

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

Case Summary: *Findlay v. Chicago Title Insurance Co.*

BY KEVIN CAMDEN & RICHARD W. RAPPOLD

Findlay v. Chicago Title Insurance Co., 2022 IL App (1st) 210889 deals with the obligations of a title insurer to its insured, negligence, and malpractice.

Findlay and Small (referred to as the "Findlays") owned a residence located in a Winnetka subdivision consisting of 10 residential lots. The Findlays owned Lot 5, located on the shore of Lake Michigan. Three of the 10 lots did not have direct access to the beach at the lake. A beach easement located on the south 15 feet of

Lot 5 and east from the toe of the bluff, which runs parallel to the beach, to the water line, was created by deed for the benefit of these three lots. Access to the beach was afforded to these three lots via Cherry Street which runs from Sheridan Road to the lake.

In the 1990s, the Village of Winnetka built a gate across Cherry Street and kept it locked except during daylight hours in the summer. After that gate was installed, the

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Notary Public Law Status

BY JOSEPH ROGUL & TIFFANY THOMPSON

Many inquiring minds in our Real Estate Law Section are asking: What is the status of that new notary public law? We attempt to sort it out a bit in this article.

As we know, the Illinois General Assembly enrolled SB2664 on May 30, 2021 and it was approved by the governor on July 23, 2021 as P.A. 102-160. The law makes many changes to the previously existing notary public law, which, in retrospect, seems quite perfunctory and quaint by comparison. The prior statute provided for the application for a notary commission, a statutory bond, the registration of the commission, and the performance of a few categories of notarial acts, which

mostly involved the notary administering oaths and generally observing, in-person, the execution or acknowledgment of documents at the time of execution. The new law brings us into the 21st century and adds provisions which substantially expand the Act. A short list of new concepts includes: a comprehensive "definitions" section; provision for "electronic notary commissions" in addition to notary commissions; electronic notary acts and remote audio-visual technology, in addition to others.

The law directs the Illinois Secretary of State, which regulates notaries, to promulgate regulations to implement

the new law. The new regulations which are working their way through the JCAR system include: new commission requirements, including a course of study and examination; provision for licensed "remittance agents"; digital notary seals and certificates; authority for the witnessing of documents executed remotely from the notary's physical location; electronic notarial acts; digital journals; and administrative hearings, among others.

The new statute provides an effective date as follows: "*Section 99. Effective date. This Act takes effect on the later of: (1) January 1, 2022; or (2) the date on which*

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owners of two of the landlocked lots, Lots 8 and 9, accessed the beach easement via Lot 5. At the east end of Cherry Street is a small public beach and the beach easement.

In 2007, the Findlays purchased Lot 5. They blocked access to the beach easement by building a fence and letting large dogs loose on the property. They planted vegetation and built a boat rack within the beach easement.

The owners of Lots 8 and 9 sued the Findlays for a declaratory judgment that they either had an existing ingress and egress easement to access the beach easement or, in the alternative, that they were entitled to such an easement by necessity or by prescription and for a permanent injunction to prevent the Findlays from interfering with any easement found by the court (including removal of the vegetation and boat rack).

The plaintiffs and defendant all had owner’s title insurance policies issued by Chicago Title Insurance Company (“CTIC”). All three parties filed claims on their policies and CTIC provided an attorney for each side. Of the four counts in the plaintiffs’ complaint, CTIC agreed to defend two of the counts for the Findlays. Fidelity National Law Group (“FNLG”) was assigned the case, and Genevieve Bernal (“Bernal”) was the attorney who tried the case for the Findlays.

At the trial level, the court ruled that: (a) there was no easement for ingress and egress, (b) the owner of Lot 9 was a beneficiary of the beach easement, and (c) the Findlays must remove the boat rack (however the vegetation could stay). The Findlays then sought sanctions against the plaintiffs for filing a frivolous lawsuit. That motion was denied. On appeal, the judgment of the trial court was upheld.

The Findlays, not happy with basically winning the case, then filed a lawsuit against CTIC, FNLG and Bernal for fraud, misrepresentation, legal malpractice, conflict of interest, and violation of the complete defense rule. It is from this case which the appeal is taken. It is worth reading the 1st District opinion of *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036 for a thorough

recitation of the first claims, as well as to review the plat showing the lots referenced in the opinion.

Because CTIC provided attorneys for both parties, the Findlays claimed that CTIC had a conflict of interest. As was the case here, occasionally both sides of a claim have the same insurer. CTIC provided independent counsel to both sides. No evidence was presented that CTIC directed either of the attorneys as to the presentation of their cases. The court noted that CTIC was bound to lose no matter what, since it had claims from both sides. Absent evidence CTIC intervened in the prosecution or defense of either party, the court held that CTIC had no conflict in this case.

