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The Title Insurance Law Journal

Title Insurance and Escrow

Policy Does Not Insure Ability to Later Divide and Build on Insured Parcels

Kiritsis v. Stewart Title Guar. Co., ___ *F.Supp.3d* ___, 2024 WL 473790 (D.Md. 2024) (permanent citation not yet available).

The title to three insured adjoining lots was not rendered unmarketable by the fact that they may not meet the zoning code minimum lot size that would enable construction of separate homes on each lot.

Vasilios and Jennifer Kiritsis bought property in Ocean City, Md., in 2020. They received a Stewart Title Homeowner's policy. The insured land is Lots 1, 2 and 3 in Block E on the Revised Plat No. 1 of Oceanbay City, recorded in 1955. The existing home straddles the three lots.

In February 2023, the Kiritsises signed a contract to sell the property to a developer, who intended to tear down the house and build three houses, one on each lot. The Kiritsises allege that the Director of Planning and the Zoning Administrator for the Town of Ocean City "confirmed in writing" that the current minimum lot area requirements in the zoning code would not apply to these lots because they had been platted before the current size ordinance was adopted prior. However, in March of 2023, a neighbor objected. The neighbor appears to have filed a lawsuit seeking an order declaring that the insured property "consists of a single lot as opposed [to] three separately buildable lots." However, the complaint was not in the record, so the references to the neighbor's claim were fuzzy.

The developer asked Stewart Title to insure its title. Stewart Title was unwilling to issue that policy "without excepting to the Neighbor's Claim," as the Kiritsis complaint phrased the lawsuit. The Kiritsises now allege that closing has been put on hold. They submitted a claim notice to Stewart Title, claiming their title is unmarketable. They also said that the insurer has a duty either to insure title free of an exception, or to "defend title" by bringing a declaratory judgment action.

Stewart Title declined to take either action. The Kiritsises sued the insurer. Both sides filed summary judgment motions. In this decision, the court held that the land's title is not unmarketable, and the insurer

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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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has no duty to defend it.

The court began by reiterating that Maryland does not follow the rule of many other states that an insurance policy is "construed most strongly against the insurer." Unless there is some indication that the parties intended a technical meaning, the terms of the policy "are given their customary, ordinary, and accepted meaning," which is the "meaning a reasonably prudent layperson would attach to the term." *Bushey v. N. Assurance Co. of America*, 766 A.2d 598, 600 (Md. 2001). If reasonably prudent layperson might find two interpretations, the court resorts to extrinsic or parol evidence, with the ambiguity being construed against the insurer. The court said that the relevant language in the policy is not ambiguous.

The Kiritsises argued simply that Covered Risk 29, the indemnity when "Title is unmarketable," was invoked because the neighbor's claim caused the contract buyer to at least delay the closing. The court said that the Covered Risk was not invoked because the buyer's hesitancy was not about title:

> The Court finds that the contract is clear that "unmarketable" refers to the Title, not the Property itself. If a storm destroyed part of a building on a piece of property, it would certainly make the property less desirable or "marketable," but it would have no impact on whether the title to the property was valid. See *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275, 278 (4th Cir. 1998) (discussing the distinction between marketable title and marketable property). "Title refers to the legal ownership of a property interest," such that one holding title to a property interest can defeat adverse claims of ownership. *Id.* "[M]arketable title is one which is 'free from reasonable doubt in law or fact as to its validity.' " *Id.* … Thus, the term "unmarketable," as used in Covered Risk 29 of STGC's standard Title Insurance Policy, unambiguously refers to situations where the validity of the insured's Title is in doubt, not situations where the covered property is simply less appealing to a buyer. As there is no evidence to suggest that the parties intended a technical definition, the term must be given this "customary, ordinary, and accepted meaning." *Bushey*, 766 A.2d at 600.

Next, the court considered whether, as it phrased the issue, Stewart Title was "required to prosecute or defend an action challenging the Neighbor's Claim." The court said that the correct analysis was to determine if *the Kiritsises'* claims "potentially fall within the scope of the policy." The court did not conduct a four-corners analysis of a complaint filed by the neighbor, because the complaint was not in the record.

Still, the court said that there was no potential for coverage. Stewart Title argued that the zoning regulations were not covered because they do not impose an encumbrance on title. The court reached the same conclusion, but by a different path:

> The Court finds that it is the existence of the Neighbor's Claim, rather than the zoning regulation, that Plaintiffs allege makes their Title unmarketable. Still, because the Neighbor's Claim does not relate to the legal Title of the Property but rather to the underlying use of the Property, it is not a matter of Title within the scope of the Title Insurance Policy.

The court referenced the holding of *Stewart Title Guar. Co. v. West*, 676 A.2d 953 (Md. Ct. Spec. App. 1996), that the policy insures title. It quoted the Fourth Circuit's definition of title in *Haw River Land & Timber Co.*:

> Title refers to the legal ownership of a property interest so that one having title to a property interest can withstand the assertion of others claiming a right to that ownership ... [A]n insurance policy insuring legal title covers only the right of the owner to assert ownership against others claiming ownership or an interest in that ownership.

Thus, the court reached the conclusion that the Neighbor's Claim did not invoke coverage because it was not about ownership:

> While the Neighbor is asserting a legal claim regarding the Property, the claim has nothing to do with ownership of the Property. The Neighbor's Claim seeks a judicial order that Plaintiffs' Deed "consists of a single lot as opposed [to] three

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separately buildable lots." … As [the Kiritsises] describe it, the Neighbor's Claim does not assert any ownership interest. It is not the purpose of title insurance to insure against any possible claim brought against owners of a property; rather, as its name suggests, its purpose is to insure against claims to the title of the property at issue. The Covered Risks that Plaintiffs cite to in the Title Insurance Policy, including Covered Risks 9 and 29, only refer to claims that encumber or affect the marketability of the Title to the Property. Contrary to what Plaintiffs argue, … the fact [is] that the Neighbor's Claim does not concern the validity of the Title or, in other words, the validity of the ownership of the Property. See *Haw River Land & Timber Co.*, 152 F.3d at 276, 279 (finding ordinance prohibiting plaintiff that purchased timber deed to 712 acres of land from harvesting timber on 179 of those acres did not render title to the property "unmarketable" for purposes of title insurance coverage).

