a 41-day bench trial, the judge issued a decision decertifying the hourly wage employee class but finding the company liable to the class of salaried employees. The judge appointed a referee to determine the amounts owed to both class representatives and class members. Over several years, the referee held individual hearings and obtained testimony of nearly 250 class members. Judgment was entered on Aug. 31, 2022, against Lennar Title for about $43.5 million.

In 2018 and 2019, several transactions occurred concerning North American Title. States Title FTS Title Company bought the right to use the name North American Title Company Inc. On Jan. 7, 2019, the companies switched names. North American filed amended articles of incorporation to change its name to CalAtlantic Title, Inc. At the same time, States Title FTS Title Company amended its articles and adopted the name North American Title Company Inc. Then, on Feb. 17, 2021, CalAtlantic Title Inc. adopted the name Lennar Title Inc. On May 12, 2021, States Title FTS Title Company abandoned the use of the name North American Title Company Inc., and changed to its present name, Doma Title of California Inc.

The result is that there are now two companies, Lennar Title and Doma Title. The class representatives sought to conduct discovery about these changes, and attempted to add Doma Title as a defendant in their action.

In ruling on those discovery motions, the trial judge made some comments about Lennar Title, which caused it to seek to disqualify the trial judge for cause. During oral argument, trial judge Jeffrey Y. Hamilton, Jr. accused Lennar Title of participating in a "name change shell game" and a "corporate game of three-card monte." He said that it was engaged in "more trickery" and "scheming" to evade payment of the judgment. However, at the time he made those comments, no judgment had been entered. Also, the trial court was never asked to make rulings about any alleged fraudulent transfer, alter ego or successor liability issue.

Lennar Title filed a statement for disqualification. The trial judge struck the statement for disqualification as untimely. Lennar Title appealed that ruling, and also separately appealed the judgment.

The appeals court ordered the judge to reinstate the statement for disqualification, and gave him three days to decide if he would voluntarily withdraw. If he did nothing in that time, by law he would be automatically disqualified.

The appeals court noted that a judge may be disqualified on less than a showing of actual bias. Disqualification is designed "to guarantee not only fairness to individual litigants, but also 'to ensure public confidence in the judiciary' [citation], which 'may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.'" *Wechsler v. Superior Court* (2014) 224 Cal. App.4th 384, 390, 168 Cal. Rptr.3d 605.

The appeals court rejected the argument by the class representatives that Lennar Title had impliedly waived the right to appeal the disqualification issue by proceeding with the litigation and appealing the judgment. The court held that the statute does not even recognize waiver of disqualification if the judge has a personal bias or prejudice concerning a party. Further, it held, Lennar Title had to continue with the lawsuit and appeal in order to protect its interests in the case. Also, the statue says that a judge is supposed to stop the proceedings if a disqualification statement is filed after a trial or hearing has started, which this judge did not do.

The class representatives also attacked the sufficiency of the statement of disqualification. The court rejected that argument, saying:

> Review of Lennar Title's statement of disqualification leaves little doubt it was facially sufficient. The verified statement is 19 pages long and is accompanied by the declaration of Lennar Title's counsel and 15 exhibits, totaling over 300 pages. The statement describes the trial judge's comments made during argument in detail, as well as provides pinpoint citations to the reporter's transcripts. Likewise, after setting forth the relevant legal standards for review of questions of disqualification based on reasonable doubts concerning the judge's impartiality, Lennar Title engaged in a detailed discussion as to why the trial judge's disqualification was required in this case.

The court said that, in addition to being sufficiently detailed, "the claims presented in Lennar Title's statement were both substantial and concerning." It looked to dictionary definitions for each of the pejorative terms used by the trial judge, and concluded that each "infers improper motive and actions on behalf of Lennar Title." It said:

> Hearing the comments, a reasonable observer may be concerned the trial judge was predisposed to decide future rulings

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unfavorably against Lennar Title, including pending post-trial motions. "Where a judge gratuitously offers an opinion on a matter not yet pending before him and thereby shows a bias or prejudice against a party, a writ of mandate will issue precluding the opining judge from hearing that matter." (*Pacific etc. Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 84, 147 Cal.Rptr. 44.)

Based on the totality of the statements above, Lennar Title presented a colorable case and a fully informed, reasonable member of the public could entertain doubts the trial judge retained an appearance of being impartial. " 'The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand.' " (*Id.* at pp. 87-88, 147 Cal. Rptr. 44.)