The “complete defense rule” is a general rule of law requiring insurers to defend all counts of a complaint even where not all of those counts are related to covered claims. The often broad defense language in general liability policies triggers this rule. The appellate court stated that “One rationale courts have used to justify the complete defense rule is that ‘dividing representation between covered and noncovered claims is impractical.’” (*Findlay v. Chicago Title Insurance Co.*, 2022 IL App (1st) 210889, ¶ 58 (citing *GMAC Mortg., LLC v. First American Title Insurance Co.*, 985 N.E. 2d, 823, 828 (2013))).

Title insurance is unique since it only covers losses from defects in title (*Findlay v. Chicago Title Insurance Co.*, 2022 IL App (1st) 210889, ¶ 60 (citing *BB Syndication Serv., Inc. v. First American Title Insurance Co.*, 780 F.3d 825, 827 (7th Cir. 2015))). “Title-related claims are ‘discrete’ and can be bifurcated fairly easily from related claims.” (*Findlay*, 2022 IL App (1st) at ¶ 61 (quoting *GMAC*, 985 N.E. 2d at 829)).

For these reasons, the court held that the complete defense rule does not apply to title insurance.

Findlay also claimed three counts of breach of contract against CTIC: breach of contractual duty to defend them against Counts I and IV of the chancery complaint; breach of contract (title commitment and

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insurance) by failing to provide notice of the easement benefitting Lots 9 and 10; and breach of contract by CTIC for failing to prosecute their counterclaim in the chancery action to quiet title.

The court found that the fraudulent misrepresentation claim failed because the Findlays could not prove two elements of the fraud claim¹ (false statement of material fact and justifiable reliance). The Findlays based their claim for misrepresentation upon a letter sent to them by Bernal during the original chancery action. Bernal informed the Findlays in that letter that FNLG was retained by CTIC to defend them; that Bernal would be the primary attorney; that she and her firm had a duty of loyalty to the Findlays; that their goal was to defend them and resolve the lawsuit; that therefore FNLG had no conflict of interest; and that if in the course of the litigation, a conflict arose, FNLG would so notify them. In reviewing the letter, Findlay's claim supported the fraud, the court found CTIC did not

misrepresent any conflict of interest, and there appeared to be no conflict between the parties' underlying claims (chancery case). Furthermore, prior to any answer being filed in the chancery case, CTIC notified Findlay it was providing counsel to the opposing party as well.

Finding there was no misrepresentation and, in fact, it is undisputed that the Findlays were provided with information, the justifiable reliance claim also failed. Lastly, the fraud claim failed because it was time barred by the statute of limitations.

Regarding the contract claim for failure to prosecute the counterclaim to quiet title, the court found the allegations were in the nature of legal malpractice, not breach of contract. In so finding, the court affirmed the trial court (in the Law Division complaint). Furthermore, the trial court found the complaint was also time-barred by the two-year statute of limitations. In finding that the claim was barred, the court held that Findlay's counsel was provided by CTIC and

that CTIC controlled the defense. Under the theory of *respondet superior*, the court held Bernal (Findlay's attorney in the chancery action) was an agent of CTIC and following agency theory, any claims in the nature of legal malpractice must have been brought within the two-year period. As an aside, the court notes the Findlay's complained of Bernal's contact to her "superior," on December 3, 2014, and "knew or reasonably should have known" they had a cognizable claim for legal malpractice. The statute of limitations ran on December 4, 2016, but the complaint was not filed until June 7, 2018. ■

1. To sufficiently plead a cause of action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) a false statement of material fact; (2) defendant's knowledge or belief the statement was false; (3) defendant's intent that the statement induced the plaintiff to act; and (4) plaintiff's justifiable reliance on the statement. (*Findlay*, 2022 IL App (1st) at ¶ 79 (citing *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193 (1989))).

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the Office of the Secretary of State files with the Index Department of the Office of the Secretary of State a notice that the Office of the Secretary of State has adopted the rules necessary to implement this Act . . .

The Illinois Administrative Procedure Act, 5 ILCS 100/5-5, *et seq.*, provides the procedures for administrative rulemaking. It grants all rulemaking authority to the General Assembly's Joint Committee on Administrative Rules, (JCAR), in §5-6. The rulemaking process begins with the filing of the proposed new rules by any administrative agency, (including the Secretary of State itself), with the Secretary of State's Index Department. From there, the Secretary of State publishes the filing in the Illinois Register. For General Rulemaking, §5-40 provides as follows: "(b) *Each agency shall give at least 45 days' notice of its intended action to the general public. This first notice period shall commence on the first day the notice appears in the Illinois Register.*"

The statutory scheme for rulemaking

includes the initial notice period within which the public may submit comments to the Secretary of State, and a second notice period commencing when the proposed rule is filed with JCAR, as set forth in §5-40(c); comments may be made directly to JCAR during that period. Eventually, JCAR either approves the proposed rule or rejects it, or a compromise acceptable to JCAR and Secretary of State is adopted.

