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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GATEWAY BANK, FSB, Plaintiff and Appellant, v. TICOR TITLE COMPANY OF CALIFORNIA, et al., Defendants and Respondents.	A121398 (Alameda County Super. Ct. No. RG04186151)

INTRODUCTION

Plaintiff Gateway Bank, FSB (Gateway) appeals from judgments of the Alameda County Superior Court, following the court's grant of summary judgments in favor of defendants Ticor Title Company of California (Ticor) and Chicago Title Insurance Company (Chicago Title).

Gateway contends that the court erred in determining that Ticor owed Gateway no duty in connection with an escrow opened by CHL Mortgage Group, Inc. (CHL), a mortgage broker/lender who created fraudulent loan packages and forged loan documents for loans that Gateway either funded or purchased. Gateway contends that triable issues of fact exist as to whether Gateway was a party to the escrow.

As to defendant Chicago Title, Gateway contends that the court erred (1) in ruling that the fraud of CHL rendered the standard ALTA title insurance policies issued by

defendant Chicago Title for the loans void *ab initio,* entitling Chicago Title to rescind the policies, and precluding coverage of Gateway as a successor in interest or assignee of CHL, and (2) in ruling that the forged notes did not create any "indebtedness" within the meaning of the policies, thus precluding Gateway from showing that it was the owner of an indebtedness secured by the insured mortgage.

We shall affirm the judgments in favor of Ticor and Chicago Title.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Ticor Escrows*

Gateway both originates mortgage loans and acquires mortgage loans for purposes of resale. Ticor is an escrow company that handles purchase transactions, refinances and other aspects of the escrow business. CHL acted as a mortgage broker and originator of mortgage loans for resale. This litigation arises out of a complex mortgage fraud scheme perpetrated by the now-bankrupt CHL.

In February 2004, Gateway entered into a written "Master Mortgage Loan Purchase Agreement" (Master Agreement) with CHL, wherein Gateway would act as a warehouse lender, purchasing loans made by CHL that were in turn to be sold to take-out investors in the secondary mortgage market. Gateway would "warehouse" the loans by providing the funding for the loan transaction and by holding the loan until such time as the take-out investor purchased the loan from Gateway.[1] Ticor was not a party to the Master Agreement.

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[1] According to the declaration of Gateway's Michael Kenny, as a part of Gateway's loan warehousing business, "we will acquire loans that have been pre-approved by us and where the lender/seller of the loan has already arranged for purchase by a takeout investor. As a part of this process, Gateway will fund the loan by wire transferring the money into escrow and will take an assignment of the loan. Gateway will hold title to the loan normally for a period of a few days to a few weeks until such time as the takeout investor purchases the loan from Gateway." The parties disputed whether the Master Agreement provided credit to CHL (as Ticor asserts) or was a loan purchase agreement (as Gateway asserts). This dispute is immaterial to the question whether Gateway was a party to the escrow.

In the CHL-Gateway Master Agreement, Gateway expressly required standard ALTA title policies because of the policy's coverage of successor insureds free of "rights and defenses" the insurer might have against the originating lender. The Master Agreement required CHL to submit to Gateway for approval "Mortgage Loan Documents" for a mortgage file. The Master Agreement required the mortgage file for a transaction to include escrow documents, but did not specify a particular escrow holder. CHL was responsible for the selection of Ticor as the escrow holder for the transactions at issue. Gateway would not approve a loan transaction without standard general and special escrow instructions.

In the summer of 2004, CHL entered into several loan transactions pursuant to the Master Agreement. Eleven of those loan transactions, totaling $5,502,860, are the subject of this action. The 11 transactions involved the purported refinancing of home loans that CHL had previously extended to the same borrowers. CHL was acting as both the new lender (or broker) and the previous lender of record whose interest was being extinguished by the refinancing. Thus, CHL was the recipient of the final payoff of the previous loan at the close of each of the escrowed transactions. Gateway required CHL to furnish it loan packages which included a copy of the escrow instructions, as well as a loan application, a borrower financial statement, an estimated HUD-1 settlement statement, the first page of a preliminary title report, an appraisal, a note, a deed of trust, an assignment of deed of trust, the loan approval from the take-out investor, a credit report and related loan documents.

