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Texas Supreme Court Rules That Special Warranty Deed Barred Suit against Grantor

The Supreme Court of Texas has ruled that a special warranty deed conveying real property limited the grantor's liability for allegedly breaching the implied covenant of "seisin" – that is, the covenant that the grantor owned the property being conveyed.

The Case

After Cochran Investments, Inc., purchased real property in Houston, Texas, at a foreclosure sale, Cochran entered into a residential sales contract with Michael Ayers regarding the property. The sales contract stated that Cochran "agrees to sell and convey to [Ayers] and [Ayers] agrees to buy from [Cochran] the Property defined below" for a purchase price of $125,000.

Cochran and Ayers closed on June 6, 2011, and Cochran executed a special warranty deed conveying title to Ayers. The deed stated that Cochran "has GRANTED, SOLD, AND CONVEYED and by these presents does hereby GRANT, SELL, AND CONVEY unto [Ayers], all of that certain tract of land lying and being situated in Harris County, Texas."

The deed also noted that, "[w]ithout limiting the grant or the warranty of title provided herein," Ayers acknowledged that Cochran had "made no representation or warranty as to the physical condition of the Property" and that Ayers accepted the property "in its current physical condition, as is, after having inspected the Property to the extent [Ayers] desired."

Additionally, the deed bound Cochran and its successors and assigns "to WARRANT AND FOREVER DEFEND, all and singular the Property, subject to the matters stated herein, unto [Ayers, his successors, and his assigns], against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through and under [Cochran], but not otherwise."

In connection with the sale, Chicago Title Insurance Company issued an owner's policy of title insurance to Ayers, agreeing to "pay [Ayers] or take other action if [Ayers] ha[d] a loss resulting from a covered title risk." The policy covered Ayers in the event he did "not have good and indefeasible title."

After Cochran executed the special warranty deed, a bankruptcy trustee sued Cochran and Ayers, seeking to set aside the foreclosure sale. Ayers filed a claim with Chicago Title, which assumed his defense in the proceeding. The case was voluntarily dismissed after Chicago Title paid $45,000 to the bankruptcy trustee.

Chicago Title, as Ayers' subrogee under the title policy, subsequently sued Cochran, asserting claims for breach of the implied covenant of seisin and breach of contract.

The case proceeded to a bench trial, and the trial court rendered judgment for Chicago Title, finding that the foreclosure sale and accompanying deed to Cochran were void and that Cochran had breached (1) the covenant of seisin implied in the special warranty deed that conveyed the property to Ayers, and (2) the residential sales contract with Ayers in connection with the sale of the property. The trial court awarded Chicago Title $125,000 in actual damages, representing the amount of the purchase price and $11,000 in attorneys' fees.

The court of appeals reversed, holding that the special warranty deed did not imply the covenant of seisin, Cochran thus had not breached the covenant, and the merger doctrine barred Chicago Title's breach-of-contract claim because the deed included no covenant regarding the ability to convey property.

Chicago Title sought to have the decision reviewed by the Texas Supreme Court, arguing that the court of appeals had erred in reversing the trial court's judgment as to both its seisin claim and its contract claim.

The Decision of the Supreme Court of Texas

The Supreme Court of Texas affirmed the court of appeals' judgment and agreed that the deed barred Chicago Title's recovery, although for different reasons than the court of appeals had cited.

In its decision, the Texas Supreme Court explained that a covenant of seisin was "an assurance to the grantee that the grantor owns the very estate in the quantity and quality" that the grantor "purports to convey." The court added that, as a matter of longstanding Texas common law, "in the absence of any qualifying expressions," the covenant of seisin was "read into every conveyance of land or an interest in land, except in quitclaim deeds."

The court found that the deed from Cochran was not a quitclaim deed that merely transferred Cochran's right, title, and interest in the property but, rather, was a special warranty deed that conveyed the property to Ayers. However, the court said, it did not have to resolve whether the special warranty deed implied the covenant of seisin because, even assuming that it did, the deed contained a "qualifying expression" that disclaimed Cochran's liability for the alleged breach of that covenant.

In particular, the court reasoned that the deed limited Cochran's liability for failures of title to claims asserted by individuals "by, through and under" Cochran, but not otherwise. Because the failure of title did not arise from such a claim, Cochran had not assumed the risk for it and, therefore, was not liable for it, the court held.

