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Title Insurance

Hawaii Court Says Policy Insures Vehicular Access

First American Title Ins. Co. v. GS Industries, LLC, 2021 WL 5985124 (Hawaii D.C.) (not yet released for publication).

A federal court in Hawaii has ruled that the standard policy right of access coverage was invoked because the insured parcel purportedly does not have a right of vehicular access, athough the property abuts a publicly-maintained road and access has never been interrupted. The court relied exclusively on the debunked 1975 *Marriott* decision from North Carolina.

In 2016, GS Industries received a deed for a parcel in Honolulu on which is situated a church and a 50-car parking lot. GS Industries got a policy from First American Title. It did not buy an access endorsement.

The parcel abuts Waipa Lane. Part of that street is publicly owned; the balance is privately owned but publicly maintained. No one, including the owners of the private segments of the road, has barred the use of the road. A 1956 city resolution designated the road as a one-way street. About 20 other parcels also have their sole means of access over that street.

GS Industries was not a stranger to the property when it received its 2016 deed. James Yamada, the principal of GS, is also the founder and pastor of Cedar Assembly of God Church, whose worship building is located on the property. For many years, Yamada and his congregation members have used Waipa Lane as access to the church property without incident.

Yamada formed GS Industries. He arranged for the church to sell the entire property to GS, and to lease the church building back to Cedar Assembly of God.

Yamada's vision was to " build a transitional housing complex with 44 affordable rental apartments" on the property. In 2019, Cedar Assembly of God applied to the Honolulu Department of Planning and Permitting for an exemption allowing the construction of those apartments. The department said the application was incomplete, and told Yamada that he must include in his resubmitted application proof that the church had a legal right to use the privately-owned segments of Waipa Lane. According to Yamada, that notice was the "first time" he had been informed of the issue.

Yamada sent a claim notice to First American, asserting that the city's response invoked the policy access coverage, and that the "lack of road access has prevented [GS] from obtaining permits needed to develop" the church property. The claim notice demanded that First American pay for the purchase of an ownership interest in the

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privately-owned Waipa Lane Parcels.

First American made further inquiry with the city. A city employee said the city considers all of Waipa Lane to be public. However, Yamada's lawyers questioned that pronouncement, and the employee "clarified" that the privately-owned parcels did not become "public roads" by dint of Honolulu's maintenance of the street.

First American denied Yamada's claim. Yamada asked First American to reconsider, stressing the expenses he had incurred in seeking permits to transform the church property. First American issued several further coverage letters, pointing out that the policy did not insure vehicular access or the ownership of the street parcels, among other issues.

First American filed a declaratory judgment suit in early 2021. Both sides moved for summary judgment. In this decision, the court granted GS's motion and denied First American's.

The court began by stating what it deemed to be the issue in the case, and its conclusion:

> The parties' primary coverage dispute concerns the term "access" in the Policy. In short, it is undisputed that the Policy insures against "No right of access to and from the Land[ ]" and that GS' vehicular access from the Property is compromised because it is dependent on the owners of the Private Waipa Lane Parcels. The parties, therefore, fight over whether the term "access" includes vehicular access. For the reasons discussed below, the Court finds that, because "access" is ambiguous in the Policy, the term must be construed against First American, as the insurer, to include vehicular access in the manner urged by GS.

The court based its ruling on the untenable premise that access has different meanings for parcels in different locations or "environments," saying:

> The Court finds that the plain, ordinary, and accepted meaning of access includes vehicular access. This is particularly so where, as here, the Property is a parcel in central Honolulu, surrounded by roadways, and dependent on vehicular traffic both before GS' acquisition and now. … Conversely, the Policy cannot be limited to insuring pedestrian access, as First American asserts, because insuring pedestrian access in Honolulu's urban sprawl would be virtually meaningless. In this environment, it is difficult to conceive of how property would not have pedestrian access and where insurance would therefore be of any value. If insuring "access" is to have any meaning in this context, in other words, it must be insuring access beyond that of the pedestrian variety.

The court refused to adopt the definition of "access" as stated in Black's Law Dictionary: "a right, opportunity, or ability to enter, approach, pass to and from, and communicate with," saying that definition "does nothing to resolve the debate."

The court also refused to consider the numerous decisions that First American had cited that have held that the term access is not ambiguous, and that the right of access coverage does not assure vehicular access, labeling those decisions "non-binding caselaw." GS's brief thumped *Marriott Fin. Servs. v. Capital Funds, Inc.*, 217 S.E.2d 551 (N.C. 1975). Although that decision is similarly non-binding, and has been universally rejected by later courts, the court adopted its rationale and said that *Marriott* is "as factually close to this one as any on which First American relies."

The court also rejected First American's argument that vehicular access is not impliedly contained in the standard access coverage because that further assurance is available in an endorsement, which would not be necessary under the court's policy interpretation. The court responded with this interesting *non sequitur*:

> First American further contends that "access" does not include vehicular access because the company offers "optional additional coverage" that specifically insures for the lack of "vehicular and pedestrian access," coverage which GS did not buy. … This argument, however, proves the point of the ambiguity in the Policy. Notably, immediately prior to making this argument, First American also asserted that "access" under the Policy includes pedestrian access. Id. That cannot be the case, though, if First American's assertion about its "optional additional coverage" is to be taken seriously. In other words, if the optional coverage

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> means that "access" cannot possibly include vehicular access, the same must be true for pedestrian access, given that the optional coverage insures both. At best, this argument simply begs the question of what "access" the Policy insures – air, water, underground, vehicular. Each (and others) are all possibilities. When that is the case, the Court has little problem finding the term ambiguous.

Next, the court addressed an issue that it characterized as loss. First American argued that GS has incurred no loss because access has not been denied or restricted. The court acknowledged that "GS does not dispute that it has never been restricted from using the Private Waipa Lane Parcels." GS nonetheless contended that "the Property's value is significantly diminished by its lack of legal access… ." The court said:

> The Court agrees with GS to the extent that, if the value of the Property has diminished due to restrictions on vehicular egress that were never disclosed, then GS would be able to show a loss insured by the Policy. … Put simply, if the value of the Property is diminished, then the Court fails to see why that would not be a loss insured by the Policy when First American itself points out that the Property is insured. … This is so even if the reason for the diminution in value is in some way related to the Private Waipa Lane Parcels being privately owned.