The court also rejected the Kiritsises' argument that the policy insured that there were three buildable lots, based on the legal description in Schedule A:

> Additionally, the legal description of the property in the Deed and Title Insurance Policy as being comprised of "Lots Nos. 1, 2, and 3 in Block E" does not change the analysis. Even viewing the facts in the light most favorable to Plaintiffs, the Neighbor's Claim does not call into doubt the validity of this description as it relates to the Property's ownership. Because the Neighbor's Claim does not challenge the validity of Plaintiffs' legal Title to the Property, it could not possibly be covered by the Title Insurance Policy, and dismissal of this case is appropriate.

This is an excellent decision. Perhaps the most fascinating aspect is the court's statement in the last footnote that, because there was no Covered Risk invoked, the court did not need to even address the zoning exclusion.

Title Insurance

Street Address Does Not Cause Policy to Insure Lien on Parcel Not Mortgaged

Deutsche Bank Nat'l Trust Co. v. Stewart Title Ins. Co., ___ F.Supp.3d ___, 2024 WL 680157 (S.D.N.Y. 2024) (permanent citation not yet available).

A loan policy did not insure that a mortgage encumbered a second parcel not described in the mortgage because Schedule A listed a street address that pertained equally to both parcels.

In 1999, Dennis J. Gandley bought a home in Mastic Beach, N.Y., with the street address of 23 Hemlock Drive. The seller was Robert Coco. A year later, he bought the vacant lot next door from Steven and Frances Cooperman. The legal description for the home parcel was Lot 23 of a subdivision. The vacant parcel was Lot 24.

Gandley borrowed money from IndyMac Bank. The loan was secured by a mortgage on both lots. In 2005, Gandley deeded only Lot 23 (the house lot) to a corporation he controlled.

In 2006, Gandley got a refinance loan from IndyMac, which paid off the prior loan. Gandley's loan application identified the property by the street address of 23 Hemlock Drive. IndyMac got an appraisal valuing the house lot only. Tax information was ordered for Lot 23, but the parties disagree about who ordered it.

IndyMac engaged Homestead Title Agency & Settlement Company for title and settlement. Homestead issued a title report (commitment) as agent of Stewart Title. That report identified only vacant Lot 24 in Schedule A, possibly because the owner was identified as Gandley and he no longer held title to Lot 23. Schedule A also said "Premises described herein are known as: 23 Hemlock Drive." Schedule A also referenced a "deed from Regina Wetzel," which was the deed conveying Lot 24 to Gandley's grantors, the Coopermans.

IndyMac did not identify the mix-up. The loan closed and the mortgage was recorded. Homestead issued a Stewart Title policy insuring the mortgage as a lien on Lot 24. Schedule A recited Lot 24, the vesting deed from Cooperman to Gandley for Lot 24, and "Property Address: 23 Hemlock Drive, Mastic Beach, New York 11951."

In 2010, IndyMac got a foreclosure report that stated that "Dennis Gandley is not the record owner of 23 Hemlock Drive" and that the 2006 mortgage did not "encumber the property assessed as such." The court noted that there was no evidence that IndyMac took steps to reform the 2006 mortgage or the policy at that time. Instead, IndyMac assigned the loan to Deutsche Bank National Trust Company, as trustee.

In 2015, Deutsche Bank began a foreclosure action. The mix-up had been detected by then, because Deutsche also sought reformation of the mortgage. However, the court twice refused to issue an order reforming the mortgage to include the house parcel. The foreclosure judgment was entered in 2021 as to Lot 24 only.

Deutsche Bank then made a policy claim to Stewart Title. The insurer denied the claim. Deutsche Bank brought this action, for declaratory judgment and breach of contract. Both sides moved for summary judgment. The court granted summary judgment to Stewart Title.

The court began with a thorough summary of New York insurance contract interpretation principles. One such rule is that, if the contract is ambiguous, "the court may accept any available extrinsic evidence to ascertain

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the meaning intended by the parties during the formation of the contract." *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London, England*, 136 F.3d 82, 86 (2nd Cir. 1998). If such extrinsic evidence does not yield a conclusive answer, the court may apply other rules of contract construction, including the rule of *contra proferentem*, which provides that where an insurer drafts a policy "any ambiguity in [the] ... policy should be resolved in favor of the insured." *McCostis v. Home Ins. Co.*, 31 F.3d 110, 113 (2d Cir. 1994).

Deutsche Bank argued that the policy unambiguously insured the existence of a mortgage lien on both Lots 23 and 24 because it contained the street address. In the alternative, it argued that, if the policy was ambiguous, extrinsic evidence showed that lender and insurer intended to enter into an insurance policy that covered both lots. Stewart Title said the policy unambiguously did *not* insure Lot 23 based on the street address.

Deutsche Bank asked the court to *find* an ambiguity in the policy based on the "copious extrinsic evidence" indicating that IndyMac expected to receive a mortgage on Lot 23. The court refused to make that leap, because "the law requires us to ignore such evidence for purposes of determining whether the Policy is ambiguous in its coverage." It cited *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 163, 565 N.Y.S.2d 440, 566 N.E.2d 639 (N.Y. 1990), for its holding that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."

Stripping the outside information away, the court said, "Deutsche Bank in the end points to a single line in the Policy to support its argument that the Policy covers Lot 23," being the recitation of the street address. Deutsche Bank said this was a reference to both Lot 23 and Lot 24. However, the only evidence it offered in support was the testimony of a Stewart Title employee that the address could refer to "either tax lot ... because lot 24 is vacant." In other words, the court said, "the address is not itself a definitive indicator that the subject of the Policy included Lot 23."

Further, the court said, the policy contained several more specific and precise descriptions of the property, including the legal description, a Subdivision Map Identifier, the deed from Wetzel and a Section/Block/Lot number of "District 0200, Section 982.10, Block 02.00, Lot 024.00." All of those referred only to Lot 24.

