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THE TITLE INSURANCE LAW JOURNAL

American Land Title Association
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Escrow Matters

Title Agent Gets Major Victory on Wire Transfer Fraud Insurance Coverage

Valero Title Inc. v. RLI Ins. Co., 2023 WL 1434270 (5th Cir. (Tex.)) (unpublished).

A title agent that paid for an endorsement to its crime protection policy, specifically protecting against wire transfer fraud, is entitled to coverage against a loss caused by fraudulent wiring instructions for a loan payoff.

Valero Title, Inc. serves as a title and escrow agent in Texas. It bought a crime protection insurance policy from RLI Insurance Company, which included a wire transfer fraud endorsement. The endorsement said:

> … we will pay for loss of funds resulting directly from a fraudulent instruction directing [*sic*] financial institution to transfer, pay or deliver funds from your transfer account.

A Valero employee requested a payoff statement from a lender. A fraudster impersonated the lender employee and sent wiring instructions to Valero's employee, identifying the fraudster's bank account. The Valero employee failed to detect the phishing attack and sent about $250,000 to the account. The money was not recovered.

Valero submitted a claim notice and proof of loss to RLI, which denied the claim despite the funds transfer fraud endorsement. Valero sued RLI.

Both sides filed motions for summary judgment. The district court ruled in Valero's favor. RLI appealed. The Fifth Circuit Court of Appeals affirmed.

RLI's argument was that the loss in this case was not caused by a "fraudulent instruction," as defined in the policy. The policy defined "fraudulent instruction" as:

> … a written instruction ... issued by you, which was forged or altered by someone other than you without your knowledge or consent, or which purports to have been issued by you, but was in fact fraudulently issued without your knowledge or consent.

The court said that everyone agreed that this definition covered two different

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

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

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

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situations, which the district court labeled "Clause A" and "Clause B." The Fifth Circuit said that this dispute involved Clause A, "a written instruction ... issued by you, which was forged or altered by someone other than you without your knowledge or consent."

RLI argued that the instruction at issue in this case was Valero's instruction to its bank to make the wire transfer to the bad person's account. RLI argued that the wire transfer instruction as issued had been authorized and approved by Valero. Thus, it was not forged or altered by someone else and the coverage was not invoked. The Fifth Circuit disagreed, saying that the district court:

> … correctly held that the only interpretation of Clause A that does not render Clause B meaningless is one in which a written instruction is forged or altered by someone other than the insured without the insured's knowledge or consent prior to being issued by the insured. RLI's construction cannot be harmonized with the rest of the policy because it makes Clause B redundant.

RLI strained to find a hypothetical under which its own interpretation of Clause A would not render Clause B meaningless. The court reported that:

> RLI proposes that if Valero had forwarded the exact e-mail forged by the fraudster (posing as the lender) to Valero's bank, instead of issuing its own wiring instructions, Clause A would apply.

The court said this example would exalt form over substance:

> Here, the instruction Valero issued to its bank included the name of the recipient institution, the routing number, the recipient account numbers, the account name, the payment date, and the total amount of payment. It was the same instruction Valero received from the fraudster posing as the lender. Unknown to Valero, the instruction was not the same as the instruction provided by the lender; it was altered to include different recipient account information. Thus, when Valero issued the instruction to its bank, it was a fraudulent instruction that was "forged or altered by someone other than [Valero] without [Valero's] knowledge or consent."

The court also examined two other hypotheticals posed by RLI and found them equally illogical. In fact, the court concluded, RLI's own hypotheticals proved Valero's point, that RLI's reading of its policy would cause "Clause A to have the same meaning as Clause B and render some or all of the terms Clause A and Clause B meaningless." The court concluded by restating that:

> … the only interpretation of Clause A that does not render Clause B meaningless is one in which a written instruction is forged or altered by someone other than the insured without the insured's knowledge or consent prior to being issued by the insured. The district court correctly applied this interpretation and found that coverage was trigged under the funds transfer fraud endorsement for Valero's claimed loss.

This is a good decision. It is no slight to say that the appellate court's analysis seems unremarkable. What is remarkable is that the insurers that are now issuing the so-called crime protection policies seem so reluctant to acknowledge plain coverage. This decision will assist every title agent insured in pursuing policy coverage for this serious risk.

Thanks to subscriber James L. Windsor of Kaufman & Canoles PC, Virginia Beach, for alerting your editor to this decision.

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Escrow Matters

Closer's Wire Transfer Fraud Action Against Paying Bank Proceeds

Cosmopolitan Title Agency, LLC v. JP Morgan Chase Bank, N.A., ___ *F.Supp.3d* ___, 2023 WL 151168 (E.D.Ky. 2023) (permanent citation not yet available).

A Kentucky court has limited but not dismissed an action brought by a title agent closer against a bank that paid a fraudster even though the wire was canceled ten minutes after it was sent. The decision illustrates a Frank Abagnale-type check kiting scheme, and highlights the arcane process for canceling a wire that is mandated by the Uniform Commercial Code.

Cosmopolitan Title Agency LLC is a Kentucky title agent. A fraudster set up a closing with Cosmopolitan for an alleged $19,900 real estate purchase. The purported buyer walked into closing with a $70,000 cashier's check and asked Cosmopolitan to wire the "overage" to his account at PNC Bank.

Cosmopolitan deposited the check into its escrow account at JP Morgan Chase Bank. On March 30, 2022, Cosmopolitan instructed JP Morgan to wire the overage of $49,014.14 to the fraudster's account at PNC. "Almost simultaneously with this wire transfer," Cosmopolitan discovered that the buyer's check was fake. Cosmopolitan submitted a wire transfer recall "within ten minutes" and contacted PNC directly.

PNC allegedly told Cosmopolitan that Chase needed to file a dispute with PNC. Then PNC would refer the issue to PNC's security department, and that department would "reach back out to [Cosmopolitan] in the next few days." Chase did not file a dispute. PNC did not contact Cosmopolitan with investigative findings. Cosmopolitan also alleges that there is "evidence of fraud associated with" the PNC account.

Shortly after the wire was sent, the fraudster withdrew the money from the PNC account. Then, on April 7, 2022, Chase sent a wire recall to PNC, which it rejected on April 13 because there was no more money in the account.

