

**ATTORNEY MALPRACTICE IN REAL ESTATE
TRANSACTIONS: IS TITLE INSURANCE THE
ANSWER?**

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Editors' Synopsis: This Article discusses the attorney malpractice risks in connection with real estate transactions; notably, the issues of whether the failure of an attorney who represents the purchaser of a property to obtain a title commitment and an owner's policy of title insurance constitutes legal malpractice and whether this duty should, under certain circumstances, extend to third parties. The Article also discusses potential malpractice claims, which might be avoided if counsel insists that the client obtain title insurance, and claims that may occur even if title insurance is purchased.

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I. INTRODUCTION

Does the failure of an attorney who represents the purchaser of a property to obtain a title commitment and an owner=s policy of title insurance constitute legal malpractice? DoesCor shouldCthe answer to this question depend on whether the attorney has made full disclosure to the

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purchaser of the risks of not being insured? Should such a duty extend, under certain circumstances, to third-party non-clients? In the commercial area, title insurance has been virtually mandatory for many years, especially as a result of securitization, lender requirements, and the nationalization of commercial real estate practice and standards. But title insurance as an industry standard has not yet reached total acceptance with respect to residential real estate transactions. Generally, the benefits of title insurance, including no-fault protection for losses covered under the policy, outweigh the risks of not obtaining title insurance. But to suggest that an attorney commits legal malpractice by not requiring a fee owner of real estate to obtain a title insurance commitment or policy is a step that few courts (or bar associations) are willing to take at the present time.

II. COMMENTARY ON DUTY OF LAWYERS

Some commentators have gone so far (probably too far) as to state that failing to require a title policy would constitute incompetence (and presumably malpractice) on the part of the lawyer. They argue that with respect to commercial real estate transactions, title insurance has been a de facto requirement for some time.¹ The commentators appear to have no problem extending this duty to residential transactions:

It is our contention that a lawyer commits malpractice in representing a home buyer if that attorney fails to require a fee owner=s commitment and policy of title insurance as part of the transaction. We believe that the only exception to this requirement is when the lawyer makes a full disclosure to the client of the risks of not being insured; gives explicit advice against proceeding without insurance; and obtains the client=s consent and signature to this effect on a written document. Furthermore, we believe that this

¹ See, e.g., Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner=s Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN=S L. REV. 407, 426B27 (2000) (AIn fact, the financial markets, the mortgage providers, and the legal profession would all consider it quite unusual and, indeed, incompetent to do a real estate closing for a lender or commercial developer without providing title insurance to cover the risk of loss from title defects.@).

obligation may run to a third party non-client in certain situations.²

The authors add further:

Today, it is widely accepted that title insurance is the only appropriate product to fully protect a homeowner or lender from risk of loss. For this reason the industry standard reflects a duty to obtain fee owner=s title insurance for a client as a routine matter in all residential transactions. Ignoring this standard is grounds for a malpractice action. Attorneys can no longer protect themselves in a malpractice action by arguing that the local, antiquated, customsCappropriate in bygone decadesCcontrol in the modern residential real estate market.³

Query: Because of the almost universal presence of title insurance in commercial real estate transactions, could an attorney also possibly be accused of malpractice for not suggesting standard title-policy endorsements (such as contiguity, zoning, access, and separate tax parcel) along with the title policy itself? Could the same concern apply (to a lesser extent, perhaps) with respect to endorsements to residential title policies? Furthermore, could the attorney be charged with malpractice for failure to suggest the right type or form of title policy, for example, leasehold owner=s or lender=s policy instead of a fee policy, if that is the appropriate industry standard? Also, should the attorney be held liable for the negligence or malpractice of third parties employed or utilized by the attorney in

² *Id.* at 407B08.

³ *Id.* at 443B44; see also Robin Paul Malloy, *Using Title Insurance to Avoid Malpractice and Protect Clients in a Changing Marketplace*, 11 DIGEST: NAT=L ITALIAN AM. BAR ASS=N L.J. 51, 52 (2003) (As a result of market changes, a lawyer commits malpractice in failing to obtain fee owner=s title insurance for a residential homebuyer. . . . Attorneys that follow local norms that do not include requiring fee owner=s title insurance should be held to have committed malpractice.); Kenneth M. Turnipseed, *Legal Malpractice and the Real Estate Lawyer*, 27 J. LEGAL PROF. 247 (2003) (discussing a few of the most often cited attorney malpractice areas in real estate practice, including incorrect title opinions and failing to inform the client of a flaw in the title to real estate); Thomas W. Hyland, Ellen M. Boratz, Frank J. Fields, *Legal Malpractice and the Real Estate Practitioner*, 265 PLI/Real 7, 31B32 (1985).

connection with a commercial or residential real estate closing, such as surveyors, appraisers, accountants, and home inspectors?

III. CASE LAW ON DUTY OF LAWYERS

The commentary reported above may indeed go too far in suggesting that attorneys should be deemed guilty of malpractice for not recommending title insurance to purchasers or lenders. Case law is sparse on the issue of whether a lawyer commits malpractice by failing to recommend title insurance to his or her client (or third parties) with respect to the purchase of real property (residential or commercial), but it generally does not impose such a duty on the attorney. On the other hand, there are some cases that find an attorney guilty of malpractice for negligent actions in connection with real estate transactions that would clearly be covered risks under an ALTA Owner=s Policy or Loan Policy.