In addition, the court said, the address shown in the policy was "the only possible candidate for the street address of Lot 24 and thus the only address that could have been put on the 'Property Address' line." It said that a "much harder case would be presented" if Lot 24 had been associated with a different street address, or if the address were the only identifier for the parcel whose title was insured. The court said:

> If the street address were the only location identifier in the Policy, the Policy would be ambiguous as to precisely what it was covering. But when the street address is read in conjunction with all the other location-identifying references, it is obvious that the intent of the document is to insure title to Lot 24, particularly since this is the only property listed … and that the only purpose of putting a property address was to allow for the location of the property by a real world indicator. As the Second Circuit has stated in reference to New York contract law, "where consideration of the contract as a whole will remove the ambiguity created by a particular clause, there is no ambiguity." *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 300 (2d Cir. 1996). So too here. Thus, even if it could be said that the address created any ambiguity as to what property was covered by the Policy, it is definitively resolved by the specificity of the other references to Lot 24. See generally *Petty v. Fid. Union Tr. Co.*, 238 A.D. 96, 100, 263 N.Y.S. 1 (2d Dep't 1933) ("[A] particular description in a deed or other instrument will prevail over one general in its character ...."), aff'd, 262 N.Y. 690, 188 N.E. 123 (N.Y. 1933).

The court said its conclusion was bolstered by New York law construing the effect of a street address as stated in a mortgage:

> Case law reflects that in the case of a mortgage instrument, "when there is a discrepancy between the street address and the legal description of a piece of real property, the legal description controls." *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 219 A.D.2d 186, 190, 641 N.Y.S.2d 680 (2d Dep't 1996) (citing 1A Warren's Weed, New York Real Property, Description, §§ 11.01-11.02 (4th ed.)); accord *U.S. Bank N.A. v. Jalas*, 195 A.D.3d 1122, 1125, 149 N.Y.S.3d 638 (3d Dep't 2021) ("[L]egal description in the mortgage ... controls ... regardless of the street address."); accord *SRP 2012-5, LLC v. Corrao*, 167 A.D.3d 798, 799-800, 90 N.Y.S.3d 76 (2d Dep't 2018); *Wells Fargo Bank NA v. Podeswik*, 115 A.D.3d 207, 213, 981 N.Y.S.2d 230 (4th Dep't 2014). Thus, a "reasonably intelligent person" who is "cognizant of the .... terminology as generally understood" in the real estate industry, *Lightfoot*, 110 F.3d at 906, would understand that the same principle would apply in the context of a title insurance policy, which is itself usually tied to the issuance of a mortgage and was so tied in the instant case… .

The court said its conclusion was further supported by *Deutsche Bank Nat. Trust Co. v. Fadili*, 2011 WL 4703707 (D.N.H. Oct. 4, 2011), which interpreted a title insurance policy under "nearly identical facts in that the disputed title insurance policy contained a street address of a residential lot and the legal description of a vacant lot." The *Fadili* court noted that a street address is "meaningless information for title research" and that to rely on it alone "would turn the one-page legal description attached to the policy into mere surplusage, a construction practice that is judicially disfavored."

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Also, *Fadili* observed, "it is not reasonable to construe the policy as applying to the property identified by the street address, in that titles are not indexed by street address in the registry of deeds."

The court distinguished the case cited by *Deutsche Bank, Demetrio v. Stewart Title Ins. Co.*, 124 A.D.3d 824, 3 N.Y.S.3d 75 (2d Dep't 2015). It said that, in *Demetrio*, the issue was not between a street address and a legal description but rather between two legal descriptions.

Finally, the court addressed the lender's equitable argument that IndyMac lent money on the assumption that it would have a mortgage on the house, and that Homestead made a "mistake" and Stewart Title should be "on the hook because it created the series of events that caused Deutsche Bank's loss." First, the court held, such arguments "do nothing to aid in determining whether the Policy is ambiguous as to its coverage." Second, Deutsche had not pled a claim for reformation of the policy, which "would have allowed the Court to examine equitable principles, which might have included an inquiry into who was at fault for starting the chain of events that caused the Policy and the 2006 Mortgage to cover only Lot 24." The court did not address Stewart Title's further argument that Deutsche was judicially estopped from seeking reformation of the policy only, by the foreclosure court's refusal to allow the lender to seek reformation of the mortgage.

The court entered summary judgment in Stewart Title's favor.

This is an excellent decision. Yet again, the issue was not a defect in the title insured, but the assertion by a lender that the title insurer should pay because the lender did not have a lien on the intended parcel.

Stewart Title was ably represented by Jenna Alexandra Gallagher and title veteran Thomas G. Sherwood of Thomas G. Sherwood LLC (now Sherwood & Truitt LLC), Garden City.

Title Insurance

Federal Judge Lines Up With Nevada Supreme Court in Homeowner Assessment Case

HSBC Bank USA N.A. v. Chicago Title Ins. Co., ___ F.Supp.3d ___, 2024 WL 325276 (D.Nev. 2024) (permanent citation not yet available).

Following the Nevada high court's ruling that policy endorsements do not cover post-policy assessment lien issues, federal chief judge Du has withdrawn her prior contradictory ruling in this case that there was such coverage under a CLTA 100 endorsement.

This is one of the many title insurance coverage lawsuits that was spawned by the Nevada Supreme Court's ruling that some homeowner association assessments have superpriority over first deeds of trust. As previously reported, Judge Du previously declared in this case that paragraph 1 of the CLTA 100 endorsement gave protection against such assessments, even though they were levied years after the policy date.

Paragraph 1(a) of a CLTA 100 endorsement protects against the effect of restrictions whose enforcement that can cut off, impair or subordinate the insured deed of trust. Judge Du had ruled that this seemingly straightforward indemnification is invoked by post-policy association assessments, because the liens were the product of the recorded declaration of restrictions.

The Nevada Supreme Court took on the same issue in *Deutsche Bank Nat'l Trust Co. as Trustee v. Fidelity Nat'l Title Ins. Co.*, 536 P.3d 915, 139 Nev. Adv. Op. 45 (Nev. 2023), reported in the December, 2023 issue. The high court ruled that there was no such post-policy coverage for a number of reasons, including that assessments do not take their priority date from the recording of the declaration.

