

Impact of Recent Case Law, Uniform Real Property Electronic Recordation Act and Uniform Mortgage Satisfaction Act On Title Insurance Practice

“Title Insurance – It’s New All Over Again. Recent
Development”

American Bar Association, Section on Real Property Probate &
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I. Recent Unauthorized Practice of Law Cases

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Dressel v. Ameribank, 468 Mich. 557, 664 N.W.2d 151 (Mich.2003)

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UNIFORM REAL PROPERTY ELECTRONIC RECORDATION ACT

The purpose of the Uniform Real Property Electronic Recordation Act is to facilitate the recordation of electronic documents supporting real estate transactions. The Act fills a need to define and provide for the recordation of electronic documents that has been created by the technological advances in the area of real estate transactions. Technology now makes it possible for real estate transactions to occur electronically without the need to have paper documents. The Act seeks to create a system that allows for the recordation of electronic documents and provides for the documents to be kept in a secure system that operates efficiently. Electronically recording the documents would further expedite the completion of real estate transactions, which are already executed more quickly than ever before due to technological advances, adoption of the Uniform Electronic Transaction Act [“UETA”], and enactment of the Electronic Signatures in Global and National Commerce Act (15 U.S.C.A. § 7001) [“E-SIGN”].

UETA was recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 1999 and has been enacted in numerous states. The Act was drafted in an attempt to validate documents that are in electronic form. The statute of frauds and various other pieces of legislation requires documents to be in writing in order to be valid. UETA calls for the acceptance of electronic documents and electronic signature. E-SIGN was enacted in 2000. Similarly to the UETA, E-SIGN was enacted to validate electronic records and signatures that would otherwise be invalid because of the Statute of Frauds.

As with every advance, problems have arisen from conducting real estate transactions electronically. For example, electronic real estate transactions have created documents that are not in writing or on paper, which raises an issue of whether the electronic documents may be recorded because most recordation laws and regulations provide that a recordable instrument is

in writing or on paper. The Uniform Real Property Electronic Recordation Act [“Act”] attempts to provide for the recordation of electronic real estate documents. The adoption of the Act should help practitioners to record documents quickly and should also serve to make documents more easily and quickly accessible to those searching the public records. The Act is currently in committee and is anticipated to be up for final approval by NCCUSL in August of 2004.

The Uniform Real Property Electronic Recordation Act permits the recordation of electronic documents and provides the means by which the electronic documents may be recorded. The Act defines an electronic document as “a document that is received by the recorder in electronic form.” Electronic is defined in the Act as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” The Act provides that documents can be recorded if they meet the requirements of the Act even if some other law or regulation requires a document to exist in writing or on paper to be recorded.

Nothing in the Act would prevent paper documents from being recorded. The Act simply allows the recorder to convert documents received in a paper form into an electronic form. Similarly, under the Act the recorder can convert paper documents received and recorded prior to the Act’s adoption into electronic documents.

The Act provides two alternatives by which the electronic documents would need to be created, recorded, and retrieved. The first alternative leaves the methods and means up to each county recorder’s office. Each recorder’s office would then have to set the requirements for submitting electronic documents and for having them recorded. The second alternative calls for the creation of a state board, which would establish the means and methods that the county recorders in the state would be required to handle electronic documents. Either the county recorder or the state board, depending on the alternative chosen by the state, would establish the

requirements for the electronic documents that would be accepted. Documents that other laws or regulations require to be notarized, acknowledged, verified, witnessed or made under oath will still remain in effect; however, the requirements can be satisfied electronically.

Many real estate documents have conditions precedent that must be satisfied before they can be recorded. For example, one county or state office might have to first certify that there are no taxes due on the property before a deed can be recorded. The Act allows the county recorder, or other government officials to establish a procedure for the conditions precedent to be satisfied electronically. The goal is to ensure that that process is an efficient one. The Act encourages county and state offices to enter into agreements with the recorder's office; whereby, the fees and taxes that are a condition precedent to the document being recorded could be satisfied electronically at the same time that the recording fees are charged. The fees would then be disbursed to the departments or agencies that are entitled to them.