Agent Focus

FedEx Discount Promise to Title Agent May Not Be Enforceable

Metropolitan Title Agency, Inc., d/b/a M+M Title Co. v. Federal Express Corp., ___ F.Supp.3d ___, 2023 WL 2600397 (S.D.Ohio 2023) (permanent citation not yet available).

A title agent that sued Federal Express because it stopped giving a discounted rate has survived a motion to dismiss in its suit to recover the "excess" fees, but the court seems skeptical.

Over 20 years ago, Metropolitan Title Agency Inc., and Mid America Land Title Agency Inc., doing business as M+M Title, struck a deal with FedEx to use it exclusively for package delivery, in exchange for a discounted rate. M+M Title says that the discount was given until 2019.

In 2021, M+M Title did an audit and discovered that it had stopped getting the discounted rate in 2019. It says that someone at FedEx "acknowledged and conceded, in writing," that the title companies had been overbilled, and sent a check for about $52,000. The companies also received an account credit of $13,402.54.

M+M Title claims that the reimbursement and credit accounted for overbilling from January 2021 to July 2021, but not for the period from Oct. 23, 2019 to Dec. 31, 2020. M+M Title says the amount still owed is about $85,000.

M+M Title sued Federal Express in Ohio federal court, claiming breach of contract, unjust enrichment and conversion. FedEx filed a motion to dismiss.

FedEx moved to dismiss the breach of contract claim by arguing that there was no contract. It said that M+M Title provided no consideration to FedEx in exchange for the discounted rates. It argued that the alleged contractual obligations were merely an "illusory promise."

Ohio defines consideration in a contract as a bargained-for legal benefit or detriment. *Fry v. FCA US LLC*, 143 N.E.3d 1108, 1114 (Ohio Ct. App. 2017). Consideration "may consist of either a detriment to the promisee or a benefit to the promisor." *Williams v. Ormsby*, 966 N.E.2d 255, 259 (Ohio 2012). Courts may not inquire into the adequacy of consideration, but the existence of *some* consideration is a proper question for the courts. The court rejected Federal Express's argument, saying this:

> Here, the Amended Complaint asserts that M+M Title and FedEx entered into an agreement for logistical services 20 years ago. One of the terms allegedly agreed upon by the parties required Defendant to give Plaintiffs a discounted billing rate. M+M Title asserts it used FedEx for its shipping services, [and] was never in default of the agreement… . Based upon the mutual obligations alleged in the Complaint, consideration exists since there is a "bargained for benefit and/or detriment."

The court thus said that dismissal of the claim at this early stage was not warranted.

The court also refused to dismiss the claim of conversion. FedEx argued that this claim was barred by the economic loss rule, because it was duplicative of the breach of contract claim. Ohio bars recovery in tort for purely economic loss caused by negligence. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624, 630 (Ohio 1989). However, the court said that M+M Title's claim "goes further" than the contract terms, because it alleged intentional overbilling and refusal to reimburse the excess charges. Thus, it refused to dismiss the claim.

However, the court dismissed M+M Title's claim of unjust enrichment. FedEx argued that the title company had failed to allege that FedEx received compensation exceeding the value of its shipping services, which it said was necessary for an unjust enrichment claim. FedEx also argued that the unjust enrichment claim was preempted by the Airline Deregulation Act, 49 U.S.C. § 41713. The court said the Airline Deregulation Act did not preempt the claim, but it did accept FedEx's argument that the title company had to, but could not, prove that FedEx had received more than its services were worth. The court said that, in Ohio, an unjust enrichment claim requires that the plaintiff allege that the defendant received compensation that was both unjust and exceeded the value of its services. M+M Title had not made that allegation.

The widespread use of such delivery service contracts in the land title industry makes this decision notable, even though it was issued at a preliminary stage in the contest.

Agent Focus

Closing Fraud Issue Reported Too Late Under Claims-Made Policy

Blazek v. Ohio Bar Liability Ins. Co., 2023-Ohio-1722, ___ N.E.2d. ___, 2023 WL 3596463 (Ohio App. 10 Dist. 2023) (permanent citation not yet available).

An attorney who owns a title agency reported a claim to his professional liability carrier too late, so that a closing fraud problem that might have been covered fell outside the claims-made policy period.