The court concluded that the merger doctrine – which provides that "[w]hen a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed" – barred Chicago Title's breach-of-contract claim, as Ayers would be unable to recover based on the limited scope of the special warranty deed's protection. The court reasoned that Chicago Title's breach-of-contract claim essentially mirrored its breach-of-seisin claim: Cochran failed to convey the property because it did not own what it agreed and purported to convey. According to the court, the special warranty limited Cochran's liability with respect to that failure of title and Chicago Title could recover for a failure of title only if it resulted from an individual claiming the property "by, through and under" Cochran, "but not otherwise."

In summary, the court concluded that the deed's "plain language" limited Cochran's liability for failures or defects of title to those failures or defects resulting from individuals claiming the property by, through, and under Cochran. Because Chicago Title asserted no such claim, Cochran could not be liable for breach of the covenant of seisin and Chicago Title could not recover for breach of contract to the extent that claim was premised on a failure of title for which the special warranty limited liability.

The case is *Chicago Title Ins. Co. v. Cochran Investments, Inc.*, 602 S.W.3d 895 (Tex. 2020).

Ohio Appellate Court Affirms Judgment in Favor of Title Company

An appellate court in Ohio has affirmed a trial court's decision in favor of a title company (and in favor of a county recorder) in a dispute over the ownership of a garage unit at an Ohio condominium.

The Case

As the appellate court explained, the case arose in 1978, when Randy D. Olenchick ("Randy") purchased a condominium and garage at Bayridge Condominiums in Willowick, Lake County, Ohio. The deed for this transaction indicated that Randy purchased Condominium Unit No. 30 and Garage Unit No. 41.

In 1980, Randy's brother Rodney P. Olenchick ("Rodney") purchased Garage Unit No. 60 from Mary Manning, a condominium owner at Bayridge.

In 1981, Randy received Garage Unit No. 59 in exchange for conveying Garage Unit No. 41 to Mary Manning.

In 1982, Mary Manning sold her condominium unit and Garage Unit No. 41 to a third party.

In 1989, Rodney transferred title of Garage Unit No. 60 to Randy by quit claim deed. Nevertheless, thereafter, Garage Unit Nos. 59 and 60 were used exclusively by Rodney pursuant to an oral agreement between the two brothers.

On February 16, 2016, Randy sold his Bayridge condominium to John Scramling. The first page of the purchase agreement described the property as a "1bdrm condominium, no garage space." However, the general warranty deed purportedly conveyed to Scramling both Condominium Unit No. 30 and Garage Unit No. 41. The deed was signed by Randy and his spouse and was recorded on March 4, 2016.

Subsequently, someone apparently changed the deed by replacing "41" with "59" and adding a note that stated, "deed rerecorded to show correct garage unit." The changes were handwritten on the original deed and were not initialed. The original time stamp of the Lake County Recorder (the "Recorder") was crossed out and a new stamp from the deputy county auditor on August 3, 2017 indicated that a second transfer was not necessary. The deed then was rerecorded by the Recorder on or about August 3, 2017 and purportedly conveyed Condominium Unit No. 30 and Garage Unit No. 59 from Randy to Scramling.

After Scramling asserted ownership of Garage Unit No. 59 and Rodney refused to vacate, the Olenchick brothers sued Scramling, the Recorder, and Ohio Real Title Agency, LLC ("Real Title").

Various motions were filed and the trial court, among other things, dismissed the Recorder and Real Title as parties to the action and granted summary judgment in favor of the Olenchicks on their claim against Scramling with respect to Garage Unit No. 59.

The Olenchicks appealed.

First, the Olenchicks argued that the trial court had committed prejudicial error in granting the Recorder's motion for summary judgment based on the trial court's determination that Rodney had not suffered any damages although it had correctly accepted his property right by granting the Olenchicks' motion for summary judgment and awarding Garage Unit No. 59 to them. Specifically, the Olenchicks contended that the trial court erred in granting summary judgment in favor of the Recorder because the Recorder had accepted and recorded a fraudulent deed. They alleged that the deed was fraudulent because the parties had not agreed to the changes and because the Recorder did not have the power to make changes to documents after they were filed.

The Olenchicks also contended that the trial court had committed prejudicial error in granting Real Title's motion for summary judgment although the trial court had correctly granted the Olenchicks' motion for summary judgment and had awarded Garage Unit No. 59 to them.

The Appellate Court's Decision

The appellate court affirmed the trial court.