Cosmopolitan sued both JP Morgan Chase and PNC Bank. It made a claim against PNC under UCC Section 4A-211, found in Chapter 355 of the Kentucky Revised Statutes, for failure to return the funds after cancelation of the payment order. Cosmopolitan also alleged negligence per se, conversion, negligence, and sought punitive damages.

PNC Bank moved to dismiss the claims against it. The court dismissed the common law claims, but not the UCC claim.

The court began by reminding the reader that a wire transfer is a "series of transactions, beginning with the originator's payment order made for the purpose of making payment to the beneficiary of the order." Ky. Rev. Stat. Ann. § 355.4A-104 (LexisNexis 2022) (emphasis added). Using UCC terminology, Cosmopolitan was the originator of the wire. Chase was the originator's bank and sender of the wire. The fraudster was the beneficiary of the transfer. PNC was the beneficiary's bank.

Section 4A-211(2) of the UCC is the section that addresses cancelation of a wire. It says that

> a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

The sender can unilaterally cancel or amend a payment order if the receiving bank has not yet paid out the money to the beneficiary. The UCC Comment 3 says "When a wire transfer has not yet been accepted, all that is required for cancellation is for the originator of the transfer to request that the transfer be stopped."

Cosmopolitan alleged that it sent a wire recall within ten minutes of submitting its payment order, and that the instruction to cancel the wire was sent to PNC Bank the same day. The court held that Cosmopolitan had plausibly alleged that PNC received the recall before accepting the payment order. It cited *Jakob v. JPMorgan Chase Bank, N.A.*, No. 22-CV-03921, WL 16798071, at *4 (E.D.N.Y. Nov. 8, 2022), which held "[i] f Plaintiff truly requested a cancellation immediately, then his request was arguably received before Defendant executed the wire transfer."

PNC argued for the first time in its reply brief that a "recall" is not a cancelation. It said that PNC had asked Chase to file a dispute, which it said is a "*different* type of communication," and that Chase did not recall the wire until after the money had been paid to the fraudster. The court said PNC was not allowed to raise the argument for the first time in its reply brief. Moreover, it said that the argument lacked merit. It cited *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 801-02 (2nd Cir. 2011), which treated the sender's "instruction to recall the wire transfers" as an attempt to "request to cancel," finding the nomenclature to be a distinction without a difference.

The court struck Cosmopolitan's common law claims, however. It said those claims were preempted by the Uniform Commercial Code, citing as authority the Comment to Section 4A-102 and *Wright v. Citizen's Bank of East Tenn.*, 640 F. App'x 401, 406 (6th Cir. 2016). It noted that the UCC controls the conduct in the wire transfer process; common law claims can apply only to misconduct before or after that process, citing *Baerg v. Ford*, No. 2014-CA-00762, 2016 WL 683118 at *3, 2016 Ky. App. LEXIS 19 at *9 (Ky.App. Feb. 19, 2016).

Thus, the court said, allowing Cosmopolitan's common law claims to proceed would be inconsistent with Article 4A, particularly to the extent that those claims were based on Cosmopolitan's instructions directly to PNC Bank. Under the UCC, the instruction to cancel the wire had to come from Chase, not Cosmopolitan. The court again resorted to an official comment to Section 4A-404, which says:

> …[T]he originator of a funds transfer cannot

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> cancel a payment order to the beneficiary's bank, with or without the consent of that bank, because the originator is not the sender of that order. Thus, the beneficiary's bank may safely ignore any instruction by the originator to withhold payment to the beneficiary.
>
> The last-quoted UCC comment highlights the inadequacy of the UCC as a protection against wire transfer fraud. Why is it good policy to say that a bank that receives a person's money may "safely ignore" an instruction from that person to return the money, and instead pay the money to a fraudster? Note, too, that PNC's response to Cosmopolitan's urgent and timely instruction to return its money was to say that the sender bank, Chase, needed to "file a dispute with PNC" that would be addressed in a few days. Then, in the litigation, PNC argued that the filing of a dispute was not a cancelation instruction, and the actual cancellation instruction was sent only after PNC disbursed the money *to the known fraudster*.
>
> All in all, it seems that an overhaul of Section 4A of the UCC is overdue. The drafters must include not just banks but representatives of the customers whose money is being stolen at such an alarming rate.

Escrow Matters

Wire Fraud Action Offers Practice Pointers

Fidelity Nat'l Title Ins. Co. v. APM Management Service's, LLC, 2023 WL 319789 (E.D.Mo.) (unpublished).

A short decision in a new action against the alleged perpetrator of a wire transfer fraud scheme gives some good pointers about how to litigate this tricky type of case.

Fidelity National Title alleges that APM Management Service's LLC and Richard C. Appelbaum orchestrated a fraudulent wire transfer of $2,258,274 from Fidelity's escrow account to a bank account controlled by Appelbaum. Fidelity immediately convinced the court to enter a temporary restraining order freezing the Appelbaum account. However, after Fidelity conducted "limited expedited discovery" on Bank of America, it learned that most of the money had been siphoned off to other accounts controlled by APM and Appelbaum, such as cryptocurrency accounts.

In the current motion for expedited discovery, Fidelity asked permission to track down those other accounts at specified banks and cryptocurrency companies. Fidelity also moved to file the information about those accounts under seal. The court granted the motions, and made these comments:

> Courts in this district "consistently" apply a good cause standard when considering motions to expedite discovery. *Monsanto Co. v. Sauceda*, No. 4:10-V-2249 CEJ, 2011 WL 65106, at *1 (E.D. Mo. Jan. 7, 2011). Here, as the further "dissipation of the money illegally taken" from Plaintiff would constitute irreparable harm to Plaintiff's ability to recover for its equitable claims, there is good cause to grant Plaintiff's motion for leave to conduct expedited discovery. *Astrove v. Doe*, No. 22-cv-80614, 2022 WL 2805345, at *4 (S.D. Fla. Jun. 17, 2022). Thus, the Court will grant in part and deny in part the motion, permitting Plaintiff to file its revised requests for production as set forth in (Doc. No. 47).
>
> Plaintiff also requests leave to file its reply to APM's and Appelbaum's opposition to its motion for expedited discovery under seal. … There is a common-law right of access to judicial records of a civil proceeding. *See IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013). However, the district court has "supervisory control" over the records in a case before it, and the decision to permit a filing under seal is "best left to the sound discretion of" that court. … The party seeking to file a pleading or document under seal may therefore overcome the presumption in favor of public access to judicial records if that party provides "compelling reasons" for doing so… . As Plaintiff seeks to protect confidential banking information in its memorandum of support for its motion for entry of a temporary restraining order, the Court finds good cause for Plaintiff to file the memorandum under seal.