The last sentence of the above passage is telling. The court identifies three different purported issues about access—that the city has limited the street to one-way traffic, that some of the road parcel is owned by private parties, and that the city said it would approve a permit only if the church proved that it had a legal right to use the privately-owned segments of Waipa Lane. However, the court has not declared that any of those issues negate or limit the insured's right of access. Moreover, GS Industries has admitted that the city maintains the road, that Yamada and his congregants drive down that road, and that no one has even threatened the 20 owners who use the street that their access would be cut off.

Finally, the court dealt with First American's argument that any issue about the right of access was barred by the exclusion for governmental regulation of the use of the property. In *Marriott*, the court held that the policy insured vehicular access because the insured parcel was in a dense downtown location and its use as a restaurant and hotel depended on auto traffic. However, because the issue arose when a city permit was denied, the court said coverage was negated by Exclusion 1. First American argued that the same logic applied here, because Honolulu's preliminary denial of the permit triggered the claim. The court responded by claiming that the permit was not the issue after all, saying:

> The Notice, however, is not the basis for GS' alleged loss. Instead, as just discussed, the basis for GS' loss–the alleged diminution in value of the Property–is GS' lack of a right to vehicular access from the Property. Thus, while GS may or may not have learned of its lack of a right to vehicular access from the Notice, it is not the Notice that has caused the alleged diminution in value. In this light, neither governmental regulation nor police power, Exclusions 1(a)(i) and 1(b), is implicated here.

This decision is worth serious contemplation by all title insurers and ALTA.

Title Insurance

CPL Was an Offer That Lender Did Not Accept Because It Knew Agent Was Cancelled

First IC Bank v. North American Title Ins. Co., ___ F.3d ___, 2021 WL 5919779 (11th Cir. (Ga.) 2021) (permanent citation not yet available).

The Eleventh Circuit has affirmed a Georgia federal court ruling that a closing protection letter was not in effect when the lender's closing agent stole the loan money. However, the appeals court affirmed based on a different legal principle, that a CPL is an offer, not a contract, and that the closing agent's knowledge that it had been cancelled by the insurer was imputed to the lender, so that the lender knew it could not accept an offer that had been withdrawn.

In early 2019, Ying Duan contracted to buy a house in Johns Creek, Georgia from Israel and Jill Malowany. Duan got a purchase money loan from First IC Bank. Allen Chang of Dickason Law Group was chosen to close the purchase and loan and to issue title insurance policies. The Malowanys' loan held by JPMorgan Chase Bank and secured by the property was to be paid off at closing.

The Dickason firm was a North American Title agent when the law firm was engaged. On March 25, 2019, North American issued a closing protection letter to First IC Bank. On April 15, North American terminated Dickason as its agent. Dickason also was an agent for Investors Title. On April 18, Investors Title issued a closing protection letter to First IC Bank for this loan closing. The bank claims that Dickason did not inform it of the North American cancellation, or send it the replacement Investors Title closing protection letter.

On April 19, First IC Bank sent its closing instructions to Dickason and wired $826,724.58 for the purchase. Closing took place that day. The Closing Disclosure listed Investors Title as receiving premiums for the CPL and the title insurance policies to be issued.

The Malowany loan was not paid off. First IC Bank investigated and decided that the Dickason firm had misused the money. First IC made a demand on Investors Title on

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its closing protection letter. Investors refused to reimburse it for the loss. On September 17, First IC paid JPMorgan $643,363.23 to satisfy the loan.

After paying off the loan, First IC Bank sued North American. North American moved to dismiss all claims against it. The district court granted that motion.

The district court relied on a provision in the Investors Title closing protection letter in holding that the North American CPL was no longer enforceable. The Investors Title closing protection letter said that it "supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction and may not be modified by the Issuing Agent or Approved Attorney." The court said that "the NATIC CPL was not in effect at closing and had been superseded by the ITIC CPL." The district court decision was reported in the April 2021 issue. See 2021 WL 732354.

The Eleventh Circuit affirmed dismissal of the breach of contract claim by a different but equally interesting path. It said:

> While the district court held that the North American CPL was superseded by a provision in the Investors CPL, we do not need to confront this issue to affirm. Instead, we hold that First IC Bank did not plead that it ever validly accepted North American's CPL offer, and therefore did not allege a viable claim for breach of contract against North American.

The court first noted that the bank was required to prove, for its breach of contract claim, that a contract had been formed between North American and itself. The court noted that an offer to contract is evidence of one party's willingness to enter into a contract, which is accepted by payment of consideration in money or something "having value in money." *Rakusin v. Radiology Assocs. of Atl., P.C.*, 699 S.E.2d 384, 388 (Ga. App. 2010), and O.C.G.A. §§ 13-3-40 to 13-3-42.

First IC Bank had conceded in its appeal brief that the North American CPL was not a contract, but rather an offer to contract. The court agreed, saying:

> While the closing protection letter did not explicitly say it was an offer, the letter indicated a willingness to contract and indemnify First IC Bank according to the conditions, exceptions, and preconditions listed. The Title Insurance Commitment Letter issued in conjunction with the CPL explicitly stated it was an "offer to issue ... title insurance."

The court added this footnote to the above passage:

> Additionally, a contract requires consideration and acceptance, neither of which appears to have occurred at the time in which the contract was delivered. See also *The Law of Closing Protection Letters*, 36 Tort & Ins. L.J. 845, 853 (2001) ("Regardless of whether a lender accepts a closing protection letter, the letter creates no obligation on the part of the title insurer unless and until the lender orders title insurance from the company and delivers closing funds and documents to the settlement agent.").

First IC Bank argued that it accepted the North American CPL offer when it wired the loan money to Dickason on April 19 to initiate the closing. A predicate to the bank's legal argument was its assertion that it did not know that North American had already cancelled Dickason. The appeals court said it could not abide the latter assertion.

The court noted that, "regardless of Dickason's status as an issuing agent for North American, as admitted by First IC Bank, Dickason was at all relevant times the bank's closing attorney and agent." Thus, the court said, Dickason's knowledge was imputed to its principal, the bank, under Georgia law. The court cited O.C.G.A. § 10-6-58 and *Vazemiller v. Sanders*, 861 S.E.2d 626, 791 (Ga. App. 2021), which held that:

> … notice to an attorney is notice to the client employing him, and that knowledge of an attorney is knowledge of his client, when such notice and knowledge come to the attorney in and about the subject matter of his employment.