A. Negligence Claims in Connection With Recommendation of Owners= Policies

Generally, institutional lenders are more sophisticated and perhaps better able to take care of themselves and, therefore, may not need special protection. Thus, the issue of malpractice usually arises in the situation where an attorney fails to recommend title insurance to a purchaser of real estate or even, in some cases, to a non-client third party.

For example, in *Lefkovich v. Kearns*,⁴ the plaintiffs alleged that the defendant lawyer negligently and carelessly failed to notify the plaintiffs of the availability of owner=s title insurance,⁵ and that he was negligent in failing to discover the correct boundary line of the property.⁶ The plaintiffs consulted the defendant and his law firm in connection with their purchase of a building lot. The defendant attorney conducted a title search of the building lot prior to the closing.⁶ At the closing, the defendant lawyer discussed the closing documents and their purpose, but according to the plaintiffs, he did not mention . . . the potential need for owner=s liability insurance.⁷ The plaintiffs contended that had they been aware of the

⁴ No. CV020516312S, 2005 Conn. Super. LEXIS 1077 (Conn. Super. Ct. Apr. 20, 2005).

⁵ *Id.* at *1.

⁶ *See id.*

⁷ *Id.* at *2.

potential risks and that an owner's policy of title insurance was available that would cover those risks, they would not have had to incur the cost of defending themselves against a subsequent lawsuit by the adjoining landowners concerning the location of the boundary line.⁸ The plaintiffs' complaint was based upon the defendant's alleged failure to discover a surveyor's error in the title search or to inform plaintiffs of these defects, the risks resulting from these defects, and a method of limiting these risks through the purchase of owner's liability insurance.⁹

The defendant attorney argued that the plaintiffs had not presented any evidence that such a policy existed or that it would have insured the risks covered by the adjoining landowner's complaint. The defendant lawyer also alleged that the statute of limitations for a tort action, as well as for an attorney's negligence or wanton misconduct with respect to the preparation and execution of an attorney's title certificate or title search, had expired pursuant to applicable Connecticut statutes.¹⁰

The court ruled in favor of the defendant attorney, holding that the applicable statutes of limitation had expired.¹¹ The court also noted that the attorney's duty with respect to the title search relates to those records concerning land, in this case, the lot purchased by the plaintiffs, which are legally required to be stored in governmental buildings and made available to the public.¹² The court reasoned that an attorney's title search is not a guaranty of the accuracy of the recorded land records, and that where errors or discrepancies arise that are not a part of the land records then they are not discoverable through a title search and are not the responsibility of the title search.¹³ The court found that the evidence showed that the error was the fault of the land surveyor and was not discoverable by a title search, and therefore the defendant lawyer was not legally responsible for the error.¹⁴ Finally, with respect to the plaintiffs' allegations that the defendant lawyer was negligent in failing to notify them of the availability of title insurance, the court stated:

⁸ *See id.*

⁹ *Id.* at *4.

¹⁰ *See id.* at *2B3.

¹¹ *See id.* at *9.

¹² *Id.* at *4.

¹³ *Id.* at *5.

¹⁴ *See id.*

The defendant raised this issue as to the availability of such insurance at the time of the closing herein involved. The plaintiffs failed to prevent [sic] evidence sufficient to show that indeed such a policy of insurance was available had there been a request for it. Therefore the defendant was not negligent in not presenting this to the plaintiffs.¹⁵

The *Lefkovich* case appears to stand for the proposition that even though the existence of an owner=s policy of title insurance might have helped the plaintiffs, the failure of the defendant attorney to make the plaintiffs aware of the availability of such insurance was not per se improper. Normally, boundary line disputes are excluded from coverage under a title policy, unless the standard exceptions are deleted or affirmative coverage is provided for matters of survey. If the survey is defective, as was the case in *Lefkovich*, the defendant attorney could not reasonably be expected to have discovered the defect during his title search, and therefore (according to the court) was not responsible for discovering or disclosing the surveyor=s error.

B. Duty to Non-Client

¹⁵ *Id.* at *8; *see also* *Toth v. Vazquez*, 65 A.2d 778, 780 (N.J. Super. Ct. Ch. Div. 1949):

It is not here alleged that this defendant [attorney] was negligent in his inspection of the records or that his report of the record title to the premises was erroneous. Nor is it evident that this defendant in acting for the plaintiffs failed to exercise reasonable care and precaution in the selection of a competent surveyor, even assuming a duty so to do. Assuredly, this defendant did not expressly agree to warrant the precision and accuracy of the survey.

rev=d on other grounds, 74 A.2d 331 (N.J. Super Ct. App. Div. 1950).

The argument is sometimes made that an attorney can be liable to a non-client in a real estate transaction, especially where the non-client reasonably believes that the attorney owes the non-client a duty. For example, *Bohn v. Cody*¹⁶ is sometimes cited for the proposition that an attorney commits malpractice for failure to recommend title insurance to a non-client. But a close reading of the case discloses that its holding does not rest on the failure of the borrower's attorney to recommend that the lenders (the parents of the borrower) obtain title insurance. The allegations against the attorney included that he should have recommended that she [the borrower's mother] obtain a title report.¹⁷ The term *title insurance* is never mentioned in the opinion, nor is it the basis for the court's holding.