The Act allows the recorder to collect the following: the applicable recording fees as allowed under the laws of the State, fees for the electronic recording system, and an access fee to those retrieving information from the electronic recording system. The Act does not specify the fees that will be charged, but the reporter's notes do suggest that there might be difficulty in determining the amount to be charged for recording the electronic documents because the typical calculation is usually determined by adding a charge per page to the base fee charged. Electronic documents may not lend themselves to a per-page fee and charging instead a standard flat fee would not place the burden on the parties who are recording larger documents.

The security and accuracy of the electronic recording system are important if the system is to work effectively and if it is to be accepted as a valid recording system. The Act requires the county recorder's office to keep a duplicate archive of the system in an area away from where

the main system is maintained. In addition, the Act requires the county recorder's office to preserve the system and to take steps to protect the system from tampering and unauthorized access, but the Act does not specify what precautions should be taken.

Finally, the Act expressly provides that it does not modify, limit, or supersede the section of the federal Electronic Signatures in Global and National Commerce Act that deals with the electronic delivery of notices. The reporter's notes indicate that this section is included to avoid an allegation that the Act is preempted by the Electronic Signatures in Global and National Commerce Act.

(ABA –Rppt)

UNIFORM MORTGAGE SATISFACTION ACT

The National Conference of Commissioners on Uniform State Law currently has a Uniform Mortgage Satisfaction Act [“UMSA”] in draft form. The UMSA is scheduled for final approval by NCCUSL in August of 2004. If enacted in a state, UMSA would provide uniform requirements to govern the recording of a satisfaction and for providing payoff statements. It protects landowners and helps to clear title. Landowner is defined in the UMSA as “a person that owns the equitable right of redemption in the real property described in a security instrument.” “Security interest” means an interest in residential real property that was used, or intended to be used, by its owner for personal, family or household purposes *at the time* the security instrument was executed. The UMSA would allow owners of residential real estate specific remedies to address situations where a secured creditor does not timely record a satisfaction or for situations where a secured creditor fails to provide, or provides an inaccurate, payoff statement.

In addition, if the UMSA is enacted, the rights of landowners would be clear and there would be definite steps to ensure that security instrument liens are removed from title when they are satisfied. Currently, the damages that mortgagors are entitled to collect from mortgagees who do not record releases as they are required to under state law differ from state to state. This is significant because national mortgage lenders will respond to mortgages that have been satisfied differently depending on the requirements of the laws of the state where the real property is situated. Thus, mortgagors in states with the strictest laws will have releases recorded in a timelier manner than mortgagors in other states. The prefatory notes to the UMSA draft discuss a

concern that states are enacting tougher laws in an attempt to induce the mortgagees to react more quickly to their requirements creating thereby a sort of ‘race to the bottom.’

Scenarios that Prompted Proposed Act

Many pieces of residential, owner-occupied property are purchased with the financing secured by a mortgage or some other form of a security interest. Since security instruments are recorded when they are executed, it is necessary for an owner of real estate who pays off the debt to have that indicated in the records. Otherwise, the owner will not have marketable title when he sells the property. In days before mortgages were regularly sold, or assigned, it was easier for an owner to obtain a release when the loan was paid off. The release would be recorded and effectively clear title.

Now, with the ubiquitous secondary mortgage market requiring the assignment of these loans, the identity of the holder of the security documents is often unclear and getting a recordable release may be daunting. Most states have laws that require a secured creditor to record a release satisfaction within a certain amount of time after the security instrument has been satisfied; however, the length of time in which the secured creditor must record varies from state to state. Also varying from state to state is whether the secured creditor has to receive a request for the release documents before it is required to provide them. The damages an owner may receive for a secured creditor’s failure to comply with the request also varies substantially. Passage of the UMSA would set realistic requirements that secured creditors would have to follow when an owner has satisfied security instrument obligations.