Therefore, the court concluded, First IC Bank had imputed knowledge that Dickason was no longer a North American agent before it sent the loan money. Also, the court said, Dickason's knowledge that Investors Title had issued a replacement CPL and would issue the loan policy was also imputed to the bank. The court answered the bank's latent objection to this reasoning by noting the following agency principles embedded in the Georgia statutes:

> Under Georgia agency law, an "agent's authority shall be construed to include all necessary and usual means for effectually executing it." O.C.G.A. § 10-6-50. "The principal shall be bound by all representations made by his agent in the business of his agency and also by his willful concealment of material facts, although they are unknown to the principal and known only by the agent." Id. § 10-6-56. "Notice to the agent of any matter connected with his agency shall be notice to the principal." Id. § 10-6-58.

Based on this analysis, the court reached this conclusion:

> Taken as true, the pleadings do not indicate an objective intent by First IC Bank to accept the North American CPL because at the time First IC Bank wired the money at closing, First IC Bank knew (1) that Dickason was no longer North American's issuing agent and (2) that Investors, through First IC Bank's issuing agent Dickason, had issued First IC Bank a subsequent, valid CPL. Under Georgia law, acceptance is an objective standard "whereby" First IC Bank's "intention is deemed to be that meaning a reasonable man in the position of the other contracting party," North American, "would ascribe to" First IC Bank. *Bedsole*, 750 S.E.2d at 450. Here, First IC Bank was sending money to Dickason knowing that Dickason had lost his status as an

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issuing agent of North American and knowing that Dickason had another valid CPL pending that was to be accepted in the same manner. Additionally, the settlement statement says that Investors was paid, and not North American, also indicating that there was no acceptance of North American's offer. Taken together, no reasonable person would believe that First IC Bank's intention was to accept the North American offer.

The appeals court also affirmed the dismissal of First IC Bank's claims for conversion and promissory estoppel. The conversion claim was premised on the notion that North American had *respondeat superior* liability for the acts of Dickason as its title agent. The estoppel claim was based on the assertion that North American was estopped from denying that Dickason was its agent as of closing because the bank did not have actual knowledge of the cancellation. The court dismissed both claims based on its ruling that the bank had imputed notice that Dickason was not North American's agent before it wired the loan money.

The court observed in a footnote that the conversion claim also failed because the bank was not seeking the return of the loan money it delivered, but the money it advanced to pay off the existing loan. A claim for conversion will not lie for the recovery of money unless "such money ... comprise[s] a specific, separate, identifiable fund to support an action for conversion." *Taylor v. Powertel, Inc.*, 551 S.E.2d 765, 769 (Ga. App. 2001).

This is an excellent decision, and one of the few concerning closing protection letters to squarely address the legal issues presented by the fact that a title agent closer has dual principals. North American was ably represented by Monica Kocurek Gilroy and Matthew Franklin Totten of The Gilroy Firm, Atlanta.

RESPA Alert

Class Suit Based on Broker Bonuses Paid for Referrals to Title Company Survives Dismissal Motion

Kallai v. Jatola Homes, LLC, ___ F.Supp.3d ___, 2021 WL 5961626 (N.D Ohio) (not yet released for publication).

An Ohio court has refused to dismiss a class action brought against a real estate broker that allegedly promised bonuses to its own agents and others for the placement of orders with a title company.

Joshua and Jena Kallai bought a house in Wadsworth, Ohio, in 2019. The listing broker was Jatola Homes, doing business as The Amy Wengerd Group. The Kallais had a buyer agent, whose name the court did not identify. The Kallais allege that the Wengerd Group promised to pay its agent a bonus if he or she placed the title and closing orders with Aman Title. The sale closed, and Aman Title performed the closing and title work, including allegedly "settlement services with respect to the Kallais' federally related mortgage loan." Aman Title LLC appears to be owned by Mara Aman.

The Kallais alleged that the Wengerd Group promised to pay money referral bonuses in 2019 and 2020, and that the 2019 bonuses were handed out at the team Christmas party.

The Kallais brought a class action suit against the Wengerd Group, Amy Wengerd, Aman Title and Mara C. Aman. All of the defendants brought motions to dismiss. In this decision, the court dismissed the individuals, but not the companies.

The Kallais alleged that the Wengerd Group, acting "with the direction, approval, and support" of Aman Title, promised to give the referring real estate agent a monetary bonus in December 2020 for the successful referral of the Kallais to Aman Title, which they said violated the Section 8 anti-kickback provision of RESPA, codified at 12 U.S.C. § 2607(a).

The necessary predicate to their RESPA claim was the allegation that the Kallais got a "federally related" mortgage loan. To invoke the "injury in fact" condition for their RESPA claim, the Kallais alleged that they paid more for the settlement services performed by Aman Title than they would have paid if a different title company had been used.

The defendants first attacked the Kallais' standing to bring a RESPA suit. A plaintiff who does not have standing cannot invoke a federal court's subject matter jurisdiction over the case. One facet of Article III standing is an adequate allegation that the plaintiff has suffered an "injury in fact."

The court said that the Kallais had adequately alleged that a referral fee was paid, invoking RESPA's Section 8(a). The defendants' argument was that payment of a referral fee did not establish that the Kallais were injured, because they might not have paid any more for Aman Title's services as a result. The defendants relied on *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244 (4th Cir. 2020). In *Baehr*, the Fourth Circuit Court of Appeals held "the deprivation of impartial and fair competition between settlement services providers – untethered from any evidence that the deprivation thereof increased settlement costs – is not a concrete injury under RESPA." The court gave this response:

> This Court will agree that *Baehr* is instructive, but not in the way the Wengerd Defendants wish it to be. The plaintiffs in *Baehr* did not allege they were overcharged for settlement services as the Kallais allege here. The Kallais' overcharge allegation provides a plausible allegation of increased settlement costs, which is what *Baehr* instructs would be a concrete injury under RESPA. Id. *See also Dye v. MLD Mortg. Inc.*, No. ELH-19-3304, 2021 U.S. Dist. LEXIS, at *34 (D. Md. July 16, 2021) (concluding plaintiffs who "explicitly alleged that they were overcharged for title and settlement services as a result of the alleged kickbacks" plausibly alleged concrete injuries such that Article III standing requirements were met).

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The court said that the Kallais had met their burden by alleging that they were charged more than they would have been by other title companies. The court said that this allegation was adequate at this stage, even if it was brief and conclusory. The court also betrayed its inclination to conclude that referral fees would necessarily be passed on to the customer, by saying:

> Their first amended class action complaint sets forth a series of detailed factual allegations regarding the referral program rewarded with monetary bonuses set up by the Wengerd Defendants and the Aman Defendants and ties the Kallais' overpayment for settlement services to the bonus program. The Kallais might not utilize the specific language the Wengerd Defendants and the Aman Defendants would like, but taking the allegations of the Kallais' first amended class action complaint as a whole leads to the reasonable inference that any overpayment the Kallais suffered was plausibly due to the referral bonus program.