The court held that the attorney did not violate the state of Washington's disciplinary rules governing conflicts of interest. But the court ruled that the attorney could be liable under negligence and malpractice theories as the result of a violation of the duty of care owed to the lenders based on the attorney's failure to advise them of the possibility of tax liens against the borrower's house.¹⁸

The court stated, "[W]e hold simply that an attorney should advise the unrepresented party to seek independent counsel before the attorney discusses the transaction with that party. It was not enough in this case that Cody told Bohn that he was not acting as her attorney."¹⁹

Notwithstanding the court's holding, it correctly noted that the attorney should have recommended that the lenders obtain a title commitment or report, which would have shown the existence of the tax liens that so upset the lenders.²⁰ By doing so, the attorney might have saved himself a whole lot of litigation and avoided the ignominy and expense of a malpractice claim.

While *Bohn* discusses the obligations due in an attorney-client relationship, it also states (as mentioned above) that an attorney may owe a duty of care to a third party.²¹ The court in *Bohn* concluded that "[u]nder certain

¹⁶ 832 P.2d 71 (Wash. 1992).

¹⁷ *Id.* at 74 (emphasis added).

¹⁸ *See id.* at 77. Note: the existence of tax liens would not have been covered by title insurance, as such liens surely would have been listed as exceptions in the policy.

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See id.* at 75B77.

circumstances, an attorney may be held liable for malpractice to a party the attorney never represented.²²

In *Jones v. Allstate Ins. Co.*,²³ the court stated as follows:

To assess whether a duty is owed to a third party, *Bohn* applies a multifactor balancing test adopted in *Bowman v. John Doe* . . . and recognized in *Stangland v. Brock* . . . Under the test a court will evaluate: the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury; the policy of preventing future harm; and the extent to which the profession would be unduly burdened by a finding of liability. . . . The inquiry under this multifactor test has traditionally focused on whether the attorney's services were intended to affect the plaintiff. . . . In *Trask v. Butler*, we changed affect to benefit, noting that the alteration represented the threshold inquiry. [The *Bohn* court went on to note that, under *Trask's* modified test, the threshold question changed to whether a plaintiff was an intended beneficiary of the transaction to which the advice pertained.]²⁴

²² *Id.* at 75B76.

²³ 45 P.3d 1068, 1076 (Wash. 2002).

²⁴ *Id.* at 1076B77. (citations omitted) (quoting *Bohn v. Cody*, 832 P.2d 71, 74 (Wash. 1992)). See also *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 990 (Ariz. 1976) (concluding that attorney can be held liable to third person not in privity if duty arises based upon balancing of various factors listed in California cases, *infra*); *Heyer v. Flaig*, 449 P.2d 161, 164 (Cal. 1969) (concluding that intended beneficiaries of deceased's will could recover for legal malpractice under duty attorney owed directly to them); *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (holding that liability should be extended to beneficiaries who were injured by will negligently drafted by an attorney; otherwise, innocent beneficiary would have to bear loss); *Biakanjia v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (using similar multi-criteria balancing test utilized by court in *Pizell*, *infra*, in connection with challenge to validity of will); *Pizell v. Zuspahn*, 795 P.2d 42, 51 (Kan. 1990) (concluding that appellants, as third-party intended beneficiaries, could sue appellee attorney for negligence in legal malpractice suit based on factors such as foreseeability of harm to appellants and intent of transaction to benefit appellants); *Nelson v. Miller*, 607 P.2d 438, 450 (Kan. 1980) (recognizing rule requiring privity of contract to hold attorney liable for legal malpractice has been relaxed in will drafting and examination of real estate titles, suggesting recognition

Secondary sources also provide insight and guidance in this area. The *Restatement (Second) of Contracts* provides as follows with respect to third-party beneficiaries:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the

of third-party beneficiary theory in appropriate cases); *Donahue v. Shughart*, Thomson & Kilroy, P.C., 900 S.W. 2d 624, 626B29 (Mo. 1995) (en banc) (noting that courts have found privity between an attorney and third party in cases in which client specifically intended for attorney's services to benefit third party and holding that attorney also may be liable to a third party in exceptional cases, such as cases involving fraud, collusion, or malicious or tortious acts by attorney, but finding that "exceptional circumstances" rule has been limited to intentional torts); *Roderick v. Ricks*, 54 P.3d 1119, 1127 (Utah 2002) ("An attorney-client relationship exists when a person reasonably believes that the attorney represents the person's legal interests. . . . In order for a person to 'reasonably believe' that an attorney represents the person, (1) the person must subjectively believe the attorney represents him or her and (2) this subjective belief must be reasonable under the circumstances" (citations omitted). Cf. *Chan v. Lee*, No. 24390, 2004 Haw. LEXIS 291, at *5 (Apr. 23, 2004) ([W]e conclude that [plaintiff's] subjective belief that [defendant attorney] acted as his . . . attorney for purposes of the purchase of the fee to the property was not reasonably drawn under the attending circumstances of the case."). See generally Ronald R. Volkmer, *Attorney Liability to Nonclients: The Need to Re-Examine Nebraska's Privity Rule*, 29 CREIGHTON L. REV. 295 (1995); Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998).

beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.²⁵

C. Failure of Attorney to Properly Conduct Title Search.

Malpractice liability can also arise in connection with a real state transaction where the attorney is negligent in performing a title search. In *Namoury v. Tibbets*,²⁶ the plaintiff, as the seller of certain real property, claimed that his attorney was negligent, committed legal malpractice, and breached his contract with plaintiff by virtue of his failure to perform his

²⁵ RESTATEMENT (SECOND) OF CONTRACTS: CONTRACT BENEFICIARIES ' 302 (1981). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: THE CLIENT-LAWYER RELATIONSHIP, ch. 2, introductory cmt. (2000):

This Topic addresses creation of a relationship of lawyer and client (' 14) and the duties a lawyer owes to a prospective client (see ' 15). A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not. Prospective and former clients receive certain protections, but not all those due to clients.