James N. Blazek is an Ohio attorney who owns Pillar Title. In a 2016 sale closing, Michelle Peters of Pillar Title mailed the proceeds check of about $93,500 to the sellers. Two days later, a fraudster sent an email to Ms. Peters impersonating the listing real estate agent. The email said that the sellers preferred to receive their money by wire transfer. The email conveniently included wiring instructions for the fraudster's bank account. The fraudster also assured Ms. Peters that the sellers had already shredded the proceeds check.

Peters wired the money. A short time later, she learned that the email was a fraud. The fraud caused the balance in the Pillar Title escrow account to go into the negative. A seller in a different transaction tried to cash a proceeds check and was told by the bank that the escrow account held insufficient money to allow the check to be deposited into the customer's account. Mr. Blazek hurriedly put together enough money to cover the shortage and protect the title agency's reputation.

Mr. Blazek worked with law enforcement to prosecute the fraudster. Pillar Title never got any of the money back. Blazek and Pillar Title had had professional liability insurance from Ohio Bar Liability Insurance Company since 2015. Blazek did not send a claim notice to OBLIC in 2016. Blazek "reported the loss to his insurer's underwriter" and a former law school classmate who was also in the title business. Neither person suggested that he file a claim with OBLIC. Blazek himself assumed that the fraud was like a cyber-security attack, which was not covered by his policy.

In August 2018, Blazek attended an underwriting seminar and was surprised to learn that other title agents had successfully submitted claims for the type of fraud he had experienced. He called OBLIC. The representative agreed that this type of loss was covered under the policy. Blazek sent an email to OBLIC giving written notice of his claim.

OBLIC denied the claim, for two reasons: the claim was not made during the same policy period as when it was reported, and Blazek had voluntarily paid the claim in violation of a policy condition.

Blazek and Pillar Title sued OBLIC in the Franklin County Court of Common Pleas. The court granted summary judgment to OBLIC. In this decision, the appeals court affirmed that judgment.

The appeals court began by explaining that OBLIC had provided professional liability insurance to Blazek and Pillar Title from 2015 to 2019 under a series of claims-made-and-reported policies. Coverage was renewed annually. Each policy said that coverage was available only for claims made against the insured and reported to the insurer during the policy period. Each policy period was one year. Condition VI stated that the insured must give written notice to OBLIC "as soon as practicable" once the insured became aware of a claim.

The relevant policy ran from May 1, 2016 to May 1, 2017. In the action, Blazek and Pillar Title argued that there was one continuous policy, which ran from May 1, 2015 until it terminated in 2019. This interpretation ran afoul of both the policy's terms and prior Ohio case law on claims-made policies. In *Garrison Southfield Park L.L.C. v. Aspen Specialty Ins. Co.*, 10th Dist. No. 21AP-21, 2022-Ohio-709, the court said that, under a claims-made policy, the insured must present a claim to the insurer within the defined policy period to trigger coverage.

Blazek argued that the term "policy period" in the OBLIC policy was ambiguous, because the word "inception" was not defined in the policy. However, the definition of "policy period" said that the inception date was as "shown in the Declarations." Every year, Blazek received a new Declarations page listing an updated inception date. The appeals court said that Blazek had continuous coverage for four years, but that did not render each successive policy as having a "perpetual or indefinite" duration.

The court also noted that it had rejected the same argument in *Asp v. Ohio Med. Transp., Inc.*, 10th Dist. No. 00AP-958, 2001 Ohio App. LEXIS 2865 (June 28, 2001). In that case also, the insured argued that the policy period ran from the inception of the first contract to the end of the last contract. The court held that "without a statement in the contract that a renewal operates as an extension of coverage, merely renewing a claims-made policy does not extend the 'policy period' in the contract."

The court also noted that Blazek's interpretation of the policy period would nullify the defined term Effective Date and other terms of the policy. It noted that a court is required to give meaning to all terms of an insurance policy.

Finally, the court considered Blazek's argument that he had merely renewed his one policy each year. The court admitted that "whether a renewal operates as a continuation of the contract, or a new contract altogether, is dependent upon the language of the policy," quoting *Dixon v. Professional Staff Mgt.*, 10th Dist. No. 01AP-1332, 2002-Ohio-4493. The court considers several factors: whether the Declarations page contains a set policy period, policy terms stating that coverage applies only to loss that occurs during a specific policy period, and whether the insurer may renew the policy or allow it to expire at the end of the term. The court said the terms of the OBLIC policy all worked against Blazek's interpretation.

Thus, the court concluded that Blazek was required to report the claim before the end of his policy period on May 1, 2017. Because he waited to notify the insurer of the claim until August 2018, he failed to satisfy that requirement, and coverage was properly denied.