After the *Deutsche Bank* decision was issued, Judge Du told the parties to submit new summary judgment briefs. In this decision, she reversed her prior ruling for the lender. She began by translating the high court ruling into the formula espoused by the lenders, that it was the declaration that subordinated the deed of trust simply by granting the association the power to assess. She framed the Supreme Court ruling this way:

> *Deutsche Bank* turns on the key holding that the NRS Chapter 116 lien is entirely statutory, so the particularities of specific CC&Rs are irrelevant because CC&Rs never cause the losses at issues in this and similar cases. *See* 536 P.3d at 926. HSBC finally argues that Chicago Title still could have breached its duty to defend even though there is no coverage under *Deutsche Bank*, but the Court rejects that argument in the same way that the Nevada Supreme Court rejected it in *Deutsche Bank*: because there has "never been a potential for coverage[,]" "the duty to defend did not arise[.]" 536 P.3d at 927.

Judge Du also rejected all of the lender's attempts to distinguish the facts in the present case from those in *Deutsche Bank*. She also observed that HSBC did not challenge her prior rulings that there was no coverage for the post-policy assessments under paragraph 2 of the CLTA 100 or the ALTA 5.

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Agent Focus

Court in Agency Employment Case Applies New Federal Rule to Strike Expert Testimony

Cleaver v. Transnation Title & Escrow, Inc., ___ F.Supp.3d ___, 2024 WL 326848 (D. Idaho 2024) (permanent citation not yet available).

A federal court has applied recently modified Rule 702 to exclude an expert's testimony about employment discrimination, because his opinions were not based on a reliable method or adequate supporting data.

Kristina Cleaver was a salesperson for Transnation Title & Escrow Inc., doing business as Fidelity National Title Company, for two years. She claims Fidelity abruptly took her off a "lucrative" account because the lead real estate agent, Jeffrey Sweet, "refused to continue working with her because she is a woman." Cleaver sued Fidelity, alleging gender discrimination, and seeking lost commissions.

Cleaver designated Kris Miller as her expert witness in "title and escrow company management and procedures." Fidelity moved to exclude Miller's testimony. The court granted the motion. The decision is worth reading because the court provides a good discussion of the recently modified Federal Rule 702 on expert testimony.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. The witness must possess special "knowledge, skill, experience, training, or education." The testimony must be that which "will help the trier of fact to understand the evidence or to determine a fact in issue." The opinions must be based on "sufficient facts or data" and "the product of reliable principles and methods." Those principles must be "reliably applied" to the facts of the case.

The Ninth Circuit has summarized Rule 702 as follows: "expert testimony must (1) address an issue beyond the common knowledge of the average layman, (2) be presented by a witness having sufficient expertise, and (3) assert a reasonable opinion given the state of the pertinent art or scientific knowledge." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001), citing *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997). The district court's role is to be a gatekeeper. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). The court considers the relevance and reliability of the proffered opinions. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141. The court is to focus "not on 'what the experts say,' or their qualifications, 'but what basis they have for saying it.'" *United States v. Holguin*, 51 F.4th 841, 854 (9th Cir. 2022).

Effective Dec. 1, 2023, Rule 702 was amended to clarify that expert testimony must meet all of Rule 702's substantive standards for admissibility by a preponderance of the evidence. The Committee Notes to the 2023 Amendment state that "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." The committee said that "Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. Comm. Note (2).

Miller opined that Fidelity's removal of Cleaver from the Sweet account violated its own company equal opportunity and harassment policies, and also "industry standards, regardless of the industry." He said that Fidelity's actions were discriminatory because there is no setting in which removing an employee from an account due to gender is not discriminatory. The court said these "general, blanket opinions" were legal conclusions. An expert witness cannot give an opinion on an ultimate issue of law. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). An expert may opine on an ultimate factual issue, but he "cannot simply tell the jury the result it should reach," the court explained, citing *United States v. Schneider*, 704 F.3d 1287, 1293 (10th Cir. 2013).

Further, the witness must explain the basis for his opinion. The court said that "Miller does not explain the basis for his conclusory opinion that Fidelity discriminated against Cleaver." The court said this about his opinion on industry standards:

> … Miller's general, vague opinion that Fidelity violated industry standards, regardless of the industry, is not based on a reliable principle applied to the facts. For example, Miller does not even identify an industry standard.

The court also found Miller's opinion about the amount of compensation she lost to be inadmissible. Miller based his opinion on an Income Loss document that he did not prepare. Miller belatedly received income information, but did not base his opinion on that data. The court said that Miller's own deposition testimony showed that he was "simply parroting Cleaver's method, analysis, and calculations to determine damages." The court said that an expert may not do so:

> An expert witness may not simply act as a conduit to parrot a party's position on an issue. "Expert opinions ordinarily cannot be based upon the opinion of others whether those opinions are in evidence or not." *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985). Rule 703 of the Federal Rules of Evidence "does not permit an expert to simply repeat or adopt the findings of another expert without attempting to assess the validity of the opinions." *La Gorce Palace Condominium Assoc., Inc. v. Blackboard Specialty Ins. Co.*, 586 F. Supp. 3d 1300, 1306 (S.D. Fla. 2022)… Likewise, an expert may not simply parrot or rely on a party's allegations and theories. *Sec. & Exch. Comm'n v. Lipson*, 46 F. Supp. 2d 758, 763-67 (N.D. Ill. 1998).

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"An expert's obligation is not to form [his] opinions first and then later be apprised of evidence that may support them; [he] must first be apprised of the evidence and *then* form [his] opinions." Flores v. FCA US LLC, No. 1:17-CV-00427-JLT, 2019 WL 3231755, at *5 (E.D. Cal. July 18, 2019).

Thus, the court said, Miller's opinions, by his own admissions in his deposition, were not based on "facts or data or the product of reliable principles and methods."

Further, Miller "exercised no expertise in establishing a method to calculate damages, and his opinions are not based on any independent analysis of any facts or data."