The defendants' other standing argument went to the third prong of Article III constitutional standing, called the prudential standing requirement. A federal court may refuse to hear a case if the plaintiff's claims do not fall within the zone of interests that are protected by the law the complaint invokes. The court said that the Kallais' claims were "well within" that zone because they alleged a direct violation of RESPA.

The Wengerd Group, however, argued that it served as the seller's listing broker, and the bonus it paid was to its own agent. It said that the Kallais' buyer agent was "an independent real estate agent who was not involved in the referral bonus program which the Kallais allege violated the anti-kickback provision of RESPA." Wengerd argued that RESPA did not protect the Kallais against referral fees paid by a broker with whom the buyers had no contract. Wengerd also argued that it was the buyer's agent who was responsible for protecting the Kallais against bad service or to help them shop around.

The court said that this argument "ignores the plain language of the anti-kickback provision of RESPA," and would require that the court read additional requirements into the statute. It said:

> The anti-kickback provision of RESPA, enumerated above, does not specify that those who pay for settlement services which were improperly referred according to the statute may only recover from their own fiduciary or agent. This Court will not read this requirement into the statute. The language of the anti-kickback provision of RESPA is clear, "[n]o person shall give and no person shall accept any fee, kickback, or thing of value" for referring real estate settlement services involving a federally related mortgage loan and "any person or persons" who engage in such conduct are liable to those "charged for the settlement service involved in the violation..." 12 U.S.C. § 2607(a); 12 U.S.C. § 2607(d)(2). As alleged in the Kallais' first amended class action complaint, the Wengerd Defendants, in concert with the Aman Defendants, engaged in conduct that violated the anti-kickback provision of RESPA when the Wengerd Defendants' real estate agents were promised a monetary bonus for the successful referral of settlement services of either buyers or sellers to Aman Title. Aman Title provided settlement services for the Kallais' federally related mortgage as a result of one such successful referral, and the Kallais were charged for the settlement services. They are within the class of individuals Congress wished to protect with the anti-kickback provision of RESPA.

The Wengerd Group also argued that the Kallais' complaint should be dismissed because this same court has said that, to survive a motion to dismiss, a plaintiff alleging a Section 8(a) RESPA claim must allege not just that a payment was made, but also the date and amount of that referral fee payment, citing *Girgis v. Countrywide Home Loans, Inc.*, 733 F. Supp. 2d 835, 846 (N.D. Ohio 2010). The court noted that *Girgis* concerned a claimed Section 8(b) violation. That section prohibits the giving or accepting of "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service … other than for services actually performed." The *Girgis* court dismissed the RESPA claim because the plaintiffs did not allege split fees or marked up charges:

> The Plaintiffs provide no factual support for this allegation. They do not state the amount or date of the fees the Defendants allegedly charged them, nor do they provide any evidence that the Defendant charged any real estate settlement fees that were not actually for settlement services.

The court said that *Girgis* could not be read to require an allegation of the amount of the kickback or the date on which it was paid under Section 8(a).

The court also found that the complaint adequately alleged a RESPA violation. The court said that the alleged payments at the Christmas party were referral fees, although the money was not paid at the time each referral was made. The court also rejected the defendants' argument that no actual referral was made, but rather that "the Kallais' real estate agent independently, fortuitously, selected Aman Title for settlement services of her own accord." The court said in conclusory fashion that this was a mere convenient argument by which the defendants sought to "absolve themselves of any liability and place it squarely at the feet of the Kallais' real estate agent under the auspice of fiduciary duty." The court also said that it was possible that the Kallais' agent did not know the lister had an incentive to use Aman, or that there was any reason to object to that use.

The court dismissed Amy L. Wengerd and Mara C. Aman from the case, because the plaintiffs had not alleged that either person violated RESPA.

The court did not discuss any allegation by the Kallais that Aman Title paid a referral fee in exchange for the referral of orders to it, or that Wengerd Group has an ownership interest in or special arrangement with Aman Title.

Escrow Matters

Notary Fulfilled Identity Verification Duty by Reviewing Apparently Legitimate Driver's License

North American Title Co., Inc. v. Gugasyan, ___ Cal.Rptr.3d ___, 2021 WL 6132791 (Cal.App. 2 Dist. 2021) (permanent citation not yet available).

A California notary public's statutory duty to verify the identity of the person who appears before him or her is satisfied by a demand for and inspection of a current driver's license. That duty is not changed or augmented based on testimony about supposed industry custom.

Noble Investments LLC owns property on North Elm Street in Beverly Hills. Noble's president is Mark Gabay. In January 2017 and again a month later, someone pretending to be Gabay applied for two loans totaling nearly $4 million, each loan to be secured by deeds of trust against the Elm Street property. Each loan was brokered by Finance for Americans Corp. and made by Lone Oak Fund LLC.

North American Title Company, Inc. served as the escrow company. North American hired one of its pre-approved notaries, Jack Aintablian, who does business as "Jack the Notary," to notarize the two deeds of trust. Aintablian, in turn, assigned the notarial acts to his contractor, Egya Nubar Gugasyan. Gugasyan's surety was Western Surety Company.

Gugasyan had two meetings with the man purporting to be Gabay. That person produced a California driver's license as proof of his identity. Gugasyan said that his practice was to compare the photograph on the license to the person before him, review the texture and color of the license to make sure it was authentic, compare the signature on the license to the signature made in his presence, and have the person place his thumb print in Gugasyan's notary journal. His practice is to decline to acknowledge the instrument if the person failed any of those tests.

The signer passed all of Gugasyan's tests. Gugasyan recorded the person's driver's license number and thumbprint in his notary journal. Gugasyan then acknowledged the deeds of trust. The acknowledgment said that Gabay had "personally appeared" in front of Gugasyan and "proved to [him] on the basis of satisfactory evidence to be the person[ ] whose name[ ] is[ ] subscribed to the within instrument and acknowledged that he[ ] executed the same in his[ ] authorized capacity[ ], and that by his[ ] signature[ ] on the instrument the person[ ], or the entity upon behalf of which the person[ ] acted, executed the instrument."

The signer was not Gabay and the driver's license presented to Gugasyan was fake. The decision does not explain how North American discovered the fraud, but the court did say that the title company sought a temporary restraining order prohibiting disbursement of the money from the fraudster's bank account at Wells Fargo. By the time the order was entered, only the $40,000 loan broker fee remained, and $3,891,935.35 had been transferred to other bank accounts in Dubai.