Fidelity is represented by Jacqueline Katrina Graves and John B. Greenberg of Lewis Rice LLC, St. Louis, and John A. Wait, Fox Rothschild LLP, New York.

Escrow Matters

Close My Account Letter Necessary to Prove HELOC Mortgage Must Be Released

Todaro v. Wells Fargo Bank, N.A. (In re Todaro), ___ B.R. ___, 2023 WL 115011 (Bkcy.W.D.Pa. 2023) (permanent citation not yet available).

A Pennsylvania bankruptcy court has ruled that a home equity lender was not required to release its mortgage on payoff of the loan balance, because the competing lender had not delivered evidence that a close-my-account letter signed by the borrower was delivered at the time the payoff was made. The court rejected the argument that the borrower's payment of a $350 prepayment penalty indicated an agreement to close the line of credit.

In 2009, Wells Fargo Bank lent money to Nicki M. Todaro,

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which was used to pay off a prior home equity loan held by PNC Bank. The PNC payoff statement showed a "payoff amount" of about $50,000 and a "prepayment penalty" of $350.

Economy Settlement Services served as the settlement agent. Wells Fargo wired the payoff money to NCB. Perhaps because the loan closed 13 years ago, Wells has been unable to locate a close-my-account letter signed by Todaro and delivered to PNC Bank, although Economy Settlement Services appears to still be in business.

PNC Bank accepted the money and did not close the account or satisfy its mortgage. Todaro again drew the full amount of the PNC line of credit. When she filed a bankruptcy petition in 2019, she owed just over $55,000 to Wells Fargo and just under $55,000 to PNC Bank.

Wells Fargo asked the court to declare the PNC Bank mortgage satisfied or subordinate to the Wells Fargo lien. The court refused, and instead granted summary judgment to PNC Bank.

The decision is lengthy and well-researched. The court analyzed the law of both Pennsylvania and Ohio, because the property is located in Pennsylvania, but PNC argued that its line of credit agreement said that Ohio law would control. The court held that the law in both states was the same, in holding that a line of credit lender is required to satisfy its lien only if it receives payment in full and a close-my-account letter signed by the borrower.

PNC may have wanted the court to apply Ohio law, because of the considerable case law in that state holding that the close-my-account letter is essential for a demand to satisfy a HELOC mortgage. The court cited those cases:

> In other words, these courts have found in favor of the open-end mortgage holder in circumstances very similar to what occurred in the present case. *See*, e.g., *Household Realty Corp. v. Hoolin*, No. 70411, 1996 WL 476470, at *2 (Ohio Ct. App. Aug. 22, 1996) (phone discussion during which possible termination of open-end account was discussed was not sufficient to terminate the account where borrowers did not request termination in writing and there was no evidence that lender promised to close account without a written request as required by Section 1321.58(F)); *Chase Manhattan Bank v. Parker*, No. CA2003-11-299, 2005 WL 880235, at *2 (Ohio Ct. App. Apr. 18, 2005) (letters from escrow agent with payoff check to holders of open-end mortgages did not constitute the written notice required by *Section 1321.58(F)* to terminate the accounts because it did not explicitly request the termination of the accounts and therefore open-end mortgages were never released and maintained their priority over a subsequent mortgage); *Bank of New York v. Fifth Third Bank of Cent. Ohio*, No. 01 CAE 03005, 2002 WL 121925, at *4 (Ohio Ct. App. Jan. 30, 2002) (open-end mortgage on home equity line of credit account retained priority over subsequent mortgage where borrowers never made a written request to terminate the account, and where there was no evidence that escrow agent which had sent a "termination letter" to the open-end mortgage holder was acting as the agent of the borrowers); *JP Morgan Chase Bank, N.A. v. Carbone*, No. 07 MA 147, 2008 WL 927777, at *4 (Ohio Ct. App. Mar. 17, 2008) (prior open-end mortgage retained priority over a subsequent mortgage even though the balance of the loan had been paid down to zero where there was no evidence that written notice of termination had been given as required by *Section 1321.58(F)*, and where terms of the loan agreement gave the borrower a ten year draw period that had not yet expired).

The most innovative argument made by Wells Fargo was that payment of the $350 prepayment penalty was a clear indication that the borrower and PNC had agreed that the HELOC would be closed. The PNC loan agreement said that the bank would charge an "early termination fee of 1% of the [Debtor's] Credit Line limit or $350.00, whichever is less, if [Debtor] closes [her] Line within the first 36 months." Wells Fargo said that the inclusion of the $350 fee in the payoff letter "must mean that NCB had received a request from the Debtor that the Line of Credit be terminated within the first 36 months of the PNC Agreement." Thus, it argued, the payoff letter itself established that NCB had received a request from the borrower to close the line of credit.

The court rejected the argument, although it had to dispense with common sense to get to its conclusion:

> While agreeing with Wells Fargo as to the likely origin of the $350 prepayment penalty figure contained in the Payoff Letter, the Court disagrees with the rest of Wells Fargo's conclusion. In that regard, it should first be reiterated that no direct evidence about the request to NCB that prompted the issuance of the Payoff Letter has been provided by the Parties. The relevant Stipulation by the Parties merely provides that NCB issued the Payoff Letter "[i]n response to a request made by or on behalf of the Debtor." … It has thus not been shown who made the request to NCB, when it was made, whether it was made orally or in writing or both, and what exactly was said or written by the person who made the request. The Payoff Letter itself provides some indirect evidence as to the nature of the request to which it was responding, but the Court does not believe it can be determined from the language of the Payoff Letter whether the request asked for a payoff amount and explicitly directed that the Line of Credit was also to be terminated early, or whether it just asked for a payoff amount without saying anything about an early termination. There is also no indication in the Payoff Letter that PNC was informed that the Debtor was seeking a refinancing loan through Wells Fargo. … The $350 prepayment penalty's … inclusion in the Payoff Letter could reasonably be viewed as NCB merely providing the additional, incidental information that if Debtor wanted

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to terminate the Line of Credit in connection with any 'payoff' she might make that the prepayment penalty would be required because the PNC Agreement was still within its first 36 months.