Addressing the Olenchicks's first assignment of error, the appellate court explained that the Recorder was an elected public official whose duties were prescribed by statute. The Recorder had a "mandated duty to record in the official records" all deeds that were presented for that purpose and had no duty "to inspect, evaluate, or investigate an instrument of writing" that was presented for recording, the appellate court said.

Moreover, the appellate court added, the Olenchicks had provided no evidence that anyone in the Recorder's office had made the changes to the deed, and there was no evidence that the Recorder had violated any duty under Ohio law when it accepted and recorded the altered deed.

Finding that no genuine issues of material fact existed as to the Olenchicks' claim against the Recorder, the appellate court ruled that the trial court had not erred in granting the Recorder's motion for summary judgment.

The appellate court then rejected the contention in the Olenchicks' second assignment of error that the trial court had erred in granting summary judgment in favor of Real Title.

The appellate court explained that the trial court's decision was based on the fact that, even if Real Title had failed to assure clear title to Scramling, the Olenchicks had no evidence of resulting damages. Because the trial court ordered reformation of the deed, there was no remedy to be had against Real Title, the appellate court ruled. Therefore, it concluded, the Olenchicks' arguments against Real Title were not well taken and it rejected the Olenchicks' second assignment of error as "without merit."

The case is *Olenchick v. Scramling*, No. 2020-L-014 (Ohio Ct. App. Aug. 17, 2020).

Kentucky Appellate Court Rejects Malpractice Claims Stemming from Title Examination

An appellate court in Kentucky has affirmed a trial court's decision rejecting a legal malpractice action filed by property owners arising from a title examination performed by an attorney.

The Case

On October 1, 2008, Sasan Pasha and Maren Schulke (together, the "plaintiffs") contracted to purchase real estate in Lexington, Kentucky. They retained Brent J. Eisele and his law firm, McConnell, Eisele and Case, PLLC, to perform a title examination and to handle the closing of the sale of the property.

After the title examination was performed, Eisele advised the plaintiffs that the property was zoned to allow construction of a multi-level building. The plaintiffs purchased a title insurance policy for the property from Commonwealth Land Title Insurance Company, and the sale of the property was finalized on May 8, 2009.

On approximately May 26, 2009, Pasha discovered a restriction on the property that would prohibit the plaintiffs from constructing the contemplated multi-level building; Pasha advised Eisele of the restriction on that same day. After Eisele was unable to have the restriction lifted, Eisele advised the plaintiffs that the restriction had not been properly indexed and to seek coverage for the alleged loss by making a claim under their title insurance policy with Commonwealth Land Title.

On September 14, 2009, the plaintiffs filed a coverage claim with Commonwealth Land Title, asserting that they had been made aware of the restriction and that Eisele had not discovered the restriction due to an "indexing issue."

After the claim was denied by Commonwealth Land Title, almost two years later, on July 11, 2011, the plaintiffs retained H. Edwin Bornstein and his law firm, Bornstein and Bornstein, P.S.C., to represent them in a breach of contract and bad faith action against Commonwealth Land Title for the diminution of the value of the property due to the restriction.

Bornstein filed a coverage action against Commonwealth Land Title, which moved for summary judgment. On April 9, 2013, the trial court granted Commonwealth Land Title's motion, holding that the restriction at issue was discoverable in the public record and was excluded from coverage under the policy, which excluded coverage for "[a]ny easements or servitudes appearing in the public records."

Then, on September 8, 2016, the plaintiffs filed a legal malpractice case against Eisele and Bornstein. The plaintiffs claimed that Eisele was negligent for failing to discover the restriction during the title examination and that Bornstein was negligent for failing to include Eisele in the coverage action filed against Commonwealth Land Title.

The trial court ruled that the statute of limitations on any potential claim against Eisele ran in May 2010 and, therefore, that the plaintiffs' 2016 action was untimely. The trial court further ruled that when the plaintiffs retained Bornstein in 2011 to represent them in the Commonwealth Land Title case, the statute of limitations against Eisele had run 14 months earlier and, therefore, that Bornstein could not be liable for failing to include Eisele in that action.

The plaintiffs appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the alleged negligent act – the title examination – occurred on or before the closing on May 8, 2009 and that the plaintiffs "were aware that they were damaged shortly after the closing on May 8, 2009." The appellate court added that the damages were "readily ascertainable by an appraisal with and without the building restriction."