It was contemplated that CHL would use the funds provided by Gateway to make its own real and valid refinancing loans to genuine residential borrowers, secured by their real property. However, CHL did not make such loans. Rather, it fabricated phony loans and committed insurance fraud. CHL opened loan escrows for the phony loans with Ticor. It identified itself as the lender, submitted phony loan documents which it had fabricated, and forged the borrowers' signatures on the escrow instructions, the notes and deeds of trust, as well as other loan documents. Gateway wired the funds directly into the CHL loan escrows, which CHL purported to use to make the phony refinancing loans. At

the loan closings, the escrow agents released the moneys as payoffs to CHL, which did not refinance the named borrowers' existing loans, but simply pocketed the money.

Ticor knew Gateway was the source of funds used to close the escrows. Gateway wire transferred the funds to Ticor to close the loan transactions at issue through 11 wire transfers of funds. Each "Incoming Wire-Advice of Credit" identified the "originating party" as Gateway Bank, FSB, and also identified the exact amount to be funded, the name of the purported borrower and the escrow number to be credited by the wire transfer.

The general and special closing instructions were supplied by CHL to Ticor. Gateway did not provide Ticor with any general or special escrow instructions, written or oral, in any of the 11 escrows. The lender's instructions provided to Ticor by CHL did not refer to Gateway or to the Master Agreement. However, the escrow instructions for each loan required the provision of "Hazard Insurance" to include the "loss payee" as "CHL Mortgage Group Inc., it's successors and/or assigns."

CHL's escrow instructions specified what Ticor was required to do to close each loan, including to disburse the loan proceeds to CHL. Each of CHL's closing escrow instructions to Ticor instructed: "Do not close or fund this loan unless All conditions in these closing instructions and any supplemental closing instructions have been satisfied. . . . You must follow these instructions exactly." Among the instructions that Ticor "Acknowledged and Agreed" to fulfill and be bound by were the following: "Each Borrower must sign all documents exactly as his or her name appears on the blank line provided for his or her signature. All signatures must be witnessed if required or customary. All signature acknowledgements must be executed by a person authorized to take acknowledgements in the state of closing." The specific closing instructions provided, "Borrower must sign and date these closing instructions."

Ticor did not verify the identity of borrowers for any of the 11 transactions. In reviewing the grant of summary judgment, we must accept as true evidence that Ticor failed to assure that the borrower signed all documents, including the promissory note and deed of trust, and failed to assure that the borrower's signature was properly

witnessed. Ticor allowed documents to be signed outside of escrow, knew or should have known that the signatures were forged, knew or should have known that the signatures had been backdated, knew or should have known that Ticor had received multiple wire transfers for funding the same loan, and knew or should have known the inconsistencies in payoffs would not result in Gateway's being in a first lien position.[2]

One of the wire transfers from Gateway that was mistakenly sent to the wrong escrow number was returned, not to Gateway, but to CHL at the direction of Ticor escrow officer Cindy Olesen, because the closing escrow instructions provided by CHL required Ticor to return the funds to CHL in the event an escrow did not close.

B. *Chicago Title ALTA Policies*

Ticor issued ALTA insurance policies on behalf of Chicago Title for the 11 loans.[3] For each deed of trust, CHL instructed Ticor to obtain an ALTA title policy naming CHL as the named insured. The policies were issued based on CHL's instructions and representations as to the authenticity of the notes, trust deeds, payoff demands, and closing instructions. The information provided by CHL to the escrows for each of the deeds of trust was material to Chicago Title's decision to issue title insurance policies to CHL. As stated before, CHL concealed that the borrowers on the deeds of trust had not authorized the purchases and/or refinances attributed to them and CHL falsely represented the validity and authenticity of the signatures of borrowers with respect to the Gateway deeds of trust.

In the fall of 2004, CHL's offices were seized by the FBI in the course of a mortgage fraud investigation. CHL filed for bankruptcy protection in 2005.[4]

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[2] Ticor disputes it was required to verify the borrowers' identities or to insure properly witnessed signatures. For purposes of summary judgment, we accept as true Gateway's evidence to the contrary.

[3] Chicago Title issued the policies though Ticor as its limited agent.