North American sued Aintablian, Gugasyan and Western Surety, seeking to recover the money paid to the fraudster. The court struck several claims on demurrer. The trial court ruled against North American on its claims for negligence and negligence per se on a motion for summary judgment. This appeal followed.

California's Government Code §8214 says that it is the notary's job to verify that the person signing a document is, in fact, the person he or she purports to be. If the notary is guilty of "neglect," the notary is civilly liable for damages. However, California law sets up a "safe harbor" for notaries if the notary is presented with "[a] driver's license issued by the Department of Motor Vehicles" that is current or issued within the preceding five years, and there is an "absence of information, evidence, or other circumstances that would lead a reasonable person to believe that the person [appearing before the notary] is not the individual he or she claims to be." Civil Code, § 1185, subds. (b), (b)(3)(A), (c). In other words, compliance with the procedures of section 1185 places a notary into a "safe harbor." *Joost v. Craig* (1901) 131 Cal. 504, 519, 63 P. 840; *Anderson v. Aronsohn* (1919) 181 Cal. 294, 299, 184 P. 12; and *Transamerica Title Ins. Co. v. Green* (1970) 11 Cal.App.3d 693, 703, 89 Cal.Rptr. 915 ("When the notary does not obey the statute, he is liable").

The court said that this appeal required the court "to define the scope of this statutory safe harbor." The court gave this conclusion:

> … the safe harbor (1) applies when a notary relies upon a driver's license that looks like one the DMV would issue (and thus does not require a notary to verify with the DMV that the driver's license is, in fact, a legitimately issued license), (2) applies even if an expert opines that industry custom requires a notary to do more than the statutory safe harbor requires, and (3) is not overcome by the simple fact that the person who appeared before the notary was an imposter.

The court acknowledged that a notary public may be civilly liable for negligence or negligence per se if he or she violates the statutory verification duty, citing *Issakhani v. Shadow Glen Homeowners Assn., Inc.* (2021) 63 Cal.App.5th 917, 924, 935, 278 Cal.Rptr.3d 270; and *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106 & fn. 6, 131 Cal.Rptr.2d 1, 63 P.3d 913.) However, "because of the important function notaries serve in our society, their duties are prescribed by law." *McComber v. Wells* (1999) 72 Cal.App.4th 512, 519, 85 Cal.Rptr.2d 376.

North American first argued that Gugasyan did not fit into section 1185's safe harbor because he did not review a genuine California driver's license, and he did not follow industry customs established

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by expert testimony. The insurer also argued that the safe harbor is automatically negated if the person who appeared before the notary was an imposter.

North American asserted that its interpretation was commanded both by the statute and the prior case law. The statute says the notary must review a driver's license "issued by the Department of Motor Vehicles," which means a genuine license. The court disagreed, holding that the safe harbor is met by a review of either a genuine driver's license or one that "reasonably appears to have been issued by the DMV, even if it was not actually issued by the DMV."

The court looked to decisions construing Business and Professions Code section 25660, which protects a person who sells alcohol to a minor if the seller verifies the buyer's age by looking at a "valid motor vehicle operator's license" "issued by a ... state ... government[ ] or ... agency." One court said that the liquor safe harbor applies to fake IDs because "[t]he [alcohol seller] should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1444-1445, 13 Cal. Rptr.3d 826 (Department of Alcohol).) This court said the same reasoning should apply to notaries because both laws involve identity verification by driver's licenses.

The court also said that North American's interpretation would place too large a burden on the notary, because it "would necessarily obligate notaries to contact the DMV to verify the authenticity of every driver's license presented to them." The court said that standard would be either impossible or wholly impractical.

North American also relied on the prior decisions construing notary duties listed above—*Joost, Anderson* and *Transamerica*. The court said those decisions now have limited applicability:

> Although these cases remain relevant to establish that compliance with section 1185 's requirements erects a safe harbor, they are no longer relevant in defining those requirements because our Legislature greatly relaxed those requirements in 1982: Prior to 1982, the safe harbor only applied if the notary "kn[e]w that the [person] making the acknowledgment is the person described in the instrument" either based on personal knowledge or upon the sworn affidavit of a credible witness (*Anderson*, supra, 181 Cal. at p. 299, 184 P. 12); in 1982, the safe harbor was expanded to apply in a variety of additional situations, including when a notary reasonably relies on an authentic-looking driver's license. (Stats. 1982, ch. 197, § 1.)

The court also rejected North American's argument that Gugasyan violated notary industry custom, as evidenced by the affidavit testimony of an industry expert. The expert said that the thumb print was smudged, Gugasyan recorded only a single entry in his notary journal for the two instruments acknowledged on two different days, and Gugasyan did not follow North American's standing demand for a copy of the driver's license presented to the notary.

The appeals court responded that the expert opinion was "not relevant" because the expert did not opine that these deficiencies "should have rung any alarm bells for Gugasyan." Further, the court said that it rejected the notion "that a party can, by expert testimony, redefine a statutory safe harbor fashioned by our Legislature." It said:

> If parties could, through expert testimony, effectively change the protocols a notary has to follow before the safe harbor applies, section 1185 would become less of a safe harbor and more of a moving target. For instance, North American's expert goes so far as to suggest that a notary should be denied the safe harbor for failing to acquiesce to an escrow holder's case-specific requests. Under this approach, if a party were to request that the notary verify with the DMV that the driver's license presented was legitimately issued, a notary would be liable for his failure to do so, and individual parties would be able to entirely rewrite the safe harbor in a manner contrary to the very construction we give to it today. We decline to construe section 1185 in a manner that would so drastically undercut its efficacy.

The court rejected North American's argument that experts regularly opine on whether a professional has satisfied the pertinent standard of care. The court said that principle was "true, but irrelevant," asserting with vehemence that a safe harbor is not based on a standard of care, although the statute itself requires the notary to act "reasonably."

Finally, the court rejected North American's argument that the notary could not reasonably have relied on a fake driver's license when the presenter was an imposter. The court said this would convert a negligence cause of action to strict liability. The court then set up the straw man argument of res ipsa loquitur to disprove North American's argument:

> Second, North American's argument is, at bottom, a request to apply the doctrine of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* erects a presumption of negligence, but it only applies when "'(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" *(Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal. App.4th 1155, 1161, 117 Cal.Rptr.3d 126.) The doctrine is inapplicable here because fake IDs fool careful people all the time; that is in part why the Penal Code makes the use of fake IDs a crime. … We thus refuse to adopt a holding that would effectively apply *res ipsa loquitur* in a situation when its prerequisites are lacking.