This decision is yet another illustration of the fact that, when a lender refinances and pays off a HELOC, the close-my-account letter and proof that it was delivered to the paid-off lender, are extremely important documents that must be preserved in the loan file. In this case, Todaro did not even file a bankruptcy petition until 10 years after the loan had been made. Most settlement agents purge their files before a decade has passed. It is rarely possible to reconstruct the closing events after several years, especially when the HELOC lender makes no effort to preserve the close-my-account letters that it receives.

Escrow Matters

Party Flunks ID Verification Agreement by Accepting Fake Passport

Zaftr Inc. v. Lawrence, ___ F.Supp.3d ___, 2023 WL 349256 (E.D.Pa. 2023) (permanent citation not yet available).

A broker or intermediary in a Bitcoin purchase contract breached an identification verification agreement by accepting a fake passport as the evidence that the person was who he said he was. Also, the escrowee in the transaction was not entitled to be indemnified against his own blunders, rendering the indemnification provision void.

Zaftr Inc. is a Canadian company that buys and sells digital currency, primarily Bitcoin, in highly-leveraged purchases. Its profit is essentially from the arbitrage of the currency. Zaftr's CEO is Nathan Montgomery.

In 2020, Montgomery was introduced to Kevin Jameson Lawrence, a then-attorney and managing member of BVFR & Associates LLC, and also to John Kirk, an attorney and founding shareholder of Kirk Law PLLC. Both Lawrence and Kirk were based in Pennsylvania.

Lawrence told Montgomery that he had previously worked with a James Smith in the sale of Bitcoin, and that Smith had relationships with Bitcoin "miners" that put Smith's company Bulk Bitcoin Trader, Ltd. in a position to sell Bitcoin. Montgomery came away from the phone call with the impression that Lawrence was an attorney and also a doctor, a former federal prosecutor and an alumnus of the Clinton administration.

Montgomery's company Zaftr signed three contracts for the purchase of Bitcoin from the fictional James Smith. It delivered $5.6 million into escrow with attorney Kirk. Zaftr received not a single Bitcoin in return.

Montgomery later learned that James Smith is not a real person. Also, Lawrence is not a medical doctor, was never a federal prosecutor or in the Clinton administration, and his law license has been administratively suspended.

Zaftr sued Lawrence and Kirk, claiming that they improperly distributed all of Zaftr's escrowed money, and that they kept almost $1 million of that money. Zaftr brought claims for breach of contract, unjust enrichment, conversion, fraudulent and negligent misrepresentation and civil conspiracy. Kirk raised a crossclaim for indemnification and contribution against Lawrence. Zaftr seeks to be paid more than $32 million, which includes the money it expected to earn on the arbitrage of the Bitcoins. This decision was issued on competing motions for summary judgment.

Zaftr made a number of claims against Kirk, the escrowee, based on his delivery of the money before any Bitcoin had been delivered to Zaftr. The court held that Kirk was not entitled to have the claims against him dismissed based on the indemnification provision in his escrow instructions. It noted Pennsylvania decisions holding that indemnity agreements "are to be narrowly interpreted in light of the parties' intentions as evidenced by the entire contract." The court said that the indemnity foiled the claims by which Zaftr sought to hold Kirk liable for Lawrence's actions. However, the indemnity did not protect Kirk from his own alleged breaches of the escrow agreements, or Kirk's own alleged tortious acts. Thus, the indemnification did not shield Kirk from Zaftr's claims for conversion, fraudulent and negligent misrepresentation and civil conspiracy.

The other aspect of this case of most interest to title and escrow companies is its discussion of the effort made by Zaftr to confirm that James Smith existed and was the same person with whom Lawrence claimed to have had prior digital currency transactions.

Montgomery did some due diligence on James Smith and his company, Bulk Bitcoin Trader Ltd. A corporate records search done in the United Kingdom showed that a James Smith was the sole owner and director of BBT, and that the company was registered in the U.K. and in good standing at the time. Kirk sent a scan of Smith's passport to Montgomery by email, after Lawrence sent it to Kirk. Montgomery did not subscribe to a service that could validate a U.K. passport. Montgomery ran a report on Smith through Trulioo, a service for watchlist screening and ID verification. The Trulioo report showed no red flags for Smith, but did not validate the passport either.

Montgomery made Lawrence's company sign an agreement attesting to Smith's identity. That contract was called an ID Verification Agreement. In that agreement, Lawrence represented that he had had prior dealings with Smith and swore that the person that he had spoken with in past video conferences was the same person described and pictured in the passport.

The court held that Kirk was not bound by the ID Verification Agreement, because he did not sign it. The court said that the analysis of that agreement "is more involved" as to Lawrence and his company. Zaftr and Montgomery said that Lawrence breached the agreement by delivering a fraudulent passport and by failing to verify the identity of the purported seller, James Smith. The court rejected Lawrence's argument that he did not guarantee the validity

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of the passport and was not required to do anything more than confirm that the person on the passport "appeared to be the person with whom" Lawrence had had prior business dealings.

The court considered two reports produced by Montgomery, both of which indicated that the passport was not genuine. One report was produced by Jumio, which describes itself as delivering a real-time government ID verification conducted with the use of artificial intelligence. See https://www.jumio.com/products/id-verification/. The Jumio report, as run by Montgomery, declared that "the passport is indisputably fraudulent although [it] provides little in support of this assessment," the court said. The report displayed the image of Smith's purported passport and stated that the identification was "DENIED" due to "FRAUD" based on "some extraneous transaction details," as the court described it.

Montgomery also produced a report produced by Veritas Investigations Ltd., which the court said "arrives at the same result but provides greater support for its conclusion." The court said:

> [The Veritas investigator] reported that the image in the passport appears to be of another person (likely a third party not connected with this litigation named Jose Carlos Riveira) and the passport number belongs to another named person, making the passport counterfeit. The Veritas Report also concludes that there was no U.K. birth record for James Smith under the purported birth date on the passport. It thus determines that: "It would therefore seem impossible that BVFR could have had face to face contact with the male pictured, believing him to be James Smith, especially given that the male pictured speaks very little English. It is not believable that the real man in the images, Jose Carlos Riveira, has presented himself to BVFR as James SMITH."

See https://www.veritasinvestigations.co.uk/ for a description of Veritas' services and procedures.