Mortgagors who are going to sell or refinance their property that is subject to a mortgage must obtain a payoff statement from their mortgagee to find out the outstanding mortgage debt. The amount stated in the payoff statement is relied on by the parties to the transaction to make

sure the mortgage is satisfied. The UMSA outlines when a mortgagee is required to provide a payoff statement, and it provides that whomever receives the payoff statement may rely on the payoff statement to determine the amount still due on the mortgage.

The UMSA also provides for a lender's failure to comply with a mortgagor's request for the recordation of the mortgage satisfaction. In addition to mortgages, the UMSA covers situations that involve deeds of trust, security deeds or other instruments that create a security interest.

Compliance with UMSA

Required **notices** may be given by facsimile or electronic mail if the recipient of the notice has agreed to receive notices via that method. Other standard means of notification (regular mail, registered mail, certified mail, or commercial delivery services) are allowed under the UMSA, and the notices are considered as given upon proper dispatch.

Under the UMSA, any entitled person may request a **payoff statement** from a secured creditor. An entitled person is defined as "a landowner, any person liable for performance of the secured obligations, or any person that holds an interest in the real property described in a security instrument." The request has to indicate the payoff date for which the payoff statement is being requested, and the payoff date must be thirty days or less after the date of notification of request. Within ten days of receiving the request for the payoff statement, the secured creditor (i.e. mortgagee) has to issue a payoff statement to the entitled person. The payoff statement must itemize all fees, charges, and other sums that comprise the amount owed to the secured creditor.

The UMSA provides that an entitled person can rely on the payoff statement to provide the amount that must be paid to obtain a recorded satisfaction of the security instrument, so long as the entitled person acts in good faith and does not have actual or constructive knowledge that

the payoff amount given is inaccurate. A secured creditor who issues an inaccurate payoff statement may provide a corrected payoff statement, but the entitled person who received the incorrect payoff statement may rely on the original payoff statement until he or she receives the corrected payoff statement. A secured creditor who does not provide a payoff statement in accordance with the UMSA is liable to the entitled person for the actual loss caused, attorney's fees and costs, and a penal sum of \$500.

The secured creditor must **record a satisfaction** of the security instrument after it has received full performance of the obligation. The UMSA provides that a document constitutes a satisfaction if it has the following characteristics: is signed and acknowledged by the secured creditor, indicates an intention to terminate the security instrument, identifies the security instrument, identifies the parties to the instrument, identifies where the instrument was recorded, identifies the date the instrument was recorded, and if the instrument was assigned it must contain information on the current holder of the instrument and on any intermediate holders via assignment. If the secured creditor does not record a satisfaction within the amount of time provided in the UMSA (which is left open), the landowner must notify the creditor that he demands that the satisfaction be recorded within thirty days. A creditor that still does not record the satisfaction is liable to the landowner for the damages incurred as a result of the failure to record plus attorney's fees and costs. In addition, the UMSA provides for the following two alternatives: (1) the additional sum of \$1,000, or (2) a per diem of \$100 for each day until the creditor records the satisfaction (up to a set limit). The secured creditor will not be liable to the landowner if the creditor had a reasonable procedure in place to record the satisfaction, the creditor complied with its procedure, and the creditor could not record the satisfaction because of

the “action or inaction of a person beyond its direct control.” The UMSA also enables a secured creditor to rescind a satisfaction that was erroneously recorded.

Further, a closing agent acting on behalf of a landowner may give the secured creditor notification that he will record an affidavit of satisfaction if the creditor has not recorded a satisfaction after it has received notification and after it has had an opportunity to cure. The closing agent may record the affidavit if the secured creditor has not recorded the satisfaction within thirty days of the notification from the closing agent. The UMSA provides a sample affidavit form that may be used by the closing agent. However, a closing agent who records an affidavit that should not be recorded may be liable to the secured creditor.