Escrow Matters

Forum Selection Clause in Escrow Agreement Not Binding on Officers

BAM International, LLC v. MSBA Group Inc., 2021 WL 5905878 (Del. Chancery) (unpublished).

A Delaware court has held that a forum selection clause in an escrow agreement was not adequate as a basis for personal jurisdiction over the officers of the seller company, despite the buyer's claim that some of the money wrongly disbursed "might" have made its way into their pockets.

Crowley Government Services contracted with BAM International LLC to buy $20 million worth of latex gloves. BAM began looking for a glove supplier. Mammoth RX Inc., a Delaware corporation operating in California, told BAM that Universal SNL Trading SDN BHD and Universal SNT Marketing SDN BHD, based in Malaysia, could supply the gloves. BAM and Universal signed a contract for the purchase of 100 million nitrile latex gloves for $7.55 million. The purchase money was escrowed with The MSBA Group Inc. Delivery of the gloves through a third-party inspector was the trigger for disbursement of the money. Mammoth acted as guarantor for Universal's obligations under the escrow.

BAM wired the $7.55 million to the MSBA escrow account on Nov. 24, 2020. It now alleges that Universal blocked the inspection from occurring, but that on Nov. 27, 2020, MSBA's principal Miles Stephen Bown transferred the money to Universal nonetheless, without BAM's knowledge or consent. Mammoth now claims that Bown told Mammoth's officers that the inspection had occurred. MSBA and Mammoth admit they did not receive approval from BAM to release the money to Universal.

BAM sent a termination notice a month later. MSBA did not return the money because Universal already had it. BAM "now believes there were never any gloves, and that Universal will not voluntarily return the funds." Further, it alleges that "most of the purloined funds were moved to a Swiss bank account maintained by the Universal CEO."

BAM sued MSBA, Bown, Mammoth and Mammoth's officers Ryan Hilton and Amir Asvadi in Delaware Chancery Court. Hilton and Asvadi filed an action in California, asking the court to rule that they were not personally liable under the escrow. The California court agreed to abide by the Delaware court's determination as whether or not it had jurisdiction over the individuals.

The Delaware court held that it did not have personal jurisdiction over Hilton and Asvadi, the Mammoth officers. The ruling of interest to escrow companies was about the choice-of-forum provision in the escrow agreement. That provision said:

> If any controversy or claim, whether based on contract, tort, statute, or other legal or equitable theory (including any claim of fraud, misrepresentation, or fraudulent inducement), arising [sic] out of this [Escrow] Agreement ... the Parties will resolve the Dispute in State Courts in Delaware.

The term "Parties" was defined to include BAM, MSBA and Mammoth. The escrow agreement also said that the laws of the State of Delaware would be the governing law for interpretation of the agreement.

Under Delaware law, a party can consent to jurisdiction in that state when a signed contract designates Delaware as the jurisdiction for dispute resolution and the person is a signatory to the contract, a third-party beneficiary or is "closely related to" the contract. BAM argued that Hilton and Asvadi benefited from or were "closely related" to the escrow because they helped negotiate its terms. The court disagreed.

BAM did not explicitly allege that Hilton and Asvadi received a direct benefit from the contract and escrow. It did allege that, because Mammoth was in fact a small company, Hilton as CEO and founder stood to gain from the contract. BAM also reported its suspicion that some of the escrowed money "may have made its way into the hands of some of the defendants," but it could not yet prove that hunch. The court said this did not count, because "receipt of the allegedly purloined funds by the Moving Defendants would not be a benefit from the contract, but from the breach of the contract." The court concluded that it could not find that either officer directly benefited from the contract or escrow.

The second avenue open to BAM was to prove that the officers were closely related to the escrow. The test is whether a non-signing officer should understand that it would be reasonably foreseeable that he or she could be sued in Delaware. Only a few Delaware decisions have dealt with the issue. One court held that a non-signatory could compel a signing party to be sued in Delaware, based on a forum selection clause in the contract.

BAM asked the court to expand the test based on a Third Circuit case applying Delaware law, *Carlyle Investment Management LLC v. Moonmouth Company,* 779 F.3d 214 (3d Cir. 2015), which said that courts should consider "the non-signatory's ownership of the signatory, its involvement in the negotiations, the relationship between the two parties and whether the non-signatory received a direct benefit from the agreement." The court admitted that the case for binding Hilton would be pretty good under this test, since he signed the escrow agreement as CEO of Mammoth, although not as good as to Asvadi, who did not sign the agreement. However, the court refused to adopt *Carlyle*. The court concluded that it did not have jurisdiction over either man.

Escrow Matters

Escrow Bank Account Must Be Beyond Control of Escrow Principals

Tarpey v. United States, ___ F.Supp.3d ___, 2021 WL 5955699 (D.Mont. 2021) (permanent citation not yet available).

In sorting out the tax liabilities of several related companies found to have facilitated tax fraud in the donation of timeshare interests, a Montana court has held that a bank account was not a true escrow account because the account manager and the "escrow" principals were all companies owned by the same person.

James Tarpey operated an elaborate, high-volume business designed to induce timeshare owners to donate their unwanted intervals to a charitable organization, and to receive appraisal reports certifying that the value of those interests was whatever the donors had paid for them, allowing large tax write-offs. Tarpey formed one company, Project Philanthropy, Inc., d/b/a Donate for a Cause, to take title to the timeshare intervals. Tarpey also operated Vacation Property Appraisers, through which Tarpey issued appraisal reports on the intervals. Tarpey also operated Resort Closings, which handled the real estate closings, and two companies that did the marketing.

The IRS sued to enjoin Tarpey's timeshare donation program. The court entered a permanent injunction against all of the Tarpey entities, concluding that the timeshare donation program constituted a bogus tax scheme.

The Treasury Department then assessed penalties against Tarpey, based on a statute setting the penalties at "50 percent of the gross income derived from the activity." Tarpey filed this action to contest the amount of the penalties assessed.

The government's expert, Dubinsky, said the penalty should be just over $11 million, because the gross income earned by Tarpey was just over $22 million. To reach his gross income figure, Dubinsky counted all income earned by all five entities, including Resort Closings.

Tarpey's expert, Copley, came up with two lower figures. Tarpey also attacked Dubinsky's gross income number, because it included money held in an escrow account. Tarpey correctly argued that a taxpayer's gross income normally does not include money paid into escrow, because the taxpayer lacks "complete dominion" over the sum. *Ware v. Comm'r*, 906 F.2d 62, 65 (2d Cir. 1990). The penalty would be reduced to less than $7 million if money in the escrow account were not included.