Agent Focus

Court Dismisses Title Agent Suit Against FedEx For Promised Discount

Metropolitan Title Agency, Inc. v. Federal Express Corp., ___ F.Supp.3d ___, 2024 WL 519798 (S.D.Ohio 2024) (permanent citation not yet available).

An Ohio federal court has dismissed a suit by two title agents against Federal Express to recover excess fees they paid when the shipper stopped giving discounted rates in exchange for a promise of exclusivity.

Metropolitan Title Agency Inc., and Mid America Land Title Agency Inc. do business together as M+M Title. They struck a deal with FedEx to use the company exclusively for package delivery, in exchange for a discounted rate. FedEx gave the discount until 2019.

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

M+M Title claims that the reimbursement and credit accounted for overbilling from January of 2021 to July of 2021, but not for the period from Oct. 23, 2019, to Dec. 31, 2020. M+M Title says the amount still owed is about $85,000. M+M Title sued Federal Express in Ohio federal court, claiming breach of contract, unjust enrichment and conversion.

M+M created airbills through the FedEx Ship Manager Application. In that program, when the user clicks "Ship/Continue," he or she agrees to the Terms of Use and Terms and Conditions, which the court euphemistically called the Service Guide.

One section of the Service Guide, entitled Invoice Adjustments/Overcharges, says "Requests for invoice adjustments due to an overcharge must be received within 60 days after the original invoice date.... [FedEx] will not be liable for any invoice adjustment unless you comply with the notice requirements described above." Another section, labeled Limitations on Legal Actions, says that any lawsuit about a package must be brought within one year from the date of delivery of the individual package.

Federal Express moved for summary judgment. The court granted the motion. It held that M+M Title "had no contractual right to receive the discounts." Further, it said, the lawsuit was filed too late based on the above terms of the Service Guide.

The court took pains to list the three court decisions that have enforced the 60-day adjustment request in the Service Guide, *On the House Syndication, Inc. v. Fed. Express Corp.*, 79 F. App'x 247, 249 (9th Cir. 2003); *Aretakis v. Fed. Express Corp.*, No. 10-1696, 2011 WL 1226278, *5 (S.D.N.Y. Feb. 28, 2011), report and recommendations adopted at 2011 WL 1197596 (S.D.N.Y. Mar. 25, 2011); and *Soto v. FedEx Express Corp.*, No. 09-365, 2009 WL 2146600, *2 (S.D.N.Y. Jul. 17, 2009)). The court also cited two decisions as authority for its holding that "courts routinely enforce contractual provisions that shorten statutes of limitations, including the limitation on actions provision in the FedEx Service Guide."

In a footnote, the court added this:

> There is also no equitable or public policy reason against enforcement of the Service Guide. The Sixth Circuit has enforced the terms of the Service Guide as against a business customer, *Headstream Tech., LLC v. FedEx Corp.*, No. 22-1410, 2023 WL 1434054, *4 (6th Cir. Feb. 1, 2023), and as Defendant notes, federal courts have even enforced the Service Guide against a pro se plaintiff. … Here, Plaintiffs are sophisticated business entities, and their President is an attorney who has reviewed and revised "hundreds" of contracts.

M+M Title argued that FedEx had waived these limitations periods by reimbursing it for discounts not given for the later period of time. The court had to really work to agree with Federal Express that it had not waived those provisions. It held that there was no waiver by FedEx in part because M+M did not even know the limitations provisions existed until July of 2021.

The court also strained to find that M+M's conversion claim failed. The title agents seemed to make a good argument, saying:

> FedEx has already conceded through its actions that M+M Title was improperly overbilled. FedEx's attempts to pick and choose which funds to return and which to improperly withhold is not sufficient to shield them from a claim for conversion. Moreover, from the outset of this litigation, M+M Title has consistently claimed that FedEx is specifically withholding $84,524.29 in funds that rightfully belong to M+M Title.

The court said the claim failed because FedEx had no special duty beyond the contract, and because the money owed was not earmarked. It quoted *RAE Assocs., Inc. v. Nexus Comm'ns,*

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Inc., 2015-Ohio-2166, 36 N.E.3d 757, ¶ 31 (10th Dist. 2015):

> In order to maintain an action for conversion of money, the plaintiff must establish that the funds were "earmarked," that is, that the defendant had an obligation to deliver a specific corpus of money capable of identification and not merely that the defendant had an obligation to pay a certain sum as a general debt.

This court said the title company's money was not earmarked, so the claim failed:

> Plaintiffs, as stated above, merely claim that Defendant overcharged them by a specific amount, $84,524.94. They do not identify a specific set of money, e.g., particularly marked bills or proceeds from a particular wire transfer, that Defendant is unlawfully retaining.

Escrow Matters

Claims Survive Against Trustee on Deed of Trust

Carpenter v. Fawcett, ___ F.Supp.3d ___, 2024 WL 553696 (W.D.Wash. 2024) (permanent citation not yet available).

Claims by the owner-borrower against the title insurer trustee on the deed of trust survive for now, with the court deferring rulings on several issues that may be important to trustees in the State of Washington.

John and Becky Carpenter borrowed money from Ronald and Carol Fawcett. They signed a deed of trust that named First American Title as trustee. The Carpenters later signed an amended note. They paid some of the debt, and then filed a bankruptcy petition.

The Carpenters have sued the Fawcetts and First American. The Carpenters claim that First American violated the Washington Consumer Protection Act by resigning as trustee when it had a duty to reconvey instead.

First American moved to dismiss. It argued that the company could have no duty to reconvey because it had resigned as trustee. The company argued that the Carpenters had admitted the resignation in their pleading. The court said that the resignation was inconsistent with the facts, since it saw no recorded resignation. However, it noted the holding of *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, that plaintiffs can plead themselves out of a claim by alleging details contrary to their claim.

First American also sought dismissal of the Carpenters' claim under the Washington Consumer Protection Act, because they had not alleged that the conditions for reconveyance under the Deeds of Trust Act, RCW 64.24.110, had been met. In requesting reconveyance, the borrowers must show that they have paid the debt in full. The Carpenters alleged that they had paid about $40,000 on a debt of about $90,000, not payment in full. In addition, the court said, the Carpenters did not allege that "they recorded a notarized declaration of payment and sent it to the beneficiary and trustee, which are also requirements for reconveyance under RCW 61.24.110." The court cited *Smith v. First American Title Ins. Co.*, No. C11-2173, 2014 WL 2511621, at *2 n.1 (W.D. Wash. June 4, 2014), as authority.