Lawrence complained that the Veritas private investigator should have been offered as an expert witness. The court said that Lawrence had not made "reasoned argument" as to why the report's conclusions should not be considered. The court rejected Lawrence's claim that he had no duty to verify Smith's identity or to validity the passport. The court said that the two reports "ineluctably lead to the conclusion that summary judgment should be granted" on the claim that Lawrence breached the ID Verification Agreement. It said:

> Specifically, given the statements in the record that the passport was fake, [Lawrence] cannot have examined a "current original government issued identification document."

This decision is very interesting, for its discussion of the very difficult issue of how to verify that a person exists, is the same person who purports to appear in a personal or video meeting, is the same person who is identified on corporate filings, and that the person is actually engaged in a business (especially a business that is conducted virtually and with no tangible physical presence). Fortunately, such verification is still beyond the scope of the duties undertaken by an escrow officer who works in the real estate escrow industry.

Title Insurance

Insurer Had No Duty to Defend Insured in Fight About Ownership of Aerial Conveyor Bridge

Pandora Distribution, LLC v. Ottawa OH, LLC, 2023 WL 335282 (6th Cir. (Ohio)) (unpublished).

A title insurer had no duty to defend the insured in a fight over ownership of a conveyor bridge linking two buildings and running over adjoining railroad tracks, because the policy contained two exceptions about the conveyor.

Longtime readers might remember this unusual dispute, which was reported in the September 2019 and January 2020 issues. Philips Electronics North America Corporation formerly owned two warehouses lying on either side of main line railroad tracks. In 1970, the railroad granted Philips an easement allowing it to build a conveyor bridge over its tracks to transport material from one warehouse to the other. In 1986, Philips and the successor railroad signed a license agreement allowing Philips to build a second conveyor bridge over the tracks. The license agreement said that, if the license terminated, Philips was required to remove the conveyor bridges.

In 2005, Philips sold both warehouses to DBI Partners LLC. In 2006, DBI sold one building to Pandora Distribution LLC. DBI and Pandora signed an "encroachment agreement" saying that the two conveyors would remain the property of DBI, and that Pandora could demand that DBI repair or remove them.

Later, DBI sold the other warehouse to Ottawa OH LLC. Shortly after that sale, Pandora demanded that Ottawa repair the conveyors. Ottawa refused, arguing that it had not bought the conveyor bridges and was not liable under the Encroachment Agreement because it had not signed the agreement.

Pandora sued Ottawa, DBI and Philips. Ottawa made its title insurer, First American, a party to the suit, making claims based on the policy and the closing escrow. The district court held that DBI conveyed the bridges to Pandora despite what the Encroachment Agreement said, and that Ottawa did *not* own the conveyors because Pandora had already sold them to Pandora. The court dismissed all claims by Ottawa against First American.

The case was appealed to

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the Sixth Circuit. The appeals court spent most of the decision addressing the district court's rulings about ownership of the bridges. It held that the bridges are not real property and Pandora does not own them. Instead, it said, the bridges are personal property and Ottawa owns them.

However, the Sixth Circuit affirmed the district court's grant of summary judgment to First American on all of Ottawa's claims. The appeals court affirmed the district court's ruling on breach of contract that "Ottawa offers no evidence there is anything wrong with its title," or that the existence of the bridges is "a matter covered by the title insurance policy." *Pandora*, 2019 WL 2924995, at *8.

On Ottawa's closing negligence and fiduciary-duty claims, the district court had found that "Ottawa fails to establish First American breached any duty it may have had to Ottawa, or that Ottawa suffered any damage as a result of any hypothetical breach." Ottawa also argued that First American had a duty to defend Ottawa in this litigation. The district court said that the insurer had no such duty, because the policy excepted the License Agreement and the encroachment of the conveyors onto the insured parcel. The appeals court affirmed both rulings.

Finally, Ottawa had claimed that First American committed fraud by concealing something about the conveyor bridges. The court characterized Ottawa's fraud theory as "an elaborate story." The Sixth Circuit said that, "[o]n appeal, Ottawa continues to press its fraud theory." However, the court said there was no fraud:

> Certain indisputable facts resolve this claim. One, prior to its purchase of the warehouse, Ottawa had actual notice of the physical existence of the bridges, which connected the east wall of that warehouse to the west wall of the Pandora Property's warehouse across the Railroad tracks and property. Two, Ottawa had a copy of the 1986 License, which stated the building owner's commitment concerning lease, repair, and removal of the second bridge, and depicted both bridges on its attached plat. And three, the First American policy excluded coverage for claims arising from or based on the bridges.
>
> Ottawa chose to purchase the property despite its knowledge of the bridges and First American's express exclusion of those bridges from its title insurance policy. First American owed no duty to Ottawa regarding the bridges, so Ottawa cannot establish that First American breached any duty, committed any negligence, or improperly denied coverage. The district court correctly granted summary judgment to First American on Ottawa's claims. We affirm.

This case remains one of the few that have combined an analysis of property's characteristics as real or personal with a discussion of policy coverage. The Sixth Circuit rendition is quite orthodox, in finding that Schedule B exceptions negate a duty to defend an action contesting ownership of property that is excepted from coverage.

First American was well represented by David Sporar and Christopher F. Swing of Brouse McDowell, Cleveland and Akron.

Title Insurance

Title Insurer Has No Duty to Procure Property Insurance

Yao v. State Farm Fire & Cas. Co., ___ F.Supp.3d ___, 2022 WL 17652712 (E.D.Pa. 2022) (permanent citation not yet available).

A Pennsylvania court has dismissed claims by property owners against their title insurer alleging that, by informing the insureds they were "cleared to close" on the purchase of the property, the insurer was assuring them that property liability insurance coverage had been bound.

Hong Yao and Yan Qin bought two adjoining buildings in Philadelphia in 2017. They asked State Farm to insure both properties, and the State Farm agent assured them that both would be insured. First American Title told Yao and Qin that they were "cleared to close" on the purchase. In 2018, a person was injured at one of the buildings. In the lawsuit that ensued, Yao and Qin learned that their State Farm policy insured only the other building. State Farm refused to defend or indemnify, and Yao and Qin incurred expenses and defense costs.

Yao and Qin then sued State Farm and First American Title. Their claim against First American was for negligence. First American moved to dismiss, on three bases. It argued that, as a title insurer, the company's only duty was to insure the title, not to make sure that any other insurance was in place. It also argued that the negligence claim was barred by the economic loss doctrine, and by the statute of limitations. The insureds' only argument was that, by closing the loan, First American had assumed a duty to make sure that the borrowers had satisfied their lender's requirement to have casualty insurance in force for the collateral parcels.