The court held that Tarpey did not maintain a true escrow arrangement. Unfortunately, it came to that conclusion by circular reasoning. The court said:

> A true escrow arrangement operates at an arm's length, and provides a bona fide agreement between three independent parties—a buyer, a seller, and an escrow agent. See *Reed v. Comm'r*, 723 F.2d 138, 144 (1st Cir. 1983). Unlike a true escrow arrangement, Account 96655 failed to operate at "an arm's length" from Tarpey. The escrow agent was not independent. Another Tarpey-owned entity—Resorts Closings, Inc.—acted as the "escrow agent" for Account 96655. … The Court already has determined that the "activity" giving rise to the penalty encompasses "the related for-profit entities" involved in the time-share donation scheme. … The "related for-profit entities" include Resorts Closings.

However, the mere fact that the court had already lumped the closing company with Tarpey's other companies did not mean that its bank account was not an escrow account. Tarpey bought and sold timeshare intervals, and paid closing expenses from the escrow account. Fortunately, the court buttressed its ruling with findings about Tarpey's control over Resorts Closings, not just its ownership:

> In *Ware*, the First Circuit determined that the question of whether the money processed through the escrow account should be included as income represents the key inquiry. … An independent escrow agent in Ware controlled funds placed in the escrow account. Id. A law firm entitled to the funds could not access the money until distribution. Id. Tarpey, by contract, exercised complete dominion over the money paid into the account. …
>
> … Tarpey exercised "complete dominion" over Account 6655, as evidenced by the comingling of funds from multiple donors and frequent bulk transfers from the account to address expenses or fees without delineating to whom the money belonged. … The money flowing through Account 96655 was not only includable as income, it actually was included as income in Tarpey's amended tax returns. … The fact that Tarpey claimed money from the escrow account on his amended tax returns demonstrates conclusively that the money in Account 96655 remained within Tarpey's control. …
>
> Tarpey's complete dominion over Account 96655 demonstrates that the account did not operate as an escrow account. Account 96655 served instead as another way for Tarpey to transfer income from one of his entities to another entity. Virtually all of the money involved in the timeshare scheme flowed through Account 96655.

This decision is interesting primarily because the courts so rarely address the issue of whether an escrow account was established under a legitimate escrow arrangement.

Conveyance News

No Double Dipping on Homestead Exemption

Big Bell 21, LLC v. Mills, 2021 WL 5903941 (Ariz.App. 1 Div.) (unpublished).

An Arizona court has held that a property owner cannot claim a homestead exemption on both the proceeds from the sale of his homestead and also in his other residence.

In 2017, Big Bell 21 LLC and others got a judgment against Michael Mills for about $370,000. The judgment was recorded. In January 2020, Mills sold his house in Peoria, Ariz., and claimed a $150,000 statutory homestead exemption from the sale proceeds. Based on that declaration, the title company transferred $196,287.54 to his Citibank account. After that sale, Big Bell learned that Mills was living in a house in Glendale, Arizona. Big Bell sought to conduct a judgment debtor examination of Mills and requested his bank records. Mills produced some records, but none for the Citibank account. At his examination, Mills testified he had owned both the Glendale property and the Peoria property at the same time. He owned the Glendale house free and clear before he sold Peoria. Mills "testified that he could not recall what he had done with the proceeds from the sale of the Peoria property."

Big Bell got a writ of general execution. A sheriff's sale of the Glendale property was held in October 2020 under that writ. The sale netted $235,000. Mills claimed he was entitled to a second $150,000 statutory homestead exemption on the Glendale property. The sheriff told Big Bell that it would deliver $150,000 of the sale proceeds to Mills unless Big Bell got a court order directing otherwise.

Big Bell ran into court and got an order telling the sheriff to hold the money until the court could rule. Later, the court ruled that Mills could not claim a homestead exemption on the Glendale sale proceeds because he had already claimed his exemption on the sale of Peoria.

Mills appealed, but the court affirmed.

In Arizona, a person may claim a homestead exemption in a residence of up to $150,000 in equity, which is "exempt from attachment, execution and forced sale." A.R.S. § 33-1101(A)(1). If the person owns more than one residence that could be deemed a homestead, the person may designate the property claimed as homestead. A.R.S. § 33-1102(A). A person may claim only one homestead exemption at a time. A.R.S. § 33-1101(B). The exemption follows the proceeds from the sale of the homestead. A.R.S. § 33-1101(C) says the exemption:

> automatically attaches to the person's interest in identifiable cash proceeds from the voluntary or involuntary sale of the property. The homestead exemption in identifiable cash proceeds continues for eighteen months after the date of the sale of the property or until the person establishes a new homestead with the proceeds, whichever period is shorter.

The appeals court applied these rules in a straightforward manner. It said that Mills used his one homestead exemption when he designated Peoria as his homestead. This meant that $150,000 of his sale proceeds were automatically protected for either 18 months or until the money was invested in a new homestead. Mills did not invest the money in a new homestead. He did not invest it in the Glendale house, which he already owned free and clear. Mills could not claim an exemption simultaneously in both the money from the sale of Peoria and his equity in Glendale, because that would grant him two separate but simultaneous homestead exemptions.

Mills argued that A.R.S. § 33-1102(A) protected him. That statute allows a creditor to force a debtor who owns more than one house to designate which is the exempt homestead. Mills argued that, "because Big Bell did not take advantage of this statute, he was free to change his homestead exemption at any time." The court rejected that argument because Mills had already made his homestead designation, and received the benefit of it in protecting the sale proceeds.

Mills also argued that he might have "spent, comingled, or given away" the exempt $150,000, so that the money might no longer be "identifiable cash proceeds" subject to protection, and the trial judge wrongly put the burden on Mills to show what he had done with the money. The court said Mills had the burden of proving that the money was still his property, having claimed the exemption in the money. Mills flatly refused to provide that proof, and was not entitled to benefit from his own concealment of fact.

This is an interesting decision, because courts so rarely deal with the mechanics of how a homestead exemption follows sale proceeds to protect the money until it is invested in a new homestead.

HOA Liens

Latest Developments in Nevada HOA Lien Coverage Cases

THSBC Bank USA, N.A., as Trustee v. Fidelity Nat'l Title Ins. Co., 2021 WL 5850905 (9th Cir. (Nev.)) (unpublished); *U.S. Bank, N.A., as Trustee v. Fidelity Nat'l Title Group, Inc.,* 2021 WL 5566538 (D.Nev.) (not yet released for publication); *U.S. Bank, N.A., as Trustee v. Fidelity Nat'l Title Group, Inc.,* 2021 WL 5566538 (D.Nev.) (not yet released for publication).