Section 14 provides:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person=s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services. *Id.* ' 14.

²⁶ No. 3:04CV599 (WWE), 2005 U.S. Dist. LEXIS 320 (D. Conn. Jan. 11, 2005), *motion denied by, sanctions disallowed by* 2005 U.S. Dist. LEXIS 37858 (D. Conn. Dec. 16, 2005).

duties pursuant to the contractual agreement between the parties.²⁷ The plaintiff specifically alleged that his attorney failed to perform a title search and obtain an actual credit report of the purchasers, which would have revealed the inability of the purchasers to perform under the purchase-money mortgage granted by the plaintiff to the defendant purchasers and the existence of tax liens and other judgments against the defendant's wife at the time of closing.²⁸ Prior to the closing, the plaintiff's attorney had produced a financial statement of the purchasers indicating that they were financially able to purchase the property and pay the note and mortgage. But unknown to the plaintiff, tax liens and other judgments against the defendant's wife existed prior to and at the time of the closing, which upon her death, became liens against the entire property. Thereafter, the defendant failed to make the mortgage payments, and the defendant reconveyed the property to the plaintiff in lieu of foreclosure. The plaintiff subsequently tried to sell the property to another individual, but was required to pay off the tax lien in order to provide the buyers with a title free and clear of encumbrances.²⁹

The court noted that A[p]laintiff claims defendants did not fulfill specific obligations inherent to the representation of a seller of property: a thorough title search and a credit report of the potential buyers.³⁰ But the court ruled that the attorney never promised the plaintiff a specific result, nor did the attorney promise that the transaction would be successful, which would be necessary to support a claim of breach of contract.³¹

The court also summarily rejected the plaintiff's claim that the defendant lawyer and his law firm acted in bad faith, stating that:

²⁷ *See id.* at *2.

²⁸ *See id.* at *6.

²⁹ *See id.* at *3B4.

³⁰ *Id.* at *8.

³¹ *See id.*

Here, no facts are alleged that would suggest any bad faith on the part of defendants. Even if it was found that there was a breach of contract, not all contracts are breached with a sinister intent. Even though plaintiff alleges specific examples of defendant=s breach of contract, he does not suggest that any of these acts were performed purposefully or with ill intent.³²

³² *Id.* at *10.

The court also rejected the plaintiff's claim that the defendant's law firm had violated the Connecticut Unfair Trade Practices Act, which provides penalties for any person or entity that engages in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.³³ The court found that there was no bad faith on the part of the defendant or his law firm, that the defendant's alleged failure to conduct proper searches did not touch upon the interests of the public, and that the plaintiff had made no allegation of fundamental unfairness, immorality, or substantial injury to consumers beyond the monetary damages he suffered solely as a result of defendant's breach of the contract.³⁴

D. Failure of Attorney to Ensure Proper Indexing

Can an attorney be found liable for legal malpractice for failing to ascertain that the county recorder misindexed a recorded document causing a later intervening lien to wipe out the interest of the attorney's client? A remarkable Pennsylvania case, *Antonis v. Liberati*,³⁵ held that an attorney may be liable for malpractice merely because of the attorney's failure to ensure that a recorded mortgage was properly indexed.³⁶ The attorney was directed by his client, a mortgagee who made a loan to the mortgagor, to see that the mortgage was properly recorded, and the attorney assured him that this had occurred. But in fact, in the process of recording, the clerk in the recorder's office made a mistake by misspelling the name of the mortgagor. As a result of this error, the mortgagor was later able to sell the property to a bona fide purchaser who had searched the record but did not find the mortgage (which the mortgagor failed to disclose to them), thereby having no actual or constructive notice of the encumbrance. The mortgagor later died without having paid off the mortgage note. The mortgagee was unable to collect from the purchasers because the trial court ruled that the bona fide purchaser cut off the rights of the mortgagee. The mortgagee thereupon

³³ *Id.* at *11.

³⁴ *Id.* at *12.

³⁴ *Id.* at *12.

³⁵ 821 A.2d 666 (Pa. Commw. Ct. 2003). The Commonwealth Court is a Pennsylvania court of intermediate resort.

³⁶ *See id.* at 669B70.

sued his attorney, who in turn joined the estate of the mortgagor and the recorder of deeds.³⁷

The trial court found for the plaintiff lender on all counts, but the appellate court reversed the judgment against the recorder, finding that *respondeat superior* liability for negligent indexing did not apply to government employees, based on Pennsylvania case law interpreting a Pennsylvania statute, section 9852 of title 16.³⁸ The recorder also was immune from liability under the Pennsylvania Tort Claims Act.³⁹ But the court found that established Pennsylvania case law made it clear that the mortgagee was responsible for assuring that the mortgage was properly recorded and that the mortgagee's attorney was negligent in performing this task for the mortgagee. The court also reasoned that the mortgagor's conduct was not an intervening cause because it could not have occurred without the attorney's negligence. The court rejected the attorney's argument that he had no duty beyond delivery of the document to the recorder and that expert testimony should have been admitted on the question of the attorney's duty, as well as the attorney's argument that the mortgagor's fraud was an intervening cause of the damages to the plaintiff (because, according to the court, the mortgagor's conduct could not have occurred without the attorney's negligence).⁴⁰ The court ruled that A[e]xpert evidence . . . is not required when the issue of negligence is clear enough to be concluded as a matter of law.⁴¹ According to the court:

It is an easy matter for a mortgagee . . . either in person, *or by a representative*, to look at the record, and see that the instrument has been properly entered. . . . There is every reason why it should be made the duty of the mortgagee to see that his instrument is properly recorded. . . . The obligation of seeing that the record of an instrument is correct must properly rest upon its holder. If he fails to protect himself, the consequence cannot justly be shifted upon an innocent purchaser.⁴²

³⁷ See *id.* at 667B68.