Escrow Matters

Closing Company Not Off the Hook for Phishing Wire Fraud Loss

Hoffman v. Atlas Title Solutions, Ltd., 2023-Ohio-1706, ___ N.E.2d ___, 2023 WL 3580894 (Ohio App. 3 Dist. 2023) (permanent citation not yet available).

An Ohio appeals court says that the trial court was too quick to dismiss claims against a title and settlement agent whose email account was hacked, allowing a fraudster to send false wiring instructions to the buyers in a cash deal.

In 2021, Conor Hoffman and his fiancé, Macie McMahon, contracted to buy a house in Marysville, Ohio for $290,000 from Richard and Stephanie Little. Tamie Gordon of Better Homes and Gardens Big Hill represented the Littles, while Jasmine McKenzie of Keller Williams Consultants Realty was the agent for Hoffman and McMahon.

The parties chose Atlas Title Solutions Ltd. as their settlement and title agent. Melonie McCaulley served as escrow officer. The court considered it important that buyers and sellers shared the closing fee.

This was a cash purchase. On April 13, 2021, a Keller Williams representative told Hoffman and McMahon that they needed to wire $289,722.19 to Atlas Title at least one day before the closing on April 22, 2021. McCaulley and her assistant, Alice Elliot, were copied on that email. The email told the buyers "[t]he Title company will send you wire instructions in a secure email. Upon receiving your wiring instructions, *please contact or have your bank contact the title company above, to confirm wiring instructions.*" McKenzie also sent a text message to Hoffman saying "[t]he title company will provide wiring instructions. Be sure to call them to confirm the amount to wire and instructions BEFORE you wire any money."

Hoffman and McMahon also got a Google Calendar invitation that listed the correct email addresses for McCaulley and Elliott, being melonie@atlastitlesoulutions.com and alice@atlastitlesoulutions.com.

On April 20, Hoffman and McMahon got an unsolicited email from a person claiming to be Elliot, although the email address was titleclosingagent101@gmail.com. The email told Hoffman and McMahon to wire the purchase money to the bank account listed on an attachment. The court observed that the email was sent at about the time the buyers were expecting to receive legitimate information from Atlas Title, and contained the correct time and date of closing, the buyers' names, the purchase price, and the names of the Atlas closers. The attachment was a near replica of Atlas Title's real wire transfer form, complete with logo.

Hoffman fell for the scam and sent the wire transfer that day. He even called the telephone number on the email and talked to someone, who purported to confirm the accuracy of the bank account listed on the wire transfer form. The one huge tell that Hoffman overlooked was that the bank account was in the name of Frances Real Estate LLC, at a Wells Fargo branch in Cincinnati.

On April 21, Atlas Title emailed the settlement statement and genuine wire transfer instructions to Hoffman. It used an unencrypted email, the court noted. Further, that email got caught in Hoffman's email spam filter.

Hoffman and McMahon went to Atlas Title on April 22, as planned, and signed closing documents. They became aware of the spoofing fraud the next day, when Atlas Title told them it had not received the purchase money. Hoffman recovered none of the stolen money. However, with a loan from his grandmother, the purchase was completed on April 27, 2021. Hoffman was the sole buyer at closing.

The court also said it found significance in the fact that Atlas Title had learned about two months earlier that its email system had been hacked, apparently by the same fraudster. Atlas Title hired a technology security person, Mark Milliron, who reported that the hacker had been in Atlas Title's email account, but did not get any important information. The court noted that "Atlas Title did not inform Hoffman, McMahon, or McKenzie of the occurrences."

On July 28, 2021, Hoffman and McMahon filed a complaint in the trial court against Atlas Title, Keller Williams, Better Homes and Gardens, McKenzie, and Gordon. They alleged claims of negligence, breach of fiduciary duty, and breach of contract as to Atlas Title, Keller Williams and McKenzie. Atlas Title and several other defendants filed crossclaims for indemnity and contribution.

The trial court granted summary judgment to Atlas Title on Hoffman's breach of contract and breach of fiduciary duty claims. The appeals court reversed, because it found questions of fact about:

> …whether (at the very least) Atlas Title implemented "proper" security measures to prevent Hoffman's personal information from being "phished" to precipitate the "spoofed" email or whether Hoffman should have recognized that the email was "spoofed."