Accordingly, the appellate court ruled, the one-year limitations period had begun to run in May 2009 and had expired years before the plaintiffs filed their action against Eisele. Consequently, the appellate court stated, the plaintiffs' claim against Eisele was time-barred and Bornstein could not be liable for failing to name Eisele in the Commonwealth Land Title case.

The appellate court said the result was the same even if the plaintiffs were correct that the first time they knew the restriction had not been properly indexed as Eisele contended was on April 9, 2013, when the trial court granted summary judgment to Commonwealth Land Title. As the appellate court noted, even if the plaintiffs were correct that Eisele's alleged negligence was not discoverable until April 9, 2013, the statute of limitations had run because they had not filed their lawsuit until 2016, "well over one year after 2013."

The appellate court added that the plaintiffs' "discovery" argument fared no better in their claim against Bornstein. The appellate court reasoned that the statute of limitations had run against Eisele at the time Bornstein was retained to represent the plaintiffs in the Commonwealth Land Title case. Therefore, no action could be successful against Eisele and Bornstein could have no liability for failing to name Eisele in that action, the appellate court concluded.

The case is *Pasha v. Eisele*, No. 2018-CA-000865-MR (Ky. Ct. App. Aug. 7, 2020).

New Jersey District Court Rejects Title Insurance Agent's Claim in "Spoofing" Case

The U.S. District Court for the District of New Jersey has rejected a title insurance agent's lawsuit seeking coverage under its errors and omissions insurance policy for losses relating to an email spoofing scheme in which it was duped into sending real estate loan proceeds to a fraudulent account.

The Case

In March and April 2016, Authentic Title Services, Inc., an agent for title insurance policies underwritten by Fidelity National Title Insurance Company, acted as title agent and settlement agent for a real estate transaction for a property in South Orange, New Jersey.

Quicken Loans, the mortgage lender, transferred the loan proceeds to Authentic on March 30, 2016, the day before the originally scheduled closing date. Authentic deposited the funds into a settlement account at TD Bank.

The closing was postponed, and emails ensued between Authentic's president, Mark Maryanski, and Quicken's Brittany Clark and others concerning return wire instructions for Authentic to use in sending the loan proceeds back.

On April 4, 2016, Maryanski received an email from "BrittanyClork@quickenloans.com" (an email address different from Clark's legitimate email address by one letter), with what appeared to be wiring instructions for the return of the funds. The email was actually from an unknown third party posing as Clark, and it directed Maryanski to transfer the funds to a specified account at Chase Bank (the "Fraudulent Account") and to confirm only by email.

On April 5, 2016, Maryanski received an email from yet another spoofed email address, purporting to be from yet another Quicken employee, Aloria Harris, and which was one letter off from her legitimate email address. The email again requested that Maryanski wire the funds to the Fraudulent Account.

That same day, Maryanski transferred the Quicken loan proceeds of $480,750.96 to the Fraudulent Account. He sent email confirmation to the spoofed email address for Harris and received an acknowledgement in response from what the parties referred to as the "fraudster."

By April 12, 2016, it became clear to both Maryanski and Quicken that the funds had been diverted to the Fraudulent Account. Around April 14, 2016, Maryanski reported the incident to Authentic's bank, TD Bank. He also reported it to Fidelity, which had issued title insurance for the real estate transaction. The diverted funds were withdrawn by an unknown party and never recovered. Quicken was indemnified by Fidelity for the loss and provided new funds for the transaction, which closed.

On April 18, 2016, Maryanski filed a claim with Greenwich Insurance Company, which insured Authentic under a title professional liability errors and omissions insurance policy for the period May 25, 2015 to May 25, 2016.

On May 3, 2016, Fidelity contacted Greenwich, copying Maryanski, advising it of the claim it received from Quicken and asserting a claim against Authentic for which it requested immediate payment. The next day, Greenwich notified Authentic that it was denying the claim. In that May 4, 2016 letter, Greenwich invoked an exclusion providing that the policy did not apply to any claim:

> 14. based on or arising out of:
>
> a. the commingling, improper use, theft, stealing, conversion, embezzlement or misappropriation of funds or accounts[.]

The letter continued:

> This claim arises from a theft, stealing, conversion and/or misappropriation of funds. As such, the claim is not covered by the policy as it arises from conduct clearly excluded under this Policy. Consequently, [Greenwich] is therefore denying defense and indemnity coverage for this matter.