An apparent anomaly presents itself upon review of the above. If the law becomes effective upon notice to the Index Department that the Secretary of State has adopted the rule, and the filing of that notice is the first step in the process of final approval of the rule, then the law becomes effective prior to having implemented final rules. Maybe the drafters intended the law to become effective at the time of publication of JCAR's approval of the rule or meant the 'final' adoption of the bill by JCAR, (no definition of 'adopted' appears in the Act), but in any event, some of our

members have commented that no escrow company, title company or lender, etc., would fully implement the new provisions of the law without the safe harbor of effective regulations so, it's probably a moot point. The Secretary of State's Office of General Counsel, which has been very helpful and informative during this process, confirmed that the adoption of the rule is the first step in the process of final approval and added that nothing is stopping providers from preparing to apply to the Secretary of State in the meantime. So the law is in effect but there are no commissioned electronic notaries in Illinois to date. The General Counsel's office filed the new proposed rule with JCAR on October 31st. There were 853 recommended changes filed, which explains the time it has taken so far to process this proposed rule. JCAR confirms that this rulemaking has moved to the second notice period and that the new proposal will be considered at the December 13th meeting. The final approval should come shortly after

the hearing if all goes well and if so, the new rule could conceivably be finalized before the end of the year.

As alluded to above, the revisions in the current version of the rule are too many to

review in this article. Once the final iteration of the proposed rules is published we can analyze and assess them for their probable impact, methods and procedures for transactions going forward, consistency and

compliance with relevant federal regulations, and other critical considerations. Stay tuned.■

Notices, Pointers, Reminders, and Other Tidbits of Interest

BY MICHAEL J. MASLANKA

1. Letters of Office. Many real estate transactions involve a decedent's estate as the owner/seller of real property. If a probate estate has been opened and a representative appointed by the court, then the circuit court clerk issues letters of office to the representative of the estate (executor or administrator). The clerk of the circuit court of Cook County, Illinois used to issue letters of office on yellow paper with a raised seal. (Remember that?). Earlier this year, that practice ended and now all letters of office are issued electronically. Such a change is likely to occur in many other circuits as well, and all attorneys involved in transactions, along with lenders and title companies, need to be aware of the change.
2. Mortgagors Need Financial Assistance? Applications are being accepted through January 2023 by the Illinois Homeowner Assistance Fund. Financial grants are available to qualifying homeowners in Illinois, who have had financial hardships due to Covid. The homeowners must own and occupy the property as their primary residence, and the maximum amount of assistance available is \$30,000. More information can be obtained by visiting illinoishousinghelp.org or calling 1-866-ILHPLP. Payments are made directly to the homeowners' mortgagees. Let your clients know about this program as soon as possible.
3. Homeowners/Landowners. For dwelling units that existed on or before July 1, 1988, smoke alarms can be battery powered or wired into the building's electrical system. However, under the amended Smoke Detector Act 425ILCS60/, owners of single and multi-family homes, as of January 1, 2023, are required to install new alarms that are 10-year sealed battery alarms. This is especially important for owners who rent single and multi-family homes, as it is their obligation and duty to install the alarms. 425 ILCS 60/3.
4. We all know about 911, but now we have 988, which is a direct line for the National Suicide Prevention lifeline. This was established by the Illinois Department of Human Services, Division of Mental Health. Trained call takers are available to help callers in various ways, and the calls are confidential, free, and available anytime day or night.
5. A new Illinois Code of Judicial Conduct takes effect on January 1, 2023. It was promulgated by the Illinois Supreme Court. It resembles the current American Bar Association model code of judicial conduct. It governs state court judges and judicial candidates.
6. Bankruptcy affects real property interests! Check out this CLE! LIVE WEB - Bankruptcy Basics: From the Creditor's Perspective. 8:30am on Nov. 18, 2022.
7. Congratulations to our own Samuel Levine who recently was appointed president of the Society of Illinois Construction Attorneys ("SOICA"). SOICA recognizes Illinois lawyers who are distinguished for their skill, experience and professional conduct in the practice of construction. Membership is by invitation.
8. Illinois Supreme Court news. Illinois Supreme Court Justice, Mary Jane Theis became the Chief Justice of the Illinois Supreme Court on October 26, 2022. The immediate past Chief Justice, Anne M Burke, is retiring from the bench as of November 30, 2022. First District Appellate Court Justice Joy V. Cunningham will take her seat, effective December 1, 2022.

If you are aware of important news, notices, reminders, etc., in the real property world, that you think other ISBA members could find useful, please email it/them to mike804@ameritech.net for possible publication in an upcoming newsletter.■



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