The court dismissed the claim, but gave permission to amend and refile.

The court did not reach three other arguments made by First American: that the Consumer Protection Act does not apply to a trustee's conduct under the Deeds of Trust Act, and that the statute of limitations had run.

The third legal issue was First American's claim that the Carpenters were judicially estopped from suing it for money because they had not listed any claim against the company in their recent bankruptcy schedules. The court approved the argument but reserved its ruling for later, saying:

> … First American correctly argues that, in general, "a plaintiff who fails to list a claim on their bankruptcy schedules and subsequently obtains a court order approving their Chapter 13 bankruptcy plan is judicially estopped from pursuing undisclosed claims existing at the time of the approval." See *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001); *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013); *In re Kelley*, 199 B.R. 698 (B.A.P. 9th Cir. 1996). Judicial estoppel issues are more appropriately resolved in connection with a motion for summary judgment, if necessary.

Escrow Matters

Cyberattack Warrants Extension of Closing Date Set By Court Order

In re Strudel Holdings LLC, 656 B.R. 404 (Bkcy.S.D.Tex. 2024).

A bankruptcy court has extended the closing date set by court order that was to occur on Nov. 22, the day of the Fidelity National Title cyberattack, because that attack rendered it impossible to close that day.

Strudel Holdings LLC is a bankruptcy debtor in Texas. A Strudel entity owns an 800-acre ranch outside of Aspen. An auction sale was held for the ranch. On Nov. 9, 2023, the court signed an order approving the sale of the ranch to Chiron AVR LLC and certain affiliates. The purchase price is $30.5 million. Fleeger Family First LP made the second-highest bid of $30 million. The order says that, if Chiron fails to close by Nov. 22, 2023, the seller will accept the Fleeger bid and close with it.

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The evening before the scheduled closing, the buyer sent an email to the seller attaching a Notice of Default because they had been wrestling with an issue about assessments due to the Aspen Valley Ranch Homeowners Association Inc. The buyer demanded that the default be cured by 10:30 a.m. ET on Nov. 22, the closing date. If the default was not cured, the buyer said, it would seek an order compelling performance under the purchase agreement and enjoining a sale to Fleeger. The buyer said it was also open to a one-week extension of the closing date.

The court says that "things became more complicated because on Nov. 21, Fidelity National Title Insurance Co.—the title company and escrow agent under the Purchase Agreement—publicly announced" in an 8-K that it had suffered a cyberattack, forcing it to block access to some of its systems and disrupting title and escrow services. Seller and buyer became aware of the attack the morning of Nov. 22, while they were still working toward closing.

The decision explains that seller and buyer then "shifted their focus to working on an extension to the closing date." On the afternoon of Nov. 22, they signed an amendment to the Purchase Agreement to extend the closing date to Nov. 28. The seller's lawyer told Fleeger's lawyer about the attack on Fidelity and asked him or her to agree to the extension. The lawyer did not respond that day.

Nov. 23 was Thanksgiving Day. The debtors filed a Notice of Postponement of Closing with the court that day. On Nov. 24, Fleeger's counsel said that the seller was required to close with his client, based on the court order deadline. There were more court filings. The court held two hearings, and took testimony. In this order, the court said that senior representatives of both debtor and buyer had testified that "they fully intended on working through their disputes and closing on November 22." They both said that "the cyberattack made that impossible." The court found both witnesses to be very credible.

The court said that it might have held that Fleeger had earned the right to buy if the debtor and buyer had merely wanted to extend closing to work out an issue, or if the Fidelity cyberattack lockdown had occurred after business hours on the scheduled closing date. However, the court said, the cyberattack was not a mere red herring, as Fleeger asserted:

> But what makes this case truly extraordinary is that Fidelity—the escrow agent and title company—publicly disclosed a cyberattack that impaired its systems the day before November 22. On the morning of November 22, Seller and Purchaser independently confirmed with Fidelity that closing could not occur on that day. It is true that the parties had not settled their disagreements before learning about the cyberattack. But one cannot consider that in isolation. They knew they could not close by 12:00 p.m. Witness testimony and contemporaneous communications between the parties provides clear and convincing evidence that the cyberattack changed their focus from closing to solely negotiating an extension. Seller's November 23 Notice of Postponement of Closing also says the cyberattack made it impossible to close. This type of extraordinary circumstance warrants relief from the Sale Order.
>
> This Court has authority to amend its Sale Order. And, based on the record, it exercises it to give Purchaser appropriate and limited relief. Back-Up Bidder is a sophisticated investor who wants to buy the ranch. And that is understandable. But it would be manifest injustice against Purchaser to allow Back-Up Bidder to step in as the purchaser because of an unforeseeable attack on Fidelity—an essential closing party—that was not within Purchaser's or Seller's control. This is exactly the type of extraordinary circumstance that merits use of Rule 60(b)(6).

Escrow Matters

No TILA Rescission on Purchase Loan and No Claims Against Closer

Cabrera v. Nazor, 2024 WL 310523 (D.N.J.) (unpublished).

A home buyer had no right under TILA to rescind her purchase money loan; also, she had no claims against the closing agent under TILA, the Fair Credit Reporting Act or the Fair Debt Collection Practices Act.

In 2023, Lolita Cabrera bought a house in Bayonne, New Jersey for $840,000. She got a loan from Movement Mortgage, LLC. Main Street Title Agency was the settlement agent.

Two days after closing, Cabrera held a live steam on her Instagram account to talk about her excitement at having bought the house. A person named Orlando Acosta joined the live stream. Cabrera told Acosta that her lawyer had told her that her loan would be sold at some point. Acosta began offering terrible legal advice. He said that Cabrera "was a victim of mortgage fraud." He asked Cabrera if she had received "the right to rescission documents and original ink signature deed at closing." When she said no, he told her to talk to her lender and "ask them not to record her original ink signature deed."