Thereafter, Authentic sued Greenwich, seeking coverage from Greenwich for Fidelity's claim. Greenwich moved for summary judgment. Among other things, it relied on exclusion 14(a) of the policy.

Authentic opposed Greenwich's motion and cross-moved for summary judgment in its favor.

The Court's Decision

The court granted summary judgment in favor of Greenwich.

In its decision, the court agreed with Greenwich that exclusion 14(a) directly addressed the factual scenario in this case. The court explained that the exclusion's "plain language" stated that no coverage was provided for claims "based on or arising out of" the theft, stealing, conversion, or misappropriation of funds.

The court then found that Fidelity's claim against Authentic and Authentic's claim for coverage under its policy with Greenwich "undeniably originated from, grew out of, or had a substantial nexus to funds belonging to Quicken that were transferred into the Fraudulent Account and then were withdrawn by a person or entity other than Quicken and were never recovered."

In the court's view, the "plain language of exclusion 14(a)" dictated its applicability to the spoofing scheme that led to the loss. The language, the court said, was "not ambiguous."

The case is *Authentic Title Services, Inc. v. Greenwich Ins. Co.*, No.: 18-4131 (KSH) (CLW) (D.N.J. Nov. 17, 2020).

Anatomy of a Title Insurance Trial

In a lengthy decision, an appellate court in Ohio recently upheld a trial court's actions in a trial involving title insurance that resulted in the jury's decision to reject the plaintiff's claims against the title companies. The appellate court's description of key elements of the trial and of the significant policy provisions, as well as its explanation of other essential documents, illustrates how a title insurance lawsuit involving large sums of money often proceeds.

The Case

Richard G. Johnson sued Chicago Title Insurance Company ("Chicago Title") and U.S. Title Agency, Inc., an insurance agent for Chicago Title, asserting the following claims:

(1) Breach of contract against U.S. Title;

(2) Breach of contract against Chicago Title;

(3) Specific performance against both U.S. Title and Chicago Title;

(4) Negligence against U.S. Title;

(5) Breach of fiduciary duty against U.S. Title; and

(6) Breach of the duty of good faith and fair dealing against both title companies.

The Plaintiff's Case

At trial, Johnson's counsel called Johnson; Mark Wachter, Johnson's real estate attorney; Mike Gerome, a closing agent for U.S. Title, as if on cross-examination; and Ed Horejs, a representative for Chicago Title, via video deposition as if on cross-examination.

According to Johnson, in early 2010 he hired Berns Custom Homes as the general contractor to renovate property he owned. Johnson retained real estate attorney Wachter to negotiate the construction loan agreement with KeyBank and the contract with Berns. Johnson entered a construction loan agreement with KeyBank in the amount of $815,581 to satisfy the existing mortgage on his property (approximately $334,000) and to finance the remaining renovations ($477,723). KeyBank held the $477,723 until Johnson made draw requests as construction progressed.

Johnson asserted that, on Wachter's recommendation, Johnson and KeyBank selected U.S. Title as the closing, escrow, and title agent for the loan closing. Johnson testified that he verbally instructed Wachter to tell U.S. Title to make sure Johnson "got the same protections that KeyBank did" for the closing. Wachter testified that he verbally told Gerome, a closing agent for U.S. Title, that Johnson "should get every bit of coverage that's being provided to the bank in favor of him." Wachter testified that he was "not aware of any" written instructions from Johnson to U.S. Title. Gerome testified that he did not remember whether he talked to Wachter about title insurance.

KeyBank provided written closing instructions to U.S. Title for the loan closing. The closing instructions provided that "[t]he title insurance commitment and final policy must not contain any exception or exclusion from coverage based on the existence or possibility of mechanic's liens." The document stated that "[a]ll standard exceptions (such as matters of survey, rights or parties in possession, mechanics liens and standard exceptions not evidenced by a specific instrument recorded against the property) must be deleted." The closing instructions further provided that "[a]ll documents

are to be executed exactly as typed." The document also contained a closing agent certification, stating: "These instructions set forth our requirements for closing the above captioned loan. . . . As used herein, 'closing' shall mean the execution by the Borrower(s) and Mortgagor(s) of all required loan documents as specified herein." Wachter testified that Johnson was both the borrower and mortgagor, and Wachter agreed that "KeyBank actually made it clear that in order to close the transaction, U.S. Title only needed Mr. Johnson to execute the closing documents[.]"