Atlas Title argued that it did not owe a duty to protect Hoffman from this kind of fraud, and that it did not act as a fiduciary toward Hoffman or McMahon. Hoffman and McMahon relied largely on the affidavit testimony of Carole Bullion of Liberty Title Agency in Brighton, Michigan. She opined that Atlas Title owed duties to the buyers as an escrow agent even though there were no written escrow instructions, in part because a settlement fee was paid. The court gave this summary of Bullion's testimony about security measures designed to prevent phishing attacks:

> … Bullion averred that "Atlas had an obligation to put in place procedures to protect consumers like [Hoffman and McMahon] from the spoofing incident that occurred, as well as warn [Hoffman and McMahon] of known spoofing incidents." … Specifically, Bullion identified that Atlas Title failed [Hoffman and McMahon] by (1) not

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> having procedures in place for the safe transmittal of wiring instruction [sic] and adequately informing customers about such procedures; (2) not having procedures in place to warn customers of the risk of spoofing incidents and how to effectively avoid them; and (3) not warning [Hoffman and McMahon] that Atlas had been the target of the same spoofer multiple times prior to the transaction involving [Hoffman and McMahon].
>
> … Further, Bullion averred that "Atlas Title Solutions did not have an adequate compliance program to safeguard their customers' information." … Importantly, Bullion averred that Atlas Title "did not follow its own policy or the [American Land Title Association ("ALTA")] Best Practices," which "fell well below the industry standards of practice and failed their obligations to [Hoffman and McMahon]" in this case. … Importantly, Bullion identified that this incident could not have happened had Atlas (1) had adequate procedures for wire transfers in place; (2) had adequate procedures for communicating wire procedures to customers; (3) adequately warned customers about spoofs and how to avoid them; (4) specifically warned [Hoffman and McMahon] that Atlas had been a target by the same fraudster * * * ; and (5) promptly advised [Hoffman and McMahon] that the wire had not been received.

The trial court had been unmoved by these seeming legal conclusions, finding that "there exists no fiduciary duty or no privity of contract." Later, the court also dismissed Hoffman's negligence and gross negligence claims.

The appeals court reversed, finding that there were at least questions of fact to be resolved. It began by holding that there was a question about whether or not the buyer and sellers had entered into an escrow contract with Atlas Title, despite the lack of any written agreement. It quoted Ohio law about the nature of an escrow and the duties of an escrow agent, as found in *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307 (11th Dist.); and *Pippin v. Kern-Ward Bldg. Co.*, 8 Ohio App.3d 196 (8th Dist. 1982). It resorted to an unpublished decision to find that "Ohio courts have held that escrow agreements do not have to be in writing." *Johnson v. U.S. Title Agency, Inc.*, 8th Dist. Cuyahoga No. 103665, 2017-Ohio-2852. It quoted from another decision that there can be an ""implied escrow agreement" and that "[n]o precise form of words is necessary to constitute an escrow." *Union Savs. Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, ¶ 21 (10th Dist.). Thus, it said, the buyer and sellers may indeed have "entered into an escrow agreement." The court never reached the issue of whether an "implied" escrow agreement would include a duty to warn the buyer of a phishing attack.

The appeals court also reversed the dismissal of the breach of fiduciary duty claim. The court found that every escrowee owes a fiduciary duty, based on the same authorities it had cited earlier. The court did observe that *Waffen v. Summers*, 6th Dist. Ottawa No. OT-08-034, 2009-Ohio-2940, stated that "[a]n escrow agent, despite fiduciary status, will not be liable when he or she acts in accordance with the escrow agreement or instructions." Again, however, the court did not reach the issue of whether there is a fiduciary duty to warn a customer of phishing fraud, or to reimburse the customer if he succumbs to such a fraud.

The court also rejected Atlas Title's argument that the economic loss rule barred Hoffman's claim for economic damages based on an alleged breach of a fiduciary duty. The court noted that a claim of breach of fiduciary duty was found to be exempt from the economic loss rule in *Morgan v. Mikhail*, 10th Dist. Franklin No. 08AP-87, 2008-Ohio-4598.

Escrow Matters

Broker Lien Escrowee Owes No Duty to Buyer Not a Party to Escrow Agreement

Elevation Enterprises Limited v. Anchor Capitol L.L.C., ___ N.E.3d ___, 2023-Ohio-1646, 2023 WL 3478493 (Ohio App. 10 Dist. 2023) (permanent citation not yet available).

When the closing company and "owner" of the property entered into an escrow that discharged a broker lien, the buyer of the property had no right to claim an interest in the money because it was not a party to the escrow.