³⁸ See *id.* at 668B69.

³⁹ See 42 PA. CONS. STAT. ANN. ' 8541 (West 2007).

⁴⁰ See *Antonis*, 821 A.2d at 669B70.

⁴¹ *Id.* at 670.

⁴² *Id.* (quoting *Prouty v. Marshall*, 74 A.550, 552 (Pa. 1909)).

The *Antonis* case caused a great deal of intestinal discomfort for real estate lawyers in Pennsylvania. But, the reality is that currently some of the recorder=s offices in Pennsylvania are more than a year behind in filing and indexing documents delivered for record (which obviously imposes a significant burden on a lawyer with respect to ascertaining whether the document has been properly filed and indexed). The lawyer appears to have made no attempt to check with the recorder=s office at any time, even though he was specifically directed by his mortgagee client to see that the mortgage was properly recorded, and the attorney assured him that he had done so. As noted by Prof. Patrick Randolph on the DIRT listserv:

If lawyers want recorders on their side, and they should, the best approach should be to work with recorders to insure that they have adequate funding to work with new electronic recording methodologies, and to develop those methodologies with an eye to certainty and safety instead of cost cutting for institutional survival. The recorders, for their part, need to recognize that their function is to facilitate transactions, not to wrap them in lead lined red tape. There=s a solution to everyone=s objectives here, but thoughtful people need to get together to find it.⁴³

Prof. Randolph continues:

Most of the decisions say that delivery of the deed to the recorder=s office is recording. Therefore, those who insure the parties= recording can safely insure from the time of such delivery. Of course, they take the risk that other items have been recorded against the property but have not yet become discoverable. The insurers swallow hard and take that risk. . . . Where the index is part of the record the opposite problem obtains. I=d like to hear from title insurers, but I think that they still have a problem, at least as to lienholders, since they insure that the lien has priority as of the date of recording, and presumably not the date of indexing. If parties are not insured against items recorded after closing but before indexing, it=s certainly a problem

⁴³ Posting of Patrick Randolph, prandolph@umkc.edu, to <http://dirt.umkc.edu> (June 18, 2003) (on file with author).

that insurance products ought to address. Insurers B is it a problem?⁴⁴

Interestingly, in *First Citizen=s National Bank v. Sherwood*⁴⁵ (another Pennsylvania appellate decision which was issued shortly before the *Antonis* decision by that state=s other court of intermediate resort, the Superior Court), the court ruled that whether a mortgage has been properly recorded but improperly indexed provides adequate notice to subsequent bona fide purchasers is a question of fact that can only be determined on a case-by-case basis (actually, on a county-by-county basis) with the focus on the accessibility of the electronic land records made available by the particular recorder. In this case, while the county recorder properly recorded the mortgage, the mortgage was indexed under an improper name. A bank, as the subsequent purchaser of the real estate, searched the index in the real estate records, which did not reveal the lien of the mortgage. The court remanded the case back to the trial court (which had ruled that by searching only the index, the bank had performed a diligent search) and stated that the trial court=s decision was mechanical because it assumed that relying on indexes was sufficient.⁴⁶ According to the court:

Therefore, the question of whether the search is diligent can no longer be approached as a mechanical question; it must now be viewed in its factual context. The fact finder must determine what steps the purchaser should reasonably have taken in pursuing a title search. The purchaser must take all reasonable steps to discover encumbrances in order to have performed a diligent search. If the records in the county are not computerized or are not easily accessible, then the finder of fact may conclude a search of the index is sufficient. If, on the other hand, the records are easily accessible, then a diligent search may require review of those records. We hold that if the fact finder concludes under an objective standard of reasonableness that a diligent search has been made, then the result of that search shall constitute notice.⁴⁷

⁴⁴ *Id.*

⁴⁵ 817 A.2d 501 (Pa. Super. Ct. 2003).

⁴⁶ *See id.* at 505.

⁴⁷ *Id.*

An interesting question is, if the court in *Antonis* had been aware of and had adopted the reasoning of the court in *Sherwood*, would it have found the attorney liable for malpractice for failing to ascertain the misindexed mortgage if the recording had occurred in a county in which land records are so easy to examine that their proper recordation (as opposed to indexing) should enable a diligent bona fide purchaser to find it despite its having been misindexed? In this age of the information superhighway with readily available and accessible electronic information (including legal filings), should an attorney be deemed to have constructive knowledge of all public government records available on the Internet regarding a parcel of real property?⁴⁸

Apparently the purchaser in the *Sherwood* case did not obtain an owner's policy of title insurance, which would have protected the purchaser under the circumstances of that case. Another interesting question: Would a title insurer be subrogated to the insured's claim against a lawyer for malpractice in not confirming the proper recording and indexing of a document? What if it were the title insurer that failed to locate or take exception to certain matters of record?