The court granted the motion to dismiss, reaching only First American's first argument. The court said:

> First American is a title insurer, not a liability insurer. … Plaintiffs argue, without supporting case law, that "First American failed to take reasonable steps to ensure" that the terms of the mortgage requiring liability insurance were satisfied. … However, Plaintiffs do not explain why First American would have had a duty to do so. …
>
> Based on the Complaint, it appears clear that First American's only role in providing insurance during the sale of the properties was to provide title insurance. … Plaintiffs fail to point to any case law or legal authority that would impose an obligation on a title insurance provider either to confirm the existence of liability insurance or to confirm that the terms of the mortgage were satisfied. Pl.'s F.A. Resp. at 3-4. To the contrary, "[t]he sole object of title insurance is to cover possibilities of loss

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through defects that may cloud or invalidate titles," that is, the existence of prior claims of ownership, liens, or collateral on the property in question. *Rood v. Commonwealth Land Title Ins. Co.*, 936 A.2d 488, 492 (Pa. Super. Ct. 2007). Like in *Rood*, the title insurance policy here only covers defects on the title of the properties and makes no reference to liability insurance or terms of a mortgage. There was no duty owed by First American to ensure that the property was insured, nor does the insurance policy itself provide any liability coverage for the physical property.

Because First American had no duty to confirm that the properties were insured for physical liability, and because the existing insurance policy does not provide such coverage, the negligence claim against First American will be dismissed with prejudice.

Title Insurance

Title Insurer Gets Judgment Against Buyer Who Did Not Pay Off Lender After Purchase Rescinded

WFG Nat'l Title Ins. Co. v. Kim, 2023 WL 165497 (Cal.App. 2 Dist.) (unpublished).

RNA Financial LLC was a house flipping company owned by sisters Laurie and Jamie Kim. RNA bought a house in Pasadena through a trustee's sale, using a $340,000 loan made by Maggie Investments, secured by a deed of trust on the property.

A short time afterward, the trustee rescinded the sale and refunded the $488,500 purchase money to RNA. Rather than pay off the loan, the Kim sisters made interest-only payments to Maggie for six years. Only when the payments stopped did Maggie learn that the sale had been rescinded years before.

Maggie "attempted to initiate foreclosure proceedings based on the deed of trust it believed secured the loan, but the trustee advised Maggie the sale to RNA had been rescinded," the court said. The decision does not say exactly what happened to the Maggie deed of trust. However, Maggie made a claim against its title insurer, WFG National Title. WFG settled with Maggie and took an assignment of its rights and claims against the Kim sisters.

WFG sued RNA and the Kims for breach of contract and fraud. The Kims had not personally guaranteed the loan. However, WFG alleged that they were both personally liable for the debt as alter egos of RNA.

RNA did not respond to the complaint and the trial court entered a default against the entity. The Kims did answer the complaint, and there was a trial to the court as to them. The judge found both of the Kims were alter egos of RNA and thus were liable on the note. It entered judgment in the amount of $556,853.20, being the loan principal and $216,853 in interest accrued since November 2015, when RNA stopped making payments.

The Kims appealed from the alter ego judgment. In California, two conditions must be met before the alter ego doctrine will be invoked. There must be such a unity of interest between the company and its owner such that the "separate personalities" of the company and its owner "do not in reality exist." Also, there must be an inequitable result if the owner is not held responsible for the acts of the company.

The appeals court agreed with the Kims that the trial court could have done a better job of labeling the acts indicating that there was a unity of interest or an inequitable result. However, it held that there was more than adequate evidence to conclude that RNA was a mere alter ego for Laurie Kim. RNA never had any employees or offices. It had limited assets and followed few corporate formalities. Bank records showing that Laurie controlled the one bank account in RNA's name, and that she wrote checks from that account for her personal expenses. Laurie used her own money to finance RNA, and used RNA's money to buy things for herself. Laurie never told Maggie about the recission, and used the refunded loan principal to pay personal bills. The court said:

> Even if Laurie did not have a duty to notify Maggie of the recission (and even if WFG had to show Laurie engaged in bad faith), there was substantial evidence Laurie deliberately kept RNA without adequate capital to pay off the principal due on the loan. That was sufficient, for purposes of the alter ego doctrine, to show bad faith and an inequitable result. … Here, the parties stipulated RNA had $488,500 in cash after ETS rescinded the sale of the Pasadena property in January 2010. When RNA received the refund, Laurie knew RNA owed Maggie $340,000 in principal on the loan, which RNA would have to pay in approximately two years. Yet Laurie did not direct RNA to repay Maggie or keep some of the proceeds from the refund with RNA to cover the outstanding debt. The record does not reflect where the $488,500 went, but it is clear it did not stay with RNA. By April 2012 RNA had only $44,000 in its bank account, and Laurie presented no evidence RNA held any assets other than the $44,000 after April 2012. … A reasonable inference from this evidence was that, in order to avoid paying a known, outstanding debt, Laurie deliberately chose to remove cash that RNA could have used to pay the debt.

The appeals court modified the judgment, holding that Jamie Kim was not liable. There was little evidence that Jamie participated in RNA's business activities. Over several years, she received only one payment from RNA, through a check written by her sister.

Finally, the court addressed the Kims' argument that WFG was not entitled to enforce the note as subrogee of Maggie. The court gave an extended

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discussion of California law on insurer subrogation rights. It began by noting that subrogation "provides a method of compelling the ultimate payment by one who in justice and good conscience ought to make it—of putting the charge where it justly belongs." Western Heritage Ins. Co. v. Frances Todd, Inc. (2019) 33 Cal.App.5th 976, 983.

Subrogation by an insurer "is qualified by a number of equitable principles," however. Indeed, the insurer must establish eight elements, including that the insured's loss was caused by the subrogation target, that the insurer was not primarily liable for the loss, and that justice requires that the loss be shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer. Pulte Home Corp. v. CBR Electric, Inc. (2020) 50 Cal.App.5th 216, 229.

The court said the Kims had waived the subrogation argument by raising it for the first time on appeal. However, it addressed their arguments anyway. The Kims asserted that Maggie's loss was caused by the trustee who rescinded the sale, not by the Kims, because the Kims did not ask to rescind the sale. The court rejected that claim, because Maggie's loss occurred when the Kims elected not to use the rescission money to pay off the loan.