Anchor Capitol LLC listed Ohio property for sale. Elevation Enterprises Limited was the exclusive listing agent for the property. Anchor signed one sale contract that fell through. Then Anchor signed a contract to sell the property to Whittier Park Limited.

Elevation learned that Anchor and Whittier were working together to complete the purchase without paying Elevation a commission. Elevation also claims that the same family owns and controls both Anchor and Whittier. Elevation recorded a broker's lien on November 28, 2018.

Northwest Title Family of Companies Inc. closed the sale to Whittier. According to the court, Northwest extinguished the broker lien by escrowing the claimed commission amount. The purchase closed.

Elevation sued Anchor and Northwest Title, seeking the commission amount. Northwest Title answered the complaint, but Anchor defaulted. Nearly a year later, Anchor moved to set aside the default judgment. At the same time, Whittier moved to intervene in the action, claiming that it had an interest in the escrowed money.

Northwest Title responded

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to those motions. It explained that it did not owe a duty to Whittier regarding the escrowed funds and its duties to Anchor were limited to those stated in the escrow agreement and section 1311.92 of the Ohio Revised Code. That law permits an owner to establish an escrow for a broker lien in order to close on a sale. Northwest also stated that it did not owe a duty to Anchor and Whittier to inform them of the existence of Elevation's action against Anchor and that it had no duty to oppose Elevation's motion for default judgment.

The trial court denied the Anchor and Whittier motions without a hearing. It held that Whittier had no interest in the escrowed money, rejecting Whittier's argument that it was the owner of the money because it had paid the money to Anchor before being deposited into the escrow account.

Anchor and Whittier appealed. The ruling of interest to title people concerned Whittier's claim to the escrowed money. The Ohio broker lien escrow statute, R.C. 1311.92(A), says:

> …[T]o enable a transfer of lien property to close when a broker's perfected lien may otherwise prevent the closing, a separate escrow account shall be established by the owner into which moneys from the proceeds of the closing shall be deposited in an amount sufficient to release the broker's lien.

Whittier's argument was that it had a right to intervene in the escrow dispute because it had an "agreement with Anchor to advance the funds that were placed in the escrow account in order to obtain the release of Elevation's broker's lien." Thus, Whittier asserted that it had an interest in the escrowed money and should be permitted to intervene. The appeals court rejected the argument, as had the trial court. It said:

> As the trial court noted, however, Whittier is not a party to the escrow agreement. Instead, the escrow agreement is between Anchor and Northwest Title. The escrow agreement provides that Anchor is the owner of the subject property and that Anchor entered into a contract for sale requiring conveyance of the property free and clear of any liens. Anchor and Northwest Title agreed, pursuant to R.C. 1311.92, that Anchor would deposit the $108,750 with Northwest Title. Additionally, R.C. 1311.92(A) provides that "to enable a transfer of lien property to close when a broker's * * * lien may otherwise prevent the closing, a separate escrow account shall be established *by the owner* into which moneys from the proceeds of the closing shall be deposited in an amount sufficient to release the broker's lien." (Emphasis added.) Thus, R.C. 1311.92(A) requires the *owner* of the property to deposit the proceeds of the closing into the escrow account. It is undisputed that Whittier was the buyer of the property in the real estate transaction, not the owner.
>
> We agree with the trial court that although Whittier may have advanced the funds, it advanced the funds to Anchor. At closing, once the funds had been advanced to Anchor, Anchor was in possession of the funds and Anchor then deposited the funds into the escrow account. Even though Anchor and Whittier had a separate agreement relating to the advancement of funds, the separate agreement does not override the escrow agreement or the requirements of R.C. 1311.92(A).

This decision is useful for two reasons. First, it is one of the few to construe a statute concerning escrows for broker commission liens, which law has been adopted in at least several states. Second, the court clearly adopted the escrowee's position that it owed no duty to a person who paid money into the closing but was not a party to the escrow agreement. That rule has long been established in the "pure escrow" states like California, with the seminal decision being S*ummit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, 27 Cal.4th 705, 41 P.3d 548, 117 Cal.Rptr.2d 541 (2002).

Escrow Matters

Title Insurer Has No Claims Against Law Firm That Failed to Deliver Loan Payoffs

Stewart Title Guar. Co. v. Law Offices of David Fleischmann, P.C., 2023 WL 3168320 (D.N.J.) (unpublished).