E. Title Insurance for Misindexed Documents

Fortunately, title insurance protects against the risks to both lenders and purchasers that misindexing will adversely affect their property interests, and although it may not be a defense to a malpractice action against a purchaser's or lender's attorney, it would have provided coverage for the insured party in the *Antonis* case.

⁴⁸ See, e.g., *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) (A reasonable investor is presumed to have information available in the public domain, and therefore Whirlpool is imputed with constructive knowledge of this information.).

With respect to a purchaser of property in a comparable situation, where the purchaser buys the property but later discovers that the unscrupulous seller has subsequently sold the property to another, misindexing would give the title to the second purchaser under the recording statutes. In this scenario, the purchaser has no lien on the property and no insuring provision in the 1992 Owner=s Policy comparable to Insuring Provision 5 of the 1992 Loan Policy. But Insuring Provision 1 in the ALTA 1992 Owner=s Policy (and Covered Risk 1 in the ALTA 2006 Owner=s Policy) would protect the purchaser from loss or damage caused by Atitle to the estate or interest described in Schedule A being vested other than as stated therein.⁴⁹ Although a possible post-policy defense under Exclusion 3(d) of the 1992 Owner=s Policy or 2006 Owner=s Policy (which excludes coverage for A[d]efects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to Date of Policy⁵⁰) could be anticipated, this defense would fail because the unscrupulous seller had to be vested in title as of and after the date of policy in order to later convey the same property to the second purchaser.

F. Gap Coverage

The *Antonis* case does not really concern the issue of the Agap@ in title insurance. The gap risk occurs when a title policy states an effective date, but the deed or mortgage is actually recorded later, which raises the possibility of an intervening lien attaching and being recorded before the deed or mortgage, thereby cutting off the priority of the insured interest. Under the new ALTA Owner=s Policy and Loan Policy forms (which were adopted and became effective on June 17, 2006),⁵¹ this problem is solved first by providing at Covered Risk 14 in the Loan Policy, protection for

⁴⁹ AMERICAN LAND TITLE ASS=N, OWNER=S POLICY (1992), <http://www.alta.org/forms> (follow AALTA Owner=s Policy (10-17-92)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007). See also AMERICAN LAND TITLE ASS=N, OWNER=S POLICY, COVERED RISKS ' 1 (2006), <http://www.alta.org/forms> (follow AALTA Owner=s Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵⁰ AMERICAN LAND TITLE ASS=N, OWNER=S POLICY, EXCLUSIONS ' 3(d) (1992), <http://www.alta.org/forms> (follow AALTA Owner=s Policy (10-17-92)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007); AMERICAN LAND TITLE ASS=N, OWNER=S POLICY, EXCLUSIONS ' 2 (2006), <http://www.alta.org/forms> (follow AALTA Owner=s Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵¹ See AMERICAN LAND TITLE ASS=N, LOAN POLICY (2006), <http://www.alta.org/forms>

[a]ny defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.⁵²

This covered risk provides post-policy title insurance for the gap, if any, between the date of policy (now defined in Section 1(b) of the Conditions of the 2006 Loan Policy and Owner=s Policy as A[t]he date designated as >Date of Policy= in Schedule A@)⁵³ and the date the insured mortgage is recorded in the public records. There is no comparable insuring clause in the 1992 Loan Policy.

Covered Risk 10 in the Owner=s Policy provides to the purchaser similar Agap@ protection for:

Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.⁵⁴

This covered risk provides post-policy title insurance for the gap, if any, between the date of policy and the date of recording of the deed or other instrument of transfer in the public records.⁵⁵ There is no comparable insuring clause in the 1992 Owner=s Policy.

(follow AALTA Loan Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵² AMERICAN LAND TITLE ASS=N, LOAN POLICY, COVERED RISKS ' 14 (2006), <http://www.alta.org/forms> (follow AALTA Loan Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵³ AMERICAN LAND TITLE ASS=N, LOAN POLICY, CONDITIONS ' 1(b) (2006), <http://www.alta.org/forms> (follow AALTA Loan Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵⁴ AMERICAN LAND TITLE ASS=N, OWNER=S POLICY, COVERED RISKS ' 10 (2006), <http://www.alta.org/forms> (follow AALTA Owner=s Policy (6-17-06)@ hyperlink; then follow APDF File@ hyperlink) (last visited June 28, 2007).

⁵⁵ *See id.*

G. Attorney Liability Notwithstanding Title Insurance

Just because a purchaser of real estate has obtained title insurance does not necessarily mean that the purchaser's attorney can avoid liability for negligence or malpractice. One case that found an attorney directly liable for legal malpractice, despite the existence of an owner's policy of title insurance, is *Breck v. Moore*.⁵⁶ In this case, involving an action against a real estate attorney and a title agency for negligent title search and disclosure, the Alaska Supreme Court held that constructive knowledge cannot be used to bar claims arising out of a professional relationship in which the plaintiffs claim that they relied on a professional to impart the knowledge that the professional asserts the plaintiffs should have possessed constructively.⁵⁷ In *Breck*, the Moores sued the title insurer, Safeco Title Agency, Inc. (Safeco) and the Moores' attorney, Breck, for negligent title research and disclosure, which the court characterized as a professional negligence or malpractice action, associated with their purchase of real estate.⁵⁸ Breck had not advised the Moores that there were significant building and sewage disposal restrictions on the property.⁵⁹

Although the restrictions were attached to the Moores' title insurance policy, which was sent to the Moores by Safeco three or four weeks after the closing, they did not read the policy or the restrictions and did not realize that any problem existed until eight years after the closing. There was no evidence that Breck ever saw the final policy or the plat.⁶⁰ The supreme court agreed with the trial court's application of the discovery rule, concluding that the Moores were reasonable in relying on their attorney to review the documents and advise them of any restrictions, even though the documents were in their possession. The court, in upholding summary judgment for Safeco, held that in a suit against a title company, the insured is generally charged with the negligence of attorneys acting in its behalf. Therefore, because Breck should have discovered the Moores' cause of action against Safeco at the time the preliminary commitment referencing the restrictions was furnished to Breck, the Moores were charged with this

⁵⁶ 910 P.2d 599 (Alaska 1996).