[4] CHL's president, Larry Seidenfeld, was convicted of various fraud offenses and is in federal prison.

C. *Summary Judgment*

On February 4, 2005, Gateway filed its first amended complaint against Ticor and others, seeking reimbursement of its losses and alleging, among other things, causes of action for negligence, fraud, negligent misrepresentation, and unfair competition. Gateway sued Chicago Title on April 11, 2005 as a Doe party, and filed a second amended complaint on May 6, 2005, asserting breach of contract, conspiracy, and unfair competition claims against Chicago Title.

On August 19, 2005, after filing of the instant lawsuit by Gateway, Chicago Title served formal notices of rescission for each of the deeds of trust upon the CHL bankruptcy trustee and returned all premiums paid for each policy.[5] On August 19, 2005, Chicago Title served Gateway with a copy of each notice of rescission concerning a Gateway deed of trust. On August 23, 2005, Chicago Title denied Gateway's claims under the title insurance policies.

Chicago Title filed a cross-complaint for declaratory relief against Gateway.

Gateway demurred to Chicago Title's first amended cross-complaint on the ground that Insurance Code section 650 bars an insurance carrier from rescinding once a claimant has filed suit to enforce a policy. The trial court overruled the demurrer.

Ticor, Chicago Title, and Gateway each filed motions for summary judgment.

On February 19, 2008, the trial court granted Chicago Title's motion for summary judgment, and denied Gateway's competing motion as moot. The trial court based its decision on two independent grounds: First, the policies were void *ab initio*, having been obtained by the fraud of the insured. The policies were not intended to insure against invalidity of title caused by the insured's own fraud and coverage did not extend to the insured (CHL) or to the assignee of such insured (Gateway). Second, the court concluded that Gateway lacked an insurable interest because there was no existing indebtedness between the named borrower and the lender (CHL). The forged notes created no

[5] Chicago Title did not seek approval from the bankruptcy court to effect the rescissions or for relief from the automatic stay. The bankruptcy trustee has not accepted the rescissions, negotiated the checks, or returned them to Chicago Title.

indebtedness within the meaning of the policies and Gateway could not show it was the owner of an indebtedness secured by the insured mortgage, i.e. an "insured" under the policy.

At the time it granted summary judgment for Chicago Title, the court also ruled upon various objections by Ticor, codefendant Cindy Olesen, and Chicago Title to evidence submitted by Gateway in opposition to defendants' summary judgment motions.

On March 13, 2008, the trial court filed its amended order granting Ticor summary judgment on Gateway's action.[6] In granting summary judgment in favor of Ticor, the court concluded that Ticor did not owe Gateway a duty of care, as the undisputed material facts demonstrated that Gateway was not a party to the escrow. The court also concluded summary judgment on this basis was consistent with analysis of the duty factors set out in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*), in light of the Supreme Court's ruling in *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711-716 (*Summit*). Consequently, the cause of action for negligence failed. The court further found no triable issue of fact on the cause of action for breach of third party beneficiary contract as there was nothing in the contracts to indicate the parties intended to benefit Gateway. With respect to causes of action for fraud and negligent misrepresentation, it was undisputed that Ticor made no promises to Gateway. The cause of action for unfair competition (Bus. & Prof. Code, § 17200) foundered on the absence of a duty of care to Gateway, and the conspiracy claim failed, absent a triable issue as to any underlying wrongful conduct by Ticor with respect to Gateway.

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[6] The court at that time also granted summary judgment in favor of codefendant, Ticor employee Cindy Olesen. Gateway's appeal from the judgment in favor of Olesen was dismissed upon stipulation of the parties following her death.

Judgment was entered in favor of Chicago Title on April 14, 2008. Judgment was entered in favor of Ticor and codefendant Cindy Olesen on April 7, 2008. These timely appeals followed.[7]

I. Standard of Review

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.]' " (*Lonicki v. Sutter Health Center* (2008) 43 Cal.4th 201, 206.) "In addition, we ' "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

"We review the trial court's evidentiary rulings on summary judgment for abuse of discretion. [Citations.]" (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.) The burden is upon Gateway "to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason. [Citation.]" (*Ibid.*)

II. Ticor

A. *Duty*

Gateway maintains that there exist triable issues of material fact as to whether Ticor owed it a duty of care and asserts it was a party to the escrow. Gateway argues that it did not need to be named in the escrow instructions to be deemed a party to the escrow and that Ticor's acceptance of the money Gateway wired into the escrows created a duty of care and a fiduciary relationship with Gateway. We disagree.