A New Jersey federal court has dismissed claims of negligence and fraud brought by a title insurer against a law firm that accepted two loan payoffs totaling about $1 million but that did not deliver the money to the lender that was to be paid off.

In 2018, two entities wanted to refinance loans secured by mortgages on properties in North Bergen and Perth Amboy, N.J. Nexus Capital Investment LLC agreed to lend the entities about $1 million. The Nexus loans were closed by World Wide Land Transfer Inc., which issued Stewart Title policies to Nexus, insuring the mortgages as first liens.

Both properties were already encumbered by mortgages in favor of PrivCap Funding LLC. Stewart Title alleged that, at the closings, Andrew Selevan, counsel for the borrowers, gave World Wide payoff instructions for the PrivCap loans. Those instructions told World Wide to make the loan payoff payments to the Law Offices of David Fleischmann, P.C. World Wide send the money to the Fleischmann firm as instructed.

In May 2020, PrivCap commenced foreclosure actions on both of its mortgages. Stewart Title alleged that this caused World Wide to discover that the "[t]he [Fleischmann] Law Firm

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received the money but did not transmit the funds to satisfy the existing mortgages." Stewart Title alleged that a demand was made upon the Fleischmann Law Firm to return the money, but no money was returned. Stewart Title alleged that "[o]ver a million dollars is missing from two simultaneous mortgage closings which occurred on September 7, 2018," and that only David Fleischmann and his firm "know where the money has gone."

Stewart Title sued the Law Offices of David Fleischmann and Mr. Fleischmann personally, for negligence, conversion and fraud. Stewart Title stipulated to the dismissal of the conversion claim. Stewart Title also sued World Wide Transfer, which made crossclaims for contribution and indemnification.

This decision concerned a motion to dismiss brought by the Fleischmann Law Firm and David Fleischmann. The court granted the motion, dismissing the claims without a right to amend.

The court found that Stewart Title failed to allege that the Fleischmann defendants owed a duty of care to the insurer, one of four necessary elements in a negligence claim. The court reiterated that the borrowers' counsel, Andrew Selevan, delivered the payoff statements purportedly issued by PrivCap, directing that the payoffs be delivered to Fleischmann's account, that the money was paid and that Fleischmann refused to return it. However, court pointed out, the complaint did not allege that Fleischmann represented Stewart Title or any other party in the transaction. Also, Stewart Title did not allege that Fleischmann owed a fiduciary duty to Stewart Title.

Stewart Title relied on *Dynasty Bldg. Corp. v. Ackerman*, 870 A.2d 629 (N.J. Super. Ct. App. Div. 2005), to assert that "if a tort plaintiff can establish ownership of funds in the attorney's trust account, a fiduciary relationship exists, and an unauthorized distribution of those funds will constitute an actionable breach of the duty arising thereunder." The court acknowledged that *Dynasty Bldg. Corp.* said that "[i]f in fact the plaintiffs can establish that it was their funds, a fiduciary relationship developed between them and [the lawyer] even though he did not represent them in any matter." 870 A.2d at 633. The court said, however, that Stewart Title had not alleged that it owned the money sent to the Fleischmann Law Firm. Rather, Stewart Title asserted that the money belonged to lender PrivCap. The court said:

> If, as Plaintiff asserts, PrivCap is the rightful owner of the funds at issue, any possible duty would be owed to PrivCap. Without more, the Court cannot find a basis to conclude that Plaintiff, whose relationship to the transaction appears to be that of underwriters of the title insurance policies issued by World Wide…, has established a duty of care owed by the Fleischmann Defendants to Plaintiff.

Further, the court said, Stewart Title seemed to imply that Fleischmann owed a fiduciary duty to PrivCap. However, the complaint did not include a claim for breach of a fiduciary duty, so the court did not consider the issue.

The court also dismissed the fraud claim. That claim was based on the fact that the Selevan payoff instructions were published to World Wide and others, were false, and that "[u]pon information and belief, Fleischmann and the Law Firm knew that the Selevan Payoff Instructions were false but took no action to prevent their use." The court said that this did not meet the standard of pleading a fraud claim with particularity.

The court acknowledged that a court "should be 'sensitive' to situations in which 'sophisticated defrauders' may 'successfully conceal the details of their fraud.'" When the important information "is peculiarly within the defendant's knowledge or control, the rigid requirements of Rule 9(b) may be relaxed." The court was quoting from *In re Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002), and *In re Burlington Coat Factory Sec. Litig*, 114 F.3d 1410, 1418 (3d Cir. 1997). Nonetheless, the court said that Stewart Title had failed to plead that the Fleischmann Law Firm had made a material misrepresentation or omission. In addition, the allegation that the Fleischmann Law Firm knew that the Selevan payoff instructions were false was not made with sufficient particularity.