The court also rejected the Kims' second argument, that WFG "had a continuing duty to review the public records of the Pasadena property and the deed of trust that secured the loan." This argument was based on the slender premise that the rescission notice had been recorded, and WFG could have discovered it and somehow caused the Kims to pay Maggie when the sale was rescinded. The court could have rejected this premise as false, based on the law and the policy's terms. Instead, it danced around the question, saying:

Dawn Weller, WFG's claims officer, testified WFG would have received a copy of the notice of recission in its "document bank," which WFG could have searched. The Kims argue WFG was negligent because it failed to search the document bank after WFG received a copy of the notice of recission. Weller also testified, however, that its document bank is no more than "a mirror of the county's records" and that WFG does not search for the title records of a property "after a policy has been issued" unless the insured submits a request "for additional coverage" or tenders a claim. …

The trial court never determined whether, or to what extent, WFG was negligent, nor did the court exercise its discretion in weighing the parties' comparative levels of fault to determine which party held a superior equitable position. Therefore, there is nothing for us to review. … Moreover, because RNA did not argue in the trial court its equitable position was superior to WFG's position, RNA deprived WFG of the opportunity and incentive to present all evidence relevant to its level of fault. The record also does not reflect whether RNA held proceeds from the refund long enough after the recission such that, even if WFG was negligent in failing to discover the recission, Maggie could have recovered anything from RNA had WFG discovered the recission within a reasonable time and notified Maggie. Therefore, we decline to exercise our discretion to consider the Kims' argument for the first time on appeal.

In any event, the court reached the correct conclusion:

True, WFG may have been a little careless in failing to adequately research who held title to the property and failing to discover the recission. But for Maggie to suffer any loss as a result of WFG's negligence, RNA first had to breach the note by failing to pay back the principal. WFG was not primarily liable for the loss.

This is a good decision, although the appeals court's vacillation on the post-policy-search-duty claim is slightly unsettling.

Agent Focus

Nebraska Holds Abstracting is a Pro Service, Two Year Limitations Applies

Mai v. German, 313 Neb. 187, 983 N.W.2d 114 (Neb. 2023).

In an appeal in which the state land title association filed a brief, the Nebraska Supreme Court has held that title searches were performed as an abstracting service, and that abstracting is a professional service for which the two-year statute of limitations applies.

Janice German and her company, Dawes County Abstract & Title Inc., conducted five title searches for John Mai and his company, MM NE LLC, between 1999 and 2012. In that series of transactions, Mai bought contiguous parcels in Dawes County, Neb. German also issued title insurance commitments and policies to Mai for each parcel.

German did not locate any grants of public roads adjoining the Mai parcels in her searches. Mai thus believed that the parcels did not have a right of access onto an adjoining public road. Mai spent over $100,000 to obtain private easements and to build an access driveway.

In 2016, Mai and two of his neighbors got in a dispute about whether the driveway was a public county road or a private driveway. The neighbors wanted to use the driveway for access to their parcels. They applied for permits from Dawes County.

The county did an investigation of the issue, which included getting a search from German. In the course of her work for the county, German discovered a road petition filed in 1887 that purported to establish a public road crossing Mai's parcels. The county declared that the road was an open public road, and granted the driveway

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permits to the neighbors. In late January or early February of 2016, German gave Mai a copy of the 1887 road petition.

In October 2016, Mai sued the county and the neighbors for quiet title, disputing the driveway permits granted to the neighbors. Mai took German's deposition in that case on Nov. 20, 2017. She testified about the 1887 road petition. The district court held that the county's claim of a public road was valid. The Nebraska Court of Appeals affirmed, in August 2022.

Mai sued German and Dawes County Abstract on Aug. 30, 2019 for abstracter negligence. German moved for summary judgment, asserting that Mai's complaint was barred by the two-year statute of limitations for claims of professional negligence under Nebraska Revised Statutes Section 25-222. The district court granted German's motion and dismissed the action. Mai appealed.

Mai had two arguments on appeal—that German was acting as a title agent, not as an abstracter; and that abstracters are not professionals and that German was not rendering "professional services" falling under the limitations periods in § 25-222. The Nebraska Supreme Court sided with German on both issues.

The appellate court noted that, although Mai now claimed that German provided various services for him, her essential service and the one on which Mai's claims rested was as a title abstracter. Mai's complaint asserted that German "fail[ed] to perform her duties as a registered abstract[e]r in examining records and disclosing the existence" of the public road grant. His claim was also grounded in claimed negligence.

The court rejected Mai's claim that German performed the title searches "merely as a title agent." The justices replied that the Nebraska high court has long recognized that "the roles of an abstracter and title agent can overlap." It quoted its own statement in *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 303, 354 N.W.2d 154, 158 (1984) that:

> [A] title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering the title report the title insurance company serves as an abstracter of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. When a title insurance company fails to perform its duty to abstract title accurately, the title insurance company may be liable in tort for all damages proximately caused by such breach of duty.

The court also observed that this overlap in duties is reflected in Nebraska's unusual statutory scheme, which includes both the Title Insurers Act, Neb. Rev. Stat. §§ 44-1978 to 44-19,105 (Reissue 2021) and the Abstracters Act, Neb. Rev. Stat. §§ 76-535 to 76-558 (Reissue 2018).

The court said that, even reading Mai's allegations and the summary judgment evidence in a light most favorable to Mai, the services at issue were those of an abstracter. Accordingly, German's services fell under the Abstracters Act. German had testified that she conducted the same kinds of searches and examinations as an abstracter or title agent, although there were differences in the "end products or reports" she issued. The court also noted that Mai's expert witness, Roy Hahn, opined that, in Nebraska, "a title agent searching for a title commitment has the same duty and responsibility as does an abstracter."

The high court then turned to the second question, whether a registered abstracter provides "professional services" within the ambit of § 25-222. The court said that abstracting of title is a professional service, so the two-year statute of limitations applies to that work.

Section 25-222 pertains to an action "based on alleged professional negligence" or "failure to render professional services." The limitations period is two years, which is extended for one year from the date of discovery if the negligence "could not be reasonably discovered within such two-year period."

The Nebraska high court had previously noted that the legislature did not provide a statutory definition of the term "professional," or list the occupations associated with professional services. *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 926 N.W.2d 107 (2019).