Johnson reviewed the closing instructions and "agreed" with them. Johnson did not send U.S. Title his own set of written closing instructions but testified that he verbally told a U.S. Title closing agent that KeyBank's closing instructions were his instructions as well.

The closing took place on May 27, 2010. Documents executed at the closing included the mortgage and the construction loan agreement with a rider. The loan agreement outlined requirements for each disbursement of the $477,723 to Johnson, which included updated title searches and lien releases. The loan agreement also included a contractor's consent clause, which provided that the contractor "hereby subordinates its lien on the Property, now existing or hereafter arising, to the lien of the Security Documents." The consent clause contained a signature block for Justin Berns but Justin Berns did not sign the consent clause. Wachter testified that he never had a conversation with Gerome or anyone at U.S. Title about having Berns sign the consent clause. Nor did Wachter follow up to confirm that Berns had signed the consent clause. Wachter explained that a lien subordination was not "part of the negotiation with Berns" and that he never contacted Berns to ask if he would be willing to sign a lien subordination.

U.S. Title offered Johnson closing protection coverage via a closing protection letter that provided that the coverage indemnified Johnson for any loss of settlement funds resulting from certain conditions, including the closing agent's "[f]ailure to . . . comply with any applicable written closing instructions, when agreed to by [U.S. Title]." Horejs, a representative from Chicago Title, explained that settlement funds were "accounted for in the closing of that particular transaction, funds coming in, funds going out. . . . [S]ettlement is another term for escrow or closing[; they] all mean[] the same thing."

U.S. Title provided Johnson with a copy of the owner's policy of title insurance that Chicago Title issued for the loan and mortgage, which Wachter had verbally requested. The policy required that Johnson notify Chicago Title of a claim by submitting a written statement to a P.O. Box address in Jacksonville, Florida. The owner's policy insured Johnson against loss or damage from certain covered risks arising before the June 2, 2010 policy date, including "[a]ny defect in or lien or encumbrance on the Title[.]" Johnson's owner's policy also contained exclusions:

> The following matters are expressly excluded from the coverage of this policy, and the Company will pay not loss or damage, costs or attorneys' fees, or expenses that arise by reason of: . . .
> 3. Defects, liens, encumbrances, adverse claims, or other matters:
>
> (a) created, suffered, assumed, or agreed to by the Insured Claimant; . . .
>
> (d) attaching or created subsequent to Date of Policy[.]

The owner's policy also included a standard mechanic's lien exception:

> This policy does not insure against loss or damage (and the Company will not pay costs attorneys' fees or expenses) which arise by reason of . . . [a]ny lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

Wachter testified that he did not tell Gerome that any specific provision should be removed from the owner's policy. Horejs testified that the closing instructions would "never" instruct the issuing agent to delete a mechanic's lien exception from the owner's policy. He explained that:

> In a situation where there is a current owner of the property, in other words, they are not a new purchaser coming into a new property, they are the existing owner who has owned and controlled the property and anything done on it, there would be no reason or purpose to delete the mechanic's lien exception because the – any work done on the property by the owner would not be a covered matter. It is excluded from coverage as a matter created and assumed by that insured.

Horejs testified that the standard exception for mechanic's liens in Johnson's owner's policy "wouldn't make any difference" with respect to liens related to work that began after the policy date "because it would be a subsequent matter, a post-policy matter outside the title policy." Horejs explained that a title insurance company in Ohio could not offer insurance for post-policy events: "It just simply is not part of the coverage that has been approved by the Department of Insurance and it's not – there isn't any forum in the industry that would do that."

Horejs further testified that the exclusion set forth in Section 3(a) of the owner's policy excluded coverage related to mechanic's liens that were created by the insured not paying a contractor, regardless of the reason for nonpayment:

> If an owner has work performed on the property, in other words, they hire a builder, they hire a contractor to do some work on the property, they are creating a situation themselves which, should they not pay that contractor for any reason, regardless of merit, and it results in a lien on the property, the lien is the result of the owner's own action. . . . There are other legal avenues that an owner can pursue if there is that kind of dispute [over the quality of the contractor's work], but from the limited standpoint of a title insurance policy, a policy cannot insure an owner from their own acts. It's one of the – it's one of the fundamental distinctions of title insurance from other forms of insurance.