⁵⁷ *See id.* at 599, 606.

⁵⁸ *Id.* at 603.

⁵⁹ *See id.* at 602.

⁶⁰ *See id.*

constructive discovery and reasonably should have known at that time of the existence of the plat restrictions.⁶¹

Upon actual discovery of the plat restrictions, the Moores amended their complaint to add (in addition to the seller and real estate agents) Safeco and Breck as defendants, claiming professional negligence based on their failing to discover or adequately warn them of the plat restrictions.⁶² The court affirmed summary judgment in favor of Safeco based on the applicable six year statute of limitations for both tort and contract actions, finding that in a suit against a title company, the insured is generally charged with lapses of attorneys acting in its behalf. But the Alaska Supreme Court affirmed judgment against Breck for malpractice.⁶³ The evidence, the court found, showed that one day before the scheduled closing Safeco sent a preliminary title commitment to Breck asking him to prepare a warranty deed and deed of trust.⁶⁴ The commitment referred to restrictions in a recorded plat Asubstantially as attached hereto,@ but the plat was not attached to the commitment or enclosed with the letter to Breck.⁶⁵ Breck prepared the requested documents and sent them to Safeco without asking for or otherwise obtaining a copy of the plat, and he never advised the Moores that there might be significant title restrictions on the property. At the closing, the deed of trust referred to the plat, but it was not attached. In fact, Breck did not even attend the closing.⁶⁶

The Alaska Supreme Court further found that Breck was retained as an attorney with expertise in real estate law, and that one of his principal duties was to confirm that the seller=s title was free of significant restrictions. He received the preliminary commitment specifically referencing restrictions in an unattached plat. Because Breck himself testified at the trial that one of the primary purposes of a preliminary title commitment is to allow the purchaser=s title agent to examine and evaluate significant title restrictions, the court concluded that the notice to Breck was sufficient as a matter of law and that this notice was charged to the Moores in their suit against Safeco.⁶⁷

⁶¹ See *id.* at 604B605.

⁶² See *id.* at 602 (The claim against Safeco apparently was for its failure to attach to the preliminary commitment a copy of the plat which would have disclosed the restrictions.).

⁶³ See *id.* at 609.

⁶⁴ See *id.* at 602.

⁶⁵ *Id.*

⁶⁶ See *id.*

⁶⁷ See *id.* at 603B605.

But the court concluded that, in their suit against Breck, the Moores were responsible only for their own knowledge and lack of diligence and held that the Moores acted reasonably in relying on Breck and the real estate agents to review the documents and identify problems.⁶⁸ Thus, the Moores' receipt of the final title policy and closing documents eight years earlier did not start the running of the statute of limitations against Breck. Rather, the discovery rule (which applies to professional malpractice actions claiming economic loss) tolled the running of the statute of limitations as to the Moores' claim against Breck until eight years after the closing, when the plat restrictions were first brought to the Moores' attention by the attorney representing them in their suit against the sellers and the real estate agents.⁶⁹

The court found that the measure of damages for a malpractice action involving restrictions on real property negligently overlooked was the lesser of (1) the cost of removing the Anno dwelling restriction, and (2) the diminution of the property value as measured by the value of the property with and without the restriction.⁷⁰

The *Breck* case clearly demonstrates that the existence of title insurance in a real estate transaction does not eliminate the role of lawyers or necessarily insulate them from liability for their own negligence.

H. Negligence for Failure to Disclose Defect in Title

An attorney may be liable for negligence or malpractice for failure to disclose a title defect even if it is possible that the defect could have been cured by legal action or the collection of evidence. In *Trimboli v. Kinkel*,⁷¹ the attorney retained by the purchasers of land to search title did not mention a flaw in record title to the property (an invalid executor's deed) to his clients, who subsequently entered into a contract to sell the property. The subsequent purchaser, upon discovering the defect, brought an action against the attorney's clients, in which he prevailed, seeking the return of his deposit and the expenses of searching title. The clients then brought an action against their attorney to recover their damages as the result of his negligence.⁷² The trial court ruled in favor of the attorney, finding that there

⁶⁸ *Id.* at 606.

⁶⁹ *See id.* at 604.

⁷⁰ *See id.* at 608.

⁷¹ 123 N.E. 205 (N.Y. 1919).

⁷² *See id.*

was marketable title and that the attorney had not been negligent. The appellate court reversed, holding that the attorney knew that the executor's deed was invalid and that he was chargeable with knowledge of the significance of this fact.

The court reasoned that when an attorney is employed to search the title of property and he makes no mention of the defect to his clients, but allows them to complete their purchase on the false assumption that the record title is perfect, he is liable for negligence.