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[7] The following entities have filed amicus briefs on appeal: California Bankers Association in support of Gateway, and California Land Title Association and American Land Title Association in support of Chicago Title Insurance Company.

"An escrow may be defined as any transaction in which one person, for the purpose of effecting a sale, transfer or encumbrance of real or personal property to another person, delivers any written instrument, money, evidence of title or other thing of value to a third party, the escrow holder or depository, to be held by [that third party] for ultimate transmittal to the other person upon the happening of an event or the performance of certain specified conditions. [Citations.]" (*Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526 (*Markowitz*), citing, among others, Fin. Code, § 17003, subd. (a); Civ. Code, § 1057; *Summit, supra,* 27 Cal.4th at pp. 711-714.)

On the facts presented, it is clear that escrows existed, and that Gateway had an interest in each of the 11 escrows. It deposited money into the escrows established by CHL. "That [Gateway] had an interest in the escrow, however, does not mean that [it] was a party to the escrow, or to the escrow instructions on which [it] relies." (*Markowitz, supra,* 142 Cal.App.4th at p. 526.) Nor does the existence of an escrow answer the question whether Ticor had a duty to Gateway.

In *Summit, supra,* 27 Cal.4th 705, the California Supreme Court outlined the scope of an escrow holder's fiduciary duties: "An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.] If the escrow holder fails to carry out the instruction it has contracted to perform, the injured party has a cause of action for breach of contract. [Citation.]"

"In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that '[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.]' [Citation.] On the other hand, an escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the

parties' instructions. [Citations.]" (*Summit, supra*, 27 Cal.4th at p. 711; accord, *Markowitz, supra,* 142 Cal.App.4th at p. 526.)[8]

In *Summit,* pursuant to the escrow instructions in a refinance transaction, the escrow holder paid off a note to the original lender, Talbert, rather than to Summit, the company to whom the note had been assigned by Talbert. Summit sued the escrow company for negligence, contending that in the refinance transaction, the escrow company should have paid it rather than Talbert, because the escrow company knew Talbert had assigned its rights in the note and deed of trust to Summit. "*Neither the assignor, Talbert, nor the assignee, Summit, was party to the escrow.*" (*Summit, supra*, 27 Cal.4th at p. 708.) The Supreme Court held that despite its knowledge of the assignment, the escrow holder did not owe a "duty of care to a nonparty to the escrow based on an assignment to that nonparty by another nonparty." (*Id.* at pp. 707-708.) The court rejected Summit's attempt to fashion a general duty owed by the escrow agent to honor contracts made by creditors of the principal absent an agency relationship with the creditor. (*Id.* at p. 714.) The court acknowledged that the escrow agent's receipt of notice of an assignment could be deemed the equivalent of a new instruction regarding the party to be paid *where the assignment was made by a party to the escrow* entitled to

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[8] Even as to parties, the escrow agent's duties are limited. "There is authority that the escrow agent does *not* have a duty to disclose to one party to the escrow that he or she is being defrauded by the other party to the escrow and therefore the agent's knowledge of the fraud is not imputed to the other party to the escrow where imputation would prevent the principal from recovering against the party committing the fraud. However, if the agent clearly knows of a fraud on a party to the escrow being committed by the other party in the escrow, the agent's fiduciary obligations would preclude it from proceeding with the escrow without disclosure to the defrauded principal. When the agent proceeds to perform the escrow with knowledge of the fraud, it is in effect a participant in the fraud and is liable to the defrauded party if the fraud is not disclosed." (3 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 6:26, p. 68, fns. omitted; *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162 [escrow holder is not under fiduciary duty to go beyond escrow instructions and notify *each party to the escrow* of any suspicious fact or circumstance which has come to its attention before or during life of the escrow which could conceivably affect such party even though the fact or circumstance is not related to that party's specific escrow instructions].)