U.S. Title also provided KeyBank with a copy of the lender's policy of title insurance issued by Chicago Title for the loan and mortgage. The lender's policy stated that KeyBank was insured "as of Date of Policy," but it did not contain the standard mechanic's lien exception.

On June 14, 2010, Berns began construction at Johnson's property. Pursuant to his loan agreement with KeyBank, Johnson requested disbursements to pay the contractors on August 2, 2010 ($86,264.98) and August 27, 2010 ($65,454.03). KeyBank approved these requests and disbursed the funds to Johnson.

On October 15, 2010, Johnson terminated Berns after disputes over construction performance. Berns claimed that Johnson owed payment for work performed, and Johnson disagreed.

On October 29, 2010, Berns recorded a mechanic's lien on Johnson's property for $241,521.95. Berns also pursued mandatory arbitration against Johnson for breach of contract. The arbitrator found that Johnson breached the contract with Berns by failing to pay for certain work and by preventing Berns and the subcontractors from further performing. The arbitrator awarded Berns $166,550, which Berns converted to a judgment lien. Johnson never paid anything to satisfy the judgment. Berns' lien remained on Johnson's property until it expired in 2016. Johnson incurred over $468,000 in legal fees from his arbitration with Berns.

On December 3, 2010, Johnson hired Korner Construction, with KeyBank's approval, to resume the renovations. On December 22, 2010, KeyBank disbursed $61,000 in response to Johnson's draw request. Johnson submitted two additional disbursement requests in December, which triggered title searches. On December 29, 2010, U.S. Title notified KeyBank of Berns' lien on the property, and KeyBank denied Johnson's outstanding draw requests.

Between December 31, 2010 and January 17, 2011, Johnson and Wachter corresponded with U.S. Title to request removal of Berns' lien pursuant to Johnson's closing protection coverage and owner's policy, asserting that Johnson was a third-party beneficiary of KeyBank's lender's policy. Johnson and

KeyBank also asked U.S. Title to "insure through" Berns' lien, to continue to insure KeyBank for future advances to Johnson as if Berns' lien did not exist. U.S. Title declined to do so.

Johnson did not correspond directly with Chicago Title and he never sent notice to Chicago Title to the P.O. Box address in Jacksonville, Florida, as required by his owner's policy. Horejs testified that Chicago Title never received a claim under the closing protection from either KeyBank or Johnson. Horejs further agreed that U.S. Title was not "authorized to accept on behalf of Chicago Title a notice of claim made by an insured."

Although Berns' lien was not removed from Johnson's property until it expired in 2016, KeyBank ultimately continued to disburse the remaining funds. In January 2011, KeyBank honored the previously dishonored draw request made in December 2010. KeyBank also disbursed $100,000 in July 2011. By August 2011, KeyBank had disbursed all loan funds except for $35,000, which it held until construction was completed pursuant to a holdback agreement with Johnson. By 2013, Korner Construction had completed the renovations, KeyBank had disbursed the full amount of the loan, and the loan converted to permanent financing.

The Defendants' Position

Presenting their case, U.S. Title and Chicago Title called Gerome and their expert witness, Michael Waiwood.

Gerome explained that it would have been "impossible" for U.S. Title to have removed the mechanic's lien exclusion from Johnson's owner's policy. He stated, "You can't do that." He further explained that mechanic's lien exceptions were "never deleted from the owner's policy" because "we do not insure things that people cause on their own." Gerome also testified that U.S. Title was not authorized to accept claims on behalf of Chicago Title.

Waiwood opined that "mechanic's liens are not a covered matter under the owner's policy." He explained:

> [A]nything that occurs in an owner's policy subsequent to the date of policy is simply not covered. In addition to that, there [are] exclusions in the policy form itself. An exclusion to the title insurance policy by statute, by law in Ohio, is these are matters that are not covered by title policies. And one of the exclusions in the policy clearly states that it doesn't cover any matters after the date of the policy.

Waiwood explained that if the mechanic's lien exception had been deleted from Johnson's owner's policy, Berns' lien still would not have been covered under the policy. He stated that "the policy

does not cover any liens that become effective or filed after the date of policy." When asked whether the mechanic's lien exception would make a difference as to whether Berns' lien would be covered, he answered "absolutely not. They're not covered. It's that simple. We are not a casualty insurer. We could only insure up to the date of policy by law."