Under the UMSA, a secured creditor *may* (unless *required* under the terms of the security instrument) provide a landowner or closing agent a satisfaction statement, which specifies the amount that must be paid to satisfy the security instrument. Following the payoff of the amount in the satisfaction statement, a closing agent may **execute and record a certificate of satisfaction** in the name of the secured creditor. A closing agent who records a certificate of satisfaction that should not be recorded may be liable to the secured creditor.

Passage of individual state acts dealing with these issues is not adequate. Some states have legislation that addresses some of the issues covered by the UMSA, but the state legislation is not as comprehensive as the UMSA. For example, Illinois recently has enacted the Mortgage Certificate of Release Act (765 ILCS 935/15), which addresses when title companies can record a certificate of release for a mortgage that has been paid off. The Illinois statute generally allows a title company to record a certificate of release when a loan has been paid off in accordance with a payoff statement from the lender. Thus it helps to insure that a purchaser, its secured lender, or a refinance lender can take clear title to the property.

If enacted by individual states, the UMSA would address many additional issues relating to mortgage satisfactions. In addition, the UMSA would be uniform throughout the United States. That uniformity would help individuals and entities that operate in more than one area of the United States (i.e. national mortgage lenders) to know how to address situations involving mortgage satisfactions.

A. Recent Unauthorized Practice of Law Cases

Toledo Bar Assn v. Chelsea Title Agency of Dayton, Inc., 100 Ohio St.3d 356, 800 N.E.2d 29, 2003 Ohio LEXIS 3414 (Ohio 2003).

An Ohio title company prepared a general warranty deed to convey property from a seller to a buyer. The title company created the deed by inputting information into a deed form that was created by an attorney. Once the title company created the deed, an attorney did not review the deed and no attorney had the opportunity to make changes to the deed. The title company was warned that the practice constituted the unauthorized practice of law but nonetheless continued to prepare deeds. A section of the Toledo Bar Association filed a complaint against the title company alleging that the title company was engaging in the unauthorized practice of law. The Supreme Court of Ohio affirmed the Board of Commissioners' finding that the preparation of the deeds constituted the unauthorized practice of law. The Court cited *Lorain Cty. Bar Assn v. Kennedy*, 95 Ohio St.3d 116, 766 N.E.2d 151 (Ohio 2002), for the proposition that the practice of law includes the preparation of legal documents. The Court enjoined the title company from such conduct and fined it \$1,000 because the respondent had been warned previously that preparation of the deed constituted unauthorized practice of law.

Dressel v. Ameribank, 468 Mich. 557, 664 N.W.2d 151 (Mich. 2003).

The Supreme Court of Michigan held that the preparation of mortgage loan documents does not constitute the practice of law because preparing the documents does not "require the use of legal discretion and profound legal knowledge." The Court also stated that the preparation of deeds does not ordinarily constitute the unauthorized practice of law because practice does not encompass drafting "the ordinary run of agreements [used] in the every day activities of the commercial and industrial world." Specifically, drafting of ordinary leases, deeds and mortgages do not constitute the practice of law. The charging of a fee by the defendant did not turn such drafting into prohibited activity. The Court held that Ameribank did not engage in the unauthorized practice of law because extensive legal knowledge or discretion was not needed in order to complete the mortgage documents. (Perhaps, this case may mean that title companies may prepare deeds in Michigan as well)

Ex Parte: Charles M. Watson, 2003 S.C. LEXIS 293 (S.C. 2003).

The Supreme Court of South Carolina decided the question of whether a non-lawyer who examines title and reports on the state of title engages in the unauthorized practice of law if he is not working under the supervision of an attorney. This case involved tax collectors who hired title abstractors to examine title and report on the state of title. The tax collectors needed the title abstract to determine who needed to be provided with notice of the tax foreclosure sale for any particular piece of property. Typically, the title abstractors who examined the state of the title were not attorneys. The Court held that the examination of title and reporting on the findings constitutes the practice of law.