Thus, in *Wehrer*, the court said that a court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services on which the lawsuit is based.

The court noted that, in *Cooper v. Paap*, 10 Neb. App. 243, 634 N.W.2d 266 (2001), the Court of Appeals concluded that abstracters are members of a profession and applied § 25-222 to registered abstracters. That conclusion rested on the finding that abstracters "provide a service to the public upon which the public relies, and those duties require specialized knowledge and a license to provide such services." The Court of Appeals also noted decisions from Indiana, Arkansas and Hawaii that concluded that abstracters are professionals or subject to the professional standard.

Mai argued that *Cooper* no longer applied because the high court had elevated the test for a professional occupation in *Wehrer*, decided after *Cooper*. *Wehrer* did compile other Nebraska decisions to declare that an occupation is not a "profession" unless eleven elements are present. The court said that the Abstracters Act and the evidence in this case "demonstrate that abstracters of title satisfy" the *Wehrer* factors. The court gave a very detailed analysis of the Abstracters Act, proving that it satisfied elements such as setting minimum competency standards, mandatory continuing education, and by imposing a standard of care on the abstracter's conduct. The high court also noted its own prior statement in *Heyd* that:

> "The duty imposed upon an abstractor of title is a rigorous one: 'An abstractor of title is hired because of his *professional* skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that *professional* skill ... the abstractor must report all matters which could affect his client's interests and which are

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> readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made.' ..."

The court noted that the only *Wehrer* qualification not required of abstracters is a college degree. The court said a college degree "can indicate preparation and training for a profession, but is not required for an occupation to be a profession." Thus, the court affirmed *Cooper* and held that abstracters of title performing title searches perform professional services within the meaning of § 25-222.

Finally, the court held that the one-year extension of the limitations period in Section 25-222 did not help Mai. He discovered the alleged negligence no later than German's deposition date, but did not file suit until almost two years later.

Amy L. Patras of Crites Shaffer Connealy Watson Patras & Watson represented German and Dawes County Abstract. Michael D. Matejka and Erin Ebeler Rolf of Woods Aitken LLP represented *amicus curiae* Nebraska Land Title Association.

Agent Focus

Buyer Has No Claim Against Title Agent for Missing Parcels

Diehl v. Hulls, ___ *N.E.3d* ___, 2022 WL 18140105, 2022-Ohio-4822 (Ohio App. 7 Dist. 2022) (permanent citation not yet available).

When an installment sale contract included 16 parcels but the deed in fulfillment included only the ten parcels owned by the seller, the buyer had no claims against the title agent for the mishap, due primarily to the doctrine of merger of title.

In 2011, James J. Diehl contracted to buy 383 acres of land in Noble County, Ohio for $640,000 under a land installment contract. The sellers were Herbert and Suzanne Hulls. The installment contract was recorded.

Diehl fulfilled the contract in 2012. Mid-Ohio Title Agency was hired to issue a title insurance policy to Diehl. Zeller & Barclay Attorneys at Law, Inc. was engaged to prepare the deed from the Hulls to Diehl.

The court said that it might be that the Hulls did not own six of the 16 parcels listed in the contract. The July 25, 2012, general warranty deed as drafted included the parcels that the Hulls did own.

Diehl did not review his deed when he received it. Diehl received a policy from Mid-Ohio, as agent of Old Republic National Title. The policy insured the same parcels included in the deed from the Hulls.

At "some point," Diehl realized that the parcels listed in the installment contract were not the same ones recited in his deed. On September 22, 2020, Diehl sued the Hulls, Zeller & Barclay and Mid-Ohio for breach of contract. He asked for rescission of the purchase contract or $25,000 as the value of the "lost" land.

All of the defendants moved for summary judgment, and the trial court granted those motions. Diehl appealed.

Based on the limited record, the appeals court said that it could not determine "why, or even whether, six parcels were omitted from the general warranty deed." It noted that someone had used whiteout "to remove several lines previously contained within the deed." Also, the Hulls argued that "the property lines have shifted over the years." Further, there were more tax parcels than legal parcels, because the county treasurer does not merge tax parcels when legal parcels are combined in a deed. Thus, although Diehl said that he had not been deeded all of the land he had contracted to buy, the appeals court said that rather important fact had not been clearly established.

The appeals court affirmed the trial court dismissals based primarily on the doctrine of merger of deed, more commonly known as merger of title. Ohio follows the same rule as adopted in all or most other states, that "when a deed is delivered and accepted without qualification pursuant to an agreement, no cause of action upon the prior agreement exists thereafter." The terms of the purchase contract merge into the deed. The appeals court cited *Miller v. Cloud*, 2016-Ohio-5390, 76 N.E.3d 297 (7th Dist.); *Bell v. Turner*, 172 Ohio App.3d 238, 2007-Ohio-3054, 874 N.E.2d 820 (4th Dist.); *Robinwood Assoc. v. Health Industries*, Inc., 47 Ohio App.3d 156, 157-158, 547 N.E.2d 1019 (10th Dist.1988); and *Fuller v. Drenberg*, 3 Ohio St.2d 109, 209 N.E.2d 417 (1965). Ohio says that the doctrine of merger by deed stems from the principle of *caveat emptor*, and bars claims against a seller when the issue could have been discovered by an inspection of the property. The appeals court held that the trial court had properly employed the doctrine to extinguish Diehl's claim for breach of contract against the sellers and Mid-Ohio, saying:

> In the matter before us, it is very clear that the deed does not appear to comport with the purchase agreement, and appears to have been altered. However, it is unquestionable that Appellant could have, and should have, discovered that six parcels were allegedly omitted from his general warranty deed at the time Appellant received the deed. Appellant admittedly possessed the general warranty deed which appears to list only ten parcels. He concedes that he failed to read the entire document before putting it into storage in a filing cabinet.

The court did not even reach the claims by Mid-Ohio and the law firm that they had no contract with Diehl, and thus could not be liable to him for breach of contract.

The court also upheld the dismissal of Diehl's negligence claims, based on the applicable four-year statute of limitations under R.C. Section 2305.09. The court said that clock began running on the day the deed was recorded in 2012, making Diehl four years late in filing his action.

This is a useful decision because it is one of the few to interpret a claim based on a legal description error through the lens of the merger of title doctrine. Another useful ruling by this court was its common sense finding that a buyer has notice of a legal description problem when he takes delivery of the deed, whether or not he elects to read it.