Waiwood further testified that the exclusion set forth in Section 3(a) of Johnson's owner's policy also precluded coverage of damages related to Berns' lien. He explained that the exclusion in Section 3(a) addressed:

> a matter that is created, suffered, or assumed by the insurer. In other words, the responsibility is caused by the insured themselves. And our position on that would be if I was being asked to underwrite this, I would say that these mechanic's liens are by virtue of the fact that Mr. Johnson simply did not pay his contractors.

In relation to the closing protection coverage, Waiwood testified that such coverage limited liability to a loss of settlement funds: settlement funds were "the only thing that [closing protection] cover[s]. And if there is no loss of settlement funds, then the issue of mechanic's liens is irrelevant." Waiwood stated that the closing protection coverage did not cover damages arising from Berns' lien because they were not settlement funds. Moreover, he explained the coverage included an exclusion that provided:

> [T]he company will not be liable for any loss [of closing funds] arising out of mechanic's and materialman's liens in connection with your purchase or lease, or consideration, or construction loan transaction. Except to the extent that that protection against such liens is afforded by a title insurance commitment or policy. . . . This form is not intended to be a substitute for a title insurance policy.

He further explained that the closing protection coverage would not apply to damages from Berns' lien because the coverage "basically excludes liability for any matters that were created or caused by, or suffered, or assumed by the named party in the closing protection letter."

The Trial's Conclusion

The trial court granted a directed verdict on Johnson's negligence claim against U.S. Title. The jury then found in favor of Chicago Title and U.S. Title on Johnson's breach-of-contract and specific-performance claims; it also rejected Johnson's breach of fiduciary duty claim against U.S. Title.

In response to an interrogatory asking, "Do you find by the greater weight of the evidence that any defect, lien, or encumbrance existed on the plaintiff's title to the property as of June 2, 2010 other than the KeyBank [m]ortgage," the jury responded "NO." In response to an interrogatory asking, "Do you find by the greater weight of the evidence that U.S. Title failed to follow written closing instructions[,]" the jury responded "NO." The trial court subsequently dismissed Johnson's claim for bad faith as a matter of law. Johnson moved for a new trial based on cumulative errors, which the trial court denied without explanation.

Johnson appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court rejected Johnson's contention that U.S. Title had breached its duty in procuring insurance for him because it had not ensured that the mechanic's lien exception was removed and had not obtained Berns' signature on the consent clause in the loan agreement. The appellate court reasoned that even if U.S. Title had breached a duty to obtain the proper insurance, Johnson failed to present evidence that the alleged breach was the proximate cause of any harm that he allegedly incurred. The appellate court observed that even if the owner's policy did not have the mechanic's lien exclusion, the policy "would still not have covered damages" arising from Berns' lien.

The appellate court explained that, in addition to the mechanic's lien exclusion, Johnson's owner's policy contained an exclusion that stated:

> The following matters are expressly excluded from the coverage of this policy, and the Company will pay not loss or damage, costs or attorneys fees, or expenses that arise by reason of . . . [d]efects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to Date of Policy[.]

The appellate court pointed out that Johnson's owner's policy was dated June 2, 2010; that the jury specifically found that no lien or encumbrance existed on the property as of June 2, 2010; and that Johnson claimed that his alleged damages arose from Berns' mechanic's lien, which Berns recorded on Johnson's property on October 29, 2010 – "long *after* the date of his owner's policy."

Thus, the appellate court ruled, even if U.S. Title had removed the standard mechanic's lien exclusion, Johnson would not have been covered under the owner's policy for any losses resulting from Berns' lien. Therefore, U.S. Title's alleged breach of duty to procure an insurance policy for Johnson with no mechanic's lien exception did not cause Johnson any damages that arose from Berns' lien.

The appellate court also pointed out although the closing protection coverage provided protection to Johnson if U.S. Title failed to follow the applicable written closing instructions, the evidence at trial established that the written closing instructions did not require U.S. Title to issue an owner's policy at all or require U.S. Title to obtain Berns' signature on the consent clause.

Moreover, the appellate court added, the jury found that U.S. Title followed the written closing instructions. Thus, the appellate court concluded, any alleged breach on the part of U.S. Title in procuring improper closing protection coverage could not have caused damage to Johnson for losses resulting from Berns' lien.

The case is *Johnson v. U.S. Title Agency, Inc.*, No. 108547 (Ohio Ct. App. Aug. 13, 2020).