Therefore, non-lawyers who did the work needed to be under the supervision of an attorney.

The Court indicated that a title abstractor can avoid engaging in the unauthorized practice of law if he prepares a report and then has the report reviewed by an attorney who determines the abstract is sufficient. This case follows a decision of the South Carolina Supreme Court the same year (below) holding that a title search performed by a title company for a lender constitutes the unauthorized practice of law. *Doe v. McMaster*, 355 S.C. 606, 585 S.E.2d 773 (2003)

John Doe v. Henery D. McMaster, et al, 355 S.C. 306, 585 S.E.2d 773 (S.C. 2003).

An attorney petitioned the Supreme Court of South Carolina to determine if his business arrangement with a lender, which included dealings with a title company, constituted the unauthorized practice of law. The attorney's arrangement with the lender called for the attorney to 1) oversee the title search, 2) the preparation and the execution of the loan documents following a meeting with the borrower "to explain legal ramifications of the documents and answer questions, (for which the attorney receives a fee from borrower consistent with that typically charged in refinance transaction) 3) closing and 4) the recordation of the title and loan documents. The Supreme Court stated that the supervision of the title search and preparation of related documents that are created by a title company does not constitute the unauthorized practice of law.

Similarly, the Court held that the preparation of HUD and settlement documents by the lender does not constitute the unauthorized practice of law when there is attorney supervision of the document preparation. In this case, the lender would prepare the documents and then submit them to the attorney for his review and for him to make any necessary changes. The Court warned that if either a title company or lender prepared the documents without direct attorney supervision, such conduct would constitute the unauthorized practice of law. The Court rejected the argument that a corporation (here, the lender) had the same right as an individual person would to appear *pro se* in a court or to prepare legal documents for its own use. Probably, this reasoning would apply to a corporate title company.

The Court also rejected an argument by the attorney that this arrangement does not fall under the rule in *State v. Buyers Service Co., Inc.*, 29 S.C. 426, 357 S.E.2d 17 (1987) that had dealt with the process of a residential purchase transaction held to require attorney supervision. The distinction between that transaction and a refinancing is without significance.

Finally, the Court stated that closings must be conducted under the supervision of an attorney. Because the attorney here is an independent attorney representing the borrower, unlike the *Buyers Service* case where the attorney was an employee of the title company, the arrangement is approved.

Countrywide Home Loans, Inc v. Kentucky Bar Assn. et al., 113 S.W.3d 105, 2003 Ky. LEXIS 181 (Ky 2003).

The Kentucky Bar Association issued an advisory opinion stating the performance of a real estate closing by a non-lawyer constitutes the unauthorized practice of law. Several petitioners brought an action requesting the Court to vacate the advisory opinion. The Bar Association alleged that the closing constituted more than the mere signing of documents at the actual closing and also alleged that attorneys need to be present at the closing to answer any legal questions that may arise. The petitioners averred that due to technological advances, the actual closing has turned into more of a ministerial event and does not require the presence of an attorney. The Supreme Court of Kentucky held that a non-lawyer could conduct the actual closing without engaging in the unauthorized practice of law. The Court did emphasize that non-lawyer closers may not answer any legal questions that arise and may not offer any legal advice.

B. Other Recent Title Insurance Cases

Lawyers Title Insurance Corp. v. Groff, 148 N.H. 333, 808 A.2d 44 (N.H. 2002).