give instructions to the escrow holder. (*Id.* at p. 714 & fn. 5.) The Supreme Court firmly rejected the holding of *Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. (*Summit, supra,* 27 Cal.4th at p. 714.)[9]

Gateway argues that *Summit* is distinguishable because Gateway *was* a party to the escrow. It also contends *Summit* is inapplicable because Gateway received its interest through CHL, a party to the escrow, and *Summit* was limited to circumstances where a stranger to the escrow assigned an interest in the funds to another stranger. Here, of course, there was no assignment of *funds* in the escrows by CHL to Gateway. It is undisputed that according to the escrow instructions provided by CHL, upon closing, CHL was to receive *all* funds deposited in the escrows and any monies from escrows that for any reason could not be closed. Gateway's interest was as a successor to CHL's security interest in the deeds of trust.

Having concluded that the escrow company owed no fiduciary duty to Summit as a nonparty, the Supreme Court next considered Summit's claim that a duty might be posited on Civil Code section 1714, subdivision (a),[10] on the grounds that all persons are liable for injuries caused by their negligent conduct. (*Summit, supra,* 27 Cal.4th at

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[9] In a concurring opinion in *Summit*, Justice Werdegar expressed her understanding of the holding "as limited to this and similar fact situations and, in particular, as not deciding whether an escrow holder might breach its fiduciary duty to *a party* to the escrow by paying off, pursuant to instructions, an original lender who had assigned and transferred the note and deed of trust to another. [¶] . . . Where the misdirected payment is made by and through an escrow agent, in the face of recorded notice of the assignment, the escrow agent might well be held to have breached its duty to the borrower. That such a misdirected payoff was made pursuant to the escrow instructions—typically drafted by the escrow agent itself or by the new lender, rather than by the borrower—would not necessarily excuse or negate the breach." (*Summit, supra,* 27 Cal.4th at pp.716-717, conc. opn. of Werdegar, J.)

[10] "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. . . ." (Civ. Code, § 1714, subd. (a).)

p. 715.) The court first recognized "the threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care [citation], and the '[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law' (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58)." (*Summit*, at p. 715.)

The *Summit* court proceeded to apply the six-factor test of *Biakanja, supra,* 49 Cal.2d 647, 650, to determine whether the escrow holder would be held liable to a third person not in privity. (*Summit, supra,* 27 Cal.4th at p. 715.) " 'The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations.]' " (*Summit*, at p. 715, quoting *Biakanja,* at p. 650.) Applying the factors, the Supreme Court found no reason to depart from the general rule that the escrow holder incurs no liability for following the escrow instructions or for failing to do something not required by the terms of the escrow. (*Summit,* at pp. 715-716.)[11]

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[11] *Summit* adopted the analysis of the Court of Appeal in that case as follows: "We find the analysis of the Court of Appeal persuasive. 'First, the transaction CLTC [the title company] undertook was not intended to affect or benefit Summit. CLTC was engaged by Dundrel and Furnish to assist them in closing a loan transaction between Dundrel and Furnish, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. Second, although the certainty of injury element is satisfied because the evidence supports the conclusion that Summit did not receive the funds paid to Talbert, the foreseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would not disburse the funds to Summit.' With regard to the moral blame factor, compliance by CLTC with its fiduciary duty to follow the instructions of the parties to the escrow was not blameworthy and is, instead, a policy consideration that militates against concluding the company had a tort duty in this case. Finally, there is not a sufficiently close

Commenting on the effect of *Summit, supra,* 27 Cal.4th 705, a leading treatise on real estate observes, "[U]nder California law, it is now clear that an escrow holder owes no duty to a non-party to the escrow when it faithfully follows instructions of a party to the escrow to distribute funds possibly subject to some claim by the non-party." (3 Miller & Starr, Cal. Real Estate (2009 Supp.) § 6:31, p. 14.)

Miller and Starr advise that *Summit, supra,* 27 Cal.4th 705, should be contrasted with *Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722 (*Money Store*). (3 Miller & Starr, Cal. Real Estate (2009 Supp.) § 6:31, p. 14.) In *Money Store,* the lender agreed to provide loan funds to the escrow holder