Cabrera told her loan officer, lawyer and two Main Street Title people that she did not want her deed recorded. The Main Street person allegedly asked her if she "would be keeping the property or rescinding the transaction." She says that she told him that "she was doing both." She demanded that Main Street return her equity money of

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about $60,000 to her. Cabrera now alleges that, in a later call, she told Main Street that "a forensic mortgage audit would be conducted, and a complaint [would be] sent to the FBI Mortgage Fraud Department, U.S. Attorney General's office, the State of New Jersey Attorney General's office, the IRS Commissioner's office, and the Office of the Comptroller of Currency."

Cabrera sued many people, including Main Street Title and several of its employees. Main Street Title moved to dismiss all claims against it. The court granted the motion.

Cabrera's first claim against the lender and Main Street was that they had violated the Truth in Lending Act by not giving her TILA rescission notices. The right to rescind certain mortgage loans is mandated under 15 U.S.C. § 1635. The court pointed out that there is no right to rescind a purchase money loan, citing *Perkins v. Central Mortgage Corp.*, 422 F.Supp. 2d 487 (E.D. Pa. 2006); 15 U.S.C. § 1635(e)(1); and regulation 12 C.F.R. § 226.23(f)(1).

Further, the court said Cabrera did not qualify for rescission because the remedy is limited to a loan on the borrower's principal dwelling. 15 U.S.C. § 1635(a). Cabrera's complaint alleged more than once that she bought the Bayonne house as a "second home." The court cited numerous decisions holding that TILA rescission does not apply to second homes.

The court also based its dismissal of the TILA claim as to Main Street on the fact that it was not the lender and had no power to rescind the loan.

The court dismissed Cabrera's claim under the Fair Credit Reporting Act also. That law penalizes a person who gives false information to credit reporting agencies. The court dismissed that claim against Main Street because it did not send information about Cabrera to a credit agency, and she did not allege that it had.

The court also dismissed Cabrera's claim based on a claimed violation of the Fair Debt Collection Practices Act. That law defines a debt collector as a person whose principal purpose is to collect debts, or one who regularly collects debt owed to others. The law does not apply to a person who collects debts owed to himself. The court noted that federal courts have "routinely" dismissed FDCPA claims against title companies, citing *Fisher v. Congress Title*, 2007 WL 77333 (D.N.J. Jan. 8, 2007). aff'd, 247 F. App'x 372 (3d Cir. 2007); *Nwonwu v. Brill Title Co.*, 2022 WL 17093947 (W.D. Mo. Nov. 21, 2022), aff'd, 2023 WL 4344128 (8th Cir. Feb. 3, 2023); and *Shetty v. Lewis*, 2017 WL 1177993 (N.D. Cal. Mar. 30, 2017), aff'd, 704 F. App'x 687 (9th Cir. 2017).

Finally, the court dismissed Cabrera's claim of intentional infliction of emotional distress. The New Jersey standard for such a claim is pretty tough, requiring proof that the conduct was so outrageous and extreme "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Cagno v. Ivery*, 2022 WL 17887231, at *8 (D.N.J. Dec. 23, 2022), citing *Segal v. Lynch*, 413 N.J. Super. 171, 186–87 (App. Div. 2010)). Cabrera alleged that a Main Street employee "was very rude to her and hung up the phone twice." The court said that allegation, even if true, did not come close to meeting the test.

Escrow Matters

Agent Gets Judgment Against Guarantor for Loan Paid Off to Protect Insured

Parsa v. Weststar Title, LLC, 2024 WL 688258 (Tex.App.-El Paso) (unpublished).

Despite the loan guarantor's plea that the situation was "complicated," a Texas appeals court has affirmed entry of a judgment against him for the loan debt paid by the title insurer, for which the agent reimbursed the insurer.

Albert Flores and his cousin sold a parcel in El Paso to Johannsen Development Group Inc. Keyvan Parsa was an owner of Johannsen. The Floreses took back a purchase money loan and deed of trust. Johannsen quickly defaulted. Nonetheless, the Floreses allowed Johannsen to take out a loan secured by the property made by Right Immix Capital, LLC, which the court called RIC. They even subordinated their lien to the RIC deed of trust. Parsa signed a personal guaranty of the RIC note.

Johannsen defaulted on the Flores loan again. Parsa emailed Albert Flores' attorney to say that he and Flores "as partners" wanted to proceed with a foreclosure. In this same email, Parsa said that he had told the servicer for the RIC loan that "Parsa and Flores would assume the payment to them after the foreclosure."

Flores foreclosed. Flores and Parsa formed Montoya Park Place Inc. and Flores deeded the land to that entity for $280,000. Shortly thereafter, IDEA Public Schools agreed to buy the land for $1,950,000.

The deal closed, with both Flores and Parsa signing the deed. They both also signed an affidavit saying that there were no liens on the property. WestStar Title LLC was the closing agent and issued a Fidelity National Title policy to IDEA. WestStar disbursed more than $1.8 million to the Flores and Parsa entity, Montoya Park. The RIC loan was not paid off.

After closing, the agent for RIC asked why it was not paid from closing. Flores signed a sworn affidavit saying that Parsa was aware of the obligation, but "intended to let Fidelity pay the debt."

Fidelity bought the loan and released the deed of trust. It made a demand on WestStar, and the title agent bought the loan from Fidelity.

Flores apparently felt cheated by Parsa. He sued Parsa for a variety of claims, including fraud in a stock transaction. WestStar intervened in the case to make a claim against Parsa based on his personal guaranty and other claims. The trial court granted summary judgment to WestStar. Parsa appealed, and the court affirmed.

Parsa argued on appeal that WestStar had not cobbled together the necessary proof for a judgment on the personal guaranty. The court disagreed.

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WestStar had included the note, the personal guaranty signed by Parsa, and an excerpt from Parsa's deposition in which he admitted having signed the guaranty. WestStar also included an affidavit attaching a payoff statement for the loan and a calculation of the amount now due.

Parsa's defense was his subjective belief that the foreclosure of the Flores deed of trust had extinguished the RIC deed of trust. He said that Flores had promised him this was true. He apparently made no argument about the debt or the guaranty.