A title company had an agency relationship with an attorney. The agent was authorized to issue title policies as an agent of the title company provided that the attorney complied with the requirements outlined in their agreement. In the situation that gave rise to this case, the attorney who was representing lender in addition to serving as agent of title company, hired a title abstractor to abstract title to a property. The title abstractor was hired as an independent contractor. The abstractor failed to find a construction mortgage that was recorded on the property. Some time after the closing took place the mortgagee of the construction mortgage came forward and threatened to foreclose on the property if the mortgage was not paid. The title company paid the mortgagee and then sought reimbursement from the seller. The seller partially reimbursed the title company for the amount paid to satisfy the mortgage. The title company then brought suit against its agent for the remainder that the title company had to pay to satisfy the mortgage.

The main issue in this case was whether or not the agent could delegate the title search to another party. The Court stated that attorneys can delegate to an independent contractor their duty to examine title because abstracting title does not involve the practice of law. The Court held that the agent was not liable to the title company for several reasons. First, there was no evidence that the attorney agent negligently hired the title abstractor. Secondly, the examination of title is a delegable duty by an attorney. Thus, the attorney is not liable to lender client in malpractice action. Finally, the agent did not break the agency agreement by hiring the independent contractor because the agreement provided that defendant agent would be responsible for his own acts and omission, not liable for those of the abstractor.

Elysian Investment Group, LLC v. Stewart Title Guaranty Co., 105 Cal.App.4th 315 (Cal.Ct.App. 2002).

In 1998 an investment company purchased a property following a foreclosure action. The investment company obtained a title policy from Stewart Title. The policy issued did not except from coverage an order/notice from the Department of Buildings and Safety recorded in 1996 warning that there had been unpermitted conversion work done on the property and that the product of said work was illegal. The previous owner had converted a garage into a living space. The order/notice was not issued as part of an enforcement action but rather constituted a warning of the condition and that the condition had to be rectified.

Following the closing, the investment company discovered that the garage had not been legally or properly converted to a dwelling and submitted a claim to the title company. The California Court of Appeals held that the title company was not liable to the plaintiff for damages due to physical defects of the property which were the subject of the Order/Notice because the owner's title policy only insures against loss or damage sustained by reason of the title being vested in some other person; a lien on title; unmarketability of title or lack of a right of access. Here the order was not a recorded lien and therefore did not affect title at the time that the title policy was issued. The Court held that the condition of the garage dwelling did not affect title to the property and the title company had no liability for the investment company not being able to use the property as it had anticipated.

Wolschlager v. Fidelity National Title Insurance Company, 111 Cal.App.4th 784, 4 Cal. Rptr.3d 179, 2003 Cal.App. LEXIS 1327, 2003 Daily Journal DAR 9841 (Cal.Ct.App. 2003).

Plaintiff discovered a lien on his property and disputed whether the claim had to be submitted to arbitration. Plaintiff ordered title insurance when he was selling his house. The plaintiff received a preliminary report from the title company that did not address the issue of arbitration in the event that there was a claim. However, the preliminary report did provide that policy forms from the title company should be consulted. The policy forms contained an arbitration clause. The California Court of Appeals held that the preliminary report incorporated the arbitration clause by reference into the preliminary report; therefore, the plaintiff was bound to submit the claim to arbitration. Although the Court agreed that the for the policy form clause to be incorporated by reference it had to be known by the plaintiff or easily available to the plaintiff, it held that in this case the forms were easily available to the plaintiff and as a result he was bound by the arbitration clause. The Court reversed the trial court that had denied the petition to compel arbitration.

Michak v. Transnation Title Insurance Company 148 Wn.2d 788, 64 P.3d 22, 2003 Wash. LEXIS 142 (Wash. 2003).

Transnation Title Insurance Company (“Transnation”) issued a preliminary title commitment to the plaintiff. Following the issuance of the preliminary commitment, Transnation became aware that one of the easements that was on the property had been reduced in size several years earlier. Transnation prepared a supplement to the Commitment with a corrected legal description portraying the reduction in the easement. At the closing the plaintiff was presented with and initialed the amended legal description. After the closing the plaintiff discovered that the easement had been reduced and the plaintiff demanded that Transnation obtain a new easement or pay money damages. The plaintiff argued that Transnation was contractually prohibited from changing the legal description that was in the preliminary title commitment. The Supreme Court of Washington rejected plaintiff’s argument because her initials next to the correct legal description indicated that she assented to the amendment. The Court cited the following rule “a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.”