The attorney argued that the defect in record title had been cured by adverse possession for more than 50 years.⁷³ But the New York Court of Appeals ruled that negligence was proved because "[t]he defendant does not acquit himself of negligence by showing that evidence *could* have been collected. He must show that it *was* collected. Until that duty has been fulfilled, the title was unmarketable."⁷⁴

The attorney also argued that the plaintiffs' damages were nominal. But the court stated that:

The plaintiffs relied on the defendant's assurance that they had a marketable record title. Relying upon that assurance, they made a fruitless contract of resale. They have lost the commissions paid their brokers. They have been forced to reimburse the purchaser for the cost of an examination of the title. If the defendant had been diligent, these expenses would have been saved. The consequences were to be foreseen. A marketable title is one that may be freely made the subject of resale. Resale involves certain expenses as common, if not necessary, incidents. A lawyer takes the risk that those expenses will be lost if he fails to gather in due season the evidences of title. It is a loss within the range of probable contemplation.⁷⁵

⁷³ See *id.* at 205B06.

⁷⁴ *Id.* at 206 (emphasis added).

⁷⁵ *Id.* Cf. *Lawyers Title v. Groff*, 808 A.2d 44, 49B50 (N.H. 2002) (finding that attorney retained to examine title who properly relies upon title report prepared by independent contractor title abstractor is not liable for contractor's negligence; title examination duty is not non-delegable as a matter of policy; and traditional use of independent contractors to do actual abstract is well established).

The *Trimboli* case involves another situation where, if the purchasers had obtained title insurance (which may not have been common at the time), the policy clearly would have covered the risk of the defect in title. If the escrow closing instructions are done properly, they will permit recording to occur only when a title insurance policy is issued consistent with the terms of the instructions and the conveyance document. Notably, title insurance companies are in the business of accepting certain risks and supplying contractual indemnity insurance (with certain exclusions and exceptions, some of which are discovered through a search that is for the benefit of the title company) in return for a premium. They are not in the business of guaranteeing title, supplying information, or even necessarily knowing what is of record. That is the majority rule in the United States.⁷⁶ A title insurer should not, in any event, be held liable in tort for failing to take exception to a title defect that could have been discovered in the land records.

IV. CONCLUSION

Although the commentary in legal journals suggests that an attorney involved in a purchase or the financing of real estate may be guilty of malpractice for failing to advise his or her client of the existence and desirability of obtaining title insurance, the existing case law does not, in general, support this conclusion. But the standard of malpractice may not be what everyone does, but instead what the client is entitled to expect, especially if the attorney represents to have special expertise in closing real estate transactions and assures the client that everything is Aokay@ when in fact it is not. In some states (or counties within certain states) standard practice, as a precautionary measure, is for a closing attorney in a residential real estate transaction, where the purchaser does not want to buy title insurance, to require the purchaser to sign a specific waiver stating that he or she was fully advised by the closing attorney, that he or she realizes that he or she is paying for the cost of a mortgagee=s policy of title insurance in any event, and that being fully informed he or she voluntarily waives the right to purchase an owner=s policy of title insurance. Unfortunately, many

⁷⁶ See, e.g., *First Midwest Bank v. Stewart Title Guar. Co.*, 823 N.E. 2d 168 (Ill. App. Ct. 2005), *aff=d* 843 N.E.2d 327 (Ill. 2006).

unsophisticated home buyers are under the impression that because they paid for it, the lender's policy of title insurance will also protect their interests as owners of the property. As cogently stated by Prof. Patrick Randolph on the DIRT listserv:

I would continue to emphasize . . . that malpractice analysis depends very much upon the understandings of the parties (particularly of the client) as to the proper function of the attorney, and also upon the sophistication of the client and the overall attorney client relationship. I would not want to state that as a general rule a client can always blame an attorney when the client fails to obtain title insurance and later gets burned.⁷⁷

In some states it is common to hear from certain parties (notably real estate brokers) that attorneys are unnecessary in typical real estate closings, but if (as often happens) neither the abstractor, closing agent, title company, realtor, lender, nor loan broker is responsible to the purchaser to ascertain that he or she is fully informed of all aspects of the transaction (including matters reflected in a title commitment or preliminary title report or opinion), then the requirement of an attorney (with adequate malpractice insurance) may be a good thing. For example, in South Carolina, the code states as follows:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose-

(a) [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing.⁷⁸

⁷⁷ Posting of Patrick Randolph, prandolph@umkc.edu, to <http://dirt.umkc.edu> (June 18, 2003) (on file with author).

⁷⁸ S.C. CODE ANN. § 37-10-102 (2002).

In all real estate closings in South Carolina—even cash sales not involving a loan, and whether the transaction is residential or commercial—the South Carolina Supreme Court consistently has held that the closing of real estate transactions is the practice of law and must be conducted by licensed attorneys.⁷⁹

⁷⁹ See *Ex parte Watson*, 589 S.E.2d 760 (S.C. 2003); *Doe v. McMaster*, 585 S.E. 2d 773, 777B78 (S.C. 2003); *In re Lester*, 578 S.E. 2d 7, 7B8 (S.C. 2003); *State v. Buyers Serv. Co.*, 357 S.E.2d 15, 18 (S.C. 1987). See also Tara Austin, *Legal Professionalism: Doe v. McMaster and the Lawyer's Role in Real Estate Transactions*, 55 S.C. L. REV. 591 (2004) (discussing *Doe v. McMaster* decision, and other South Carolina cases, which have made it clear that an attorney must supervise the several stages of a real estate closing and be present at the closing).