The court reviewed the four elements for proof of a claim based on a loan guaranty, saying:

> …[A]n email from RIC's agent … states "We did not receive a payoff from the title company and I was wondering if you knew anything about the closing and why the 1st lien was not paid with the sale?" … Flores testified that Parsa told him that after WestStar "demanded return of the money to satisfy the [RIC] lien, that he had moved the money out of Western Heritage Bank and 'into Mexico.' He refused to say where in Mexico." When Parsa did not resolve the lien, Fidelity was required to step in. Through these proofs, WestStar proved the "occurrence of the conditions upon which liability is based."

Thus, the court affirmed the judgment in WestStar's favor.

Escrow Matters

Hawaii Refuses to Dismiss Claims Against Escrow Company Brought By Lender To Be Paid from Escrow

Wolf v. Heis, 2024 WL 639280 (Hawai'i App.) (unpublished).

The Hawaiian appeals court has reversed the dismissal of a suit against a title agent, holding that a lender whose loan was to be paid from escrow is or may be an intended beneficiary of the escrow.

Beverly H. Wolf was a private lender. Henry J. Heis and his company, Grunewald Equity Funding Inc., served as her loan broker.

Beverly Wolf died. The personal representative for her estate is her daughter, Katherine A. Wolf. She sued First American Title Company Inc. and First Hawaii Title Corp., doing business as Nextitle. Her claim is that, in three escrows those companies conducted, Wolf loans were paid off, but the payoff money was delivered to Heis, not Wolf. Katherine believes that Heis did not forward the money to Wolf.

The trial court entered two judgments, dismissing the claims against both escrow companies, in 2017 and 2018. Wolf appealed. The appeals court reversed and remanded.

The court began by noting the lenient standard on a motion to dismiss. The complaint should not be dismissed unless it is beyond doubt that the plaintiff "can prove no set of facts supporting their claim that would entitle them to relief."

Both escrow companies relied on the same decision, *DeMello v. Home Escrow, Inc.*, 4 Haw. App. 41, 659 P.2d 759 (1983), to argue they owed no legal duty to Wolf because she was not a party to the escrows. The court split some hairs, saying that its ruling in *DeMello* was that the escrow company owed no *fiduciary* duty to a person who was not an escrow principal.

The court said that, giving Wolf every benefit, she could be considered an intended third-party beneficiary of the escrows. The court cited no relevant escrow decision to support that conclusion.

The court also rejected the argument that Wolf's claims were time-barred under Hawaii Revised Statutes (HRS) § 657-7 (two years for damage to persons or property). It said that the six-year contract limitation period under HRS § 657-1 applied. It also said that the meter began running when Wolf learned or should have discovered that the escrow "contracts" had been breached.

This is a preliminary ruling only. However, the court's very limited reasoning is the dead opposite of that in all or most states that have considered the issue. The seminal decision on the subject is *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, 27 Cal.4th 705, 41 P.3d 548, 117 Cal. Rptr.2d 541 (2002), in which the California Supreme Court ruled that a lender claiming the right to be paid from an escrow may not sue the escrowee for negligence, because the lender was not a party to the escrow. Also see *Lyons v. Birmingham Law Office, LLC*, reported this issue, which held that a lawyer-escrowee owed no duty to a non-client whose sole connection to closing was that she was to receive the proceeds of sale.

This court's reasoning is also dangerous because it suggests that the escrowees should pay Wolf because her agent took her money. Escrow is a service, not a theft bond. It certainly is not an agreement by the escrow company to pay money from its own pocket if a lender's agent steals his client's money, as alleged by Wolf.

Escrow Matters

Escrowee Owes No Duty to Person Claiming Sale Proceeds

Lyons v. Birmingham Law Office, LLC, 2024 WL 209079 (2nd Cir. (Vt.)) (unpublished).

The Second Circuit Court of Appeals has held that, under Vermont law, a person who claims that the seller of real estate intended her to receive the proceeds of sale was not an intended beneficiary of the escrow, and had no claims against the escrowee.

Alfred Ducharme sold Vermont real estate. Matthew Birmingham of Birmingham Law Office LLC

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represented Ducharme in the sale. Ducharme instructed Birmingham to wire the sale proceeds to Justine Lyons.

The wire transfer failed. Then Ducharme died suddenly. Birmingham held the money for a short time. Then he delivered it to Ducharme's estate.

Lyons sued Birmingham and the buyer's lawyer, Marylou Scofield of Marylou Scofield PC for conversion and professional negligence. The district court dismissed the claims. That decision is at 2023 WL 3294276. Lyons appealed. The Second Circuit affirmed the dismissal.

The court said that the lawyers were not liable for conversion. The court assumed without deciding that the money belonged to Lyons. In Vermont, "the key element of conversion ... is the wrongful exercise of dominion over property of another." *P.F. Jurgs & Co. v. O'Brien*, 160 Vt. 294, 299 (1993). One establishes conversion by showing that the defendant has controlled the property in "defiance of the owner's right," among other things. The court considers the length of time the defendant held the property.

The court noted that the wire failed and then Birmingham was unable to get Ducharme's instructions because he had died. Birmingham might have filed an interpleader action, but he "did something similar" by delivering the money to the estate to be held in trust until the probate court settled the ownership issue. Further, Lyons was annoyed by the delay, but that delay was caused by "a series of events including the wire failure, Ducharme's death, and the estate's claim to the money—not from the defendants' exercise of control over the funds."

The court also held that Lyons' claim for professional negligence failed because the lawyers did not owe her a duty of care. In Vermont, in most cases, "an attorney owes a duty of care only to the client and not to third parties." *Hedges v. Durrance*, 175 Vt. 588, 589 (2003). Some legal representation is for the benefit of a third party, such as in estate-planning or will-drafting.

However, the court said that no exception applied in this case. The primary purpose of the lawyers' engagement was the purchase and sale of Ducharme's property. If there was an escrow agreement, as Lyons alleged, "that agreement was not the primary purpose of the attorney-client relationships so the defendants would still not owe Lyons a duty of care."