Nevada courts continue to influence the direction of the flotilla of lawsuits filed against title insurers in which lenders seek coverage for super-priority homeowner association liens.

Scores of lawsuits have been filed by lenders in Nevada because their deeds of trust were extinguished by the foreclosure of super-priority HOA liens. Many of those cases were filed in or removed to federal court. District Judge Miranda Du issued an October 2019 decision that was favorable to the title insurer, finding that there was no coverage against the foreclosure of an assessment lien when the lien was levied after the policy date, under the Covered Risks, a CLTA 100 endorsement or an ALTA 5 endorsement. See *Wells Fargo Bank, N.A. v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 5578487 (unpublished).

Judge Du dismissed a number of other actions based on the reasoning she gave in the *Wells Fargo* decision. After Wells

Fargo brought an appeal to the Ninth Circuit, federal judges stayed a number of similar cases until the *Wells Fargo* appeal was decided.

The January 2022 issue reported on the Ninth Circuit decision in that appeal, *Wells Fargo Bank, N.A.*, as *Trustee v. Fidelity Nat'l Title Ins. Co.*, 2021 WL 5150044 (9th Cir. (Nev.)) (unpublished). The decision was not the decisive conclusion that would allow all pending cases to be resolved. Instead, the appeals court remanded the case to the trial court to allow Judge Du to consider a Fidelity manual in interpreting the policy endorsements. The Ninth Circuit noted that Judge Du had said in April 2021, in a similar case, *HSBC Bank USA, N.A. v. Fidelity Nat'l Title Group*, 2021 WL 1579896 (D. Nev. Apr. 22, 2021), that if the case were remanded to her, she might consider the effect of the statements made about endorsement coverage in a Fidelity manual, particularly the difference between the ALTA 5 and 5.1 endorsements.

The Ninth Circuit decision in *Wells Fargo* is already having a cascading effect on other cases before the Ninth Circuit that formerly were stayed. The HSBC Bank decision listed above, issued by the Ninth Circuit on December 9, was an appeal of a decision by Judge Du in favor of the insurer on a motion to dismiss, without leave to amend. HSBC argued that, if it had been given leave to amend, it might have been able to present a viable claim against Fidelity based on the endorsement manual. The Ninth Circuit remanded the case. It said this about the import of the manual:

> Because the manuals would be probative as to the protections offered and sold to Appellant, which is the crux of the Appellant's claims, the manuals potentially may support Appellant HSBC's claims. The possible probative value of the manuals is sufficient to support amendment. This is especially true given Nevada's application of trade usage information. The insurance manuals, like many other dictionaries and explanatory commentaries "operate as specialized dictionaries in interpreting a written contract." *Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 367 (2013) (internal citations omitted).

A second change of wind direction guiding the litigation armada is strategy over jurisdiction. After Judge Du had issued a number of decisions in favor of the title insurers, lenders switched to filing suit in state court. In many such cases, counsel for the insurers filed snap removals to federal court (in which the removal motion is filed before any of the parties have been served and have answered the complaint). The lenders asserted that Nevada should not recognize the efficacy of snap removals, based on *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 317-18 (D. Mass. 2013).

In a series of decisions, federal judges Jennifer A. Dorsey and Andrew P. Gordon agreed with the lenders, finding that allowing snap removal would promote gamesmanship. Those decisions were reported in the February 2021 issue.

However, District Judge Gloria M. Navarro has now issued two decisions allowing snap removal, and rejecting the reasoning of *Gentile*, in the decisions listed above in which U.S. Bank is plaintiff.

Judge Navarro began by noting that, although the Ninth Circuit has not issued a decision on the efficacy of snap removal, a number of other federal appeals courts have approved the practice. She cited *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153 (3d Cir. 2018); *Texas Brine Co., L.L.C. v. Am. Arbitration Ass'n, Inc.*, 955 F.3d 482, 487 (5th Cir. 2020); *McCall v. Scott*, 239 F.3d 808, 813, n.2 (6th Cir. 2001); and *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014). She gave a lengthy and scholarly review of the rationale behind those decisions, to conclude that removal is prohibited only when "a forum defendant, who has been properly joined and served, seeks to remove the case." The plaintiffs in the two U.S. Bank cases had named local title agents, as a means of thwarting federal diversity jurisdiction. However, the defendants had removed before any of them had been served. Thus, Judge Navarro held, the defendants had properly removed to federal court.

Judge Navarro acknowledged "other courts in this District" had followed the reasoning of *Gentile*, that the word "any" in Section 1441(b) means that the statute assumes that at least one party has been served. Judge Navarro cited in a footnote to the title insurance decisions issued by Judges Dorsey and Gordon that so held, based on *Gentile*. Judge Navarro said that *Gentile* rewrote the removal statute to insert a condition that the law does not impose. She also noted that the law was rewritten in 2011 to clarify that "a defendant may remove a case unless a forum defendant has been properly joined and served." She acknowledged that there is a risk that "technological advancements have furthered new forms of potential 'gamesmanship' in the form of snap removal," but that that was an issue for Congress, not the courts.

Thus, all or most of the federal court cases will likely now remain on hold until Judge Du takes up the issue of the effect, if any, of the Fidelity manual in the interpretation of title insurance endorsements in the *Wells Fargo* remand. Even that ruling will likely not dispose of all federal cases, however, since each policy had a different set of endorsements and many cases concern policies issued by title insurers other than Fidelity. Also, there are now a number of pending cases in several state courts, proceeding on different schedules, and your editor is not aware of any state court action having been designated as the "lead" case as was the *Wells Fargo v. Fidelity* case.

The Nevada homeowner association lien cases have several longer-term ramifications for the title industry. This would be the first time in which a court interprets the contours of an endorsement's coverage based on a manual issued by a title insurer. Underwriting lawyers write endorsement manuals with title officers as the audience, not customers or federal judges. Also, one could imagine that one insurer's manual might be very different from any other insurer's manual, especially given the fact that ALTA does not issue official guidance on the interpretation of its endorsements. Should an endorsement be interpreted differently depending on which insurer issued it? In addition, these decisions are among the first to interpret a number of endorsements, including the CLTA 100 and ALTA 5 and 5.1. Finally, these decisions show that, while most title risks are limited to the facts of one parcel's title, an endorsement coverage that is in any way dependent on the interpretation of a statute can cause a large cluster of similar claims.