Snow v. First American Title Insurance Company, et al., 332 F.3d 356 (5th Cir. 2003).

A group of real estate purchasers brought actions against various title companies, alleging violations of the Real Estate Settlement Procedures Act (“RESPA”). Specifically, the plaintiffs alleged that the title companies had compensation plans in effect; whereby, agents of the title companies received some form of additional compensation for generating large volumes of title policies. RESPA prohibits agents from receiving a “thing of value” for the referral of business involving a real estate service.

The title companies argued that the plaintiffs’ claims were barred by the one-year statute of limitations that is contained in RESPA. Under RESPA, the statute of limitations begins to run “from the date of the occurrence of the violation.” 12 U.S.C. §2614. The plaintiffs conceded that the closing occurred more than one year from the filing of the actions. However, the plaintiffs alleged that when the title companies gave the agent the compensation for the business, the statute of limitations began to run anew.

For four reasons, the Court disagreed and held that the closing date was the triggering date. First, RESPA’s legislative history spoke of a singular triggering event for RESPA violations and suggests that RESPA was directed towards closings. Second, the plaintiffs’ interpretation of the triggering event could potentially allow a plaintiff to recover more than once for a single violation. The plaintiffs’ interpretation would allow the plaintiffs to recover for a RESPA violation at the closing and again bring an action for a violation when the agent received the compensation. Third, using the closing date as the triggering event establishes a clear date that could be ascertained and relied on by all parties. Finally, the limited case law that exists on this issue supports using the date of closing as the date of violation.

Because there had been more than a year between the closing dates and the dates that the claims were filed, the Court affirmed the trial court and held that the plaintiffs’ cases could not proceed because they were barred by the statute of limitations.

Denaxas v. Sandstone Court of Bellevue, et al., 148 Wn.2d 654, 63 P.3d 125 (Wash. 2003).

An agent of a realtor approached an owner of property to inquire whether the owner wanted to sell the property. The owner indicated that he owned two lots and that he also owned a strip of a third lot and that he might be willing to sell what he owned. Another agent of the realtor performed an online search and determined that the owner owned three full lots. The information from the online search was incorrect. A purchase and sale agreement, with financing by the seller, was drafted containing the incorrect legal description based on the information from the online search. The purchase and sale agreement was executed and a title company was hired to perform a preliminary title report. The preliminary report that was prepared had the correct legal description for the property, but neither the seller nor the owner reviewed the legal description. The deed that was prepared by the title company contained the correct legal description. The sale closed with the title company acting as escrow agent. At no time before or during the closing, did any of the parties notice the discrepancy between the legal description in the purchase and sale agreement and the legal description prepared by the title company.

After the closing he purchaser became aware that he had not purchased the amount of square footage that he had thought. He contacted the seller requesting that the seller lower the purchase price. The seller refused and as a result the purchaser stopped making the payments that were due under the agreement and a note. The seller then accelerated the note and sued the purchaser for failure to pay on the note. The purchaser brought a third party action against the title company alleging breach of fiduciary duty and negligence.

The Washington Supreme Court affirmed the ruling of the trial court granting the motions of both the Seller and title company for summary judgment. It reversed the appellate court and held that the title company was under no duty to the purchaser to disclose the discrepancy between the legal description in the purchase and sale agreement and the legal description in the other documents. The Court stated that the escrow instructions did not impose a duty on the title company to compare the purchase and sale agreement with other documents to determine if there were any differences. Similarly, the Court found that existing case law did not show that the title company breached its duty of reasonable care. “Purchaser had constructive knowledge of the true facts at the time of closing the transaction” and could not invoke the doctrine of mutual mistake.