Stewart Title also relied on a certification of Juan Polistico that was appended to the complaint. Polistico said that he called the Fleischmann Law Firm before the closings and was told by an associate, Aaron Schlusselberg, that the Selevan Payoff instructions were correct. The court said that this certification was not enough, because the complaint did not mention it and because Stewart Title did not allege that Schlusselberg knew his statement was false.

The court also dismissed World Wide Transfer's crossclaims against the Fleischmann defendants for contribution and indemnification. Essentially, the court held that those crossclaims depended on Stewart Title's claims, and must be dismissed along with the insurer's claims.

Escrow Matters

Lender Did Not Prove That Notary Was Title Insurer's Agent

Dattala v. Precision Assets, 528 P.3d 282 (Table), 2023 WL 3051611 (Nev.) (unpublished).

An individual lender harmed by the forged releases of two deeds of trust failed to prove that the notary on the forged releases was the agent of the title insurer that closed the sales.

John Dattala sold two Texas properties to Eustachius Bursey that the court labeled as 50 Sacramento and 59 Sacramento. Dattala made purchase money loans to Bursey secured by deeds of trust on both parcels.

Later, Bursey sold both properties, one to Precision Assets and the other to Aery Development. WFG National Title Insurance Company served as the escrow agent and title insurer for Bursey's sales.

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A release of the Dattala deed of trust was delivered with each closing. However, Bursey did not pay off the purchase money loans when he sold the properties.

Dattala found out about the sales. He sued Precision, Aery, WFG, Bursey and Lillian Medina, who "served as a notary on various documents pertaining to Dattala's and Bursey's title to the properties," as the court phrased it. Dattala alleged that Medina and Bursey had conspired to forge the releases. He sued to quiet title, claiming that Precision Assets and Aery Development received void deeds (thus ignoring the fact that Bursey was the owner, subject to Dattala's security interests).

Dattala's claim against WFG was for negligence, based on the allegation that Medina was acting as WFG's agent when she notarized the forged releases.

Bursey and Medina did not defend themselves in the lawsuit. The court held a prove-up hearing and entered a default judgment against both of them. In this appeal, Dattala claimed that the court had made "findings" in the default judgment that Bursey had acquired title to the two properties from Dattala by fraud, and that Medina had acted as WFG's agent.

WFG and the two buyers moved for summary judgment, and the court granted the motions. The court said that Dattala had not presented any evidence that notary Medina was WFG's agent. It also held that Dattala could not void the sales because the buyers were bona fide purchasers. Dattala moved for reconsideration. As to WFG, Dattala produced three bits of information to support his agency contention: the so-called "finding" in the default judgment against Medina, an interrogatory response from WFG that he claimed was an agency admission and a declaration signed by Bursey claiming that Medina "represented that she was WFG's agent." The district court denied that motion.

Dattala appealed, and the court affirmed for WFG. As to the default judgment finding, which had been drafted by Dattala's lawyer, the court said that *Estate of Lomastro v. American Family Insurance Group*, 124 Nev. 1060, 195 P.3d 339 (2008), stands for the proposition that the entry of a default judgment against one person does not preclude another party from contesting its own liability.

Dattala did not rebut *Lomastro*. He argued instead that the district (trial) court was bound by the "finding" in the Medina default judgment and could not later enter a "contrary finding." The appeals court said that WFG was not bound by the Medina judgment, and the trial court had every right to make new rulings in the claim against WFG.

The court also rejected Dattala's second contention, that WFG had admitted in an interrogatory that Medina was its agent. In fact, the insurer had said that "Lilian Medina is an independent notary / signing agent and WFG has no responsibility to supervise her actions." The court said this was not an admission of agency.

The court refused to consider the Bursey declaration, because Dattala first produced it to support his motion for reconsideration, and he did not explain why he could not have produced it earlier. The court thus avoided having to consider the credibility of an affidavit from an apparent forger. The court thus affirmed the dismissal of WFG from the case.

This is a good decision on an issue that seems to be arising more often in recent years: forgeries facilitated by independent notaries. The decision is also a good illustration as to why it is so important for a title insurer or title agent not to inadvertently imply that such an independent notary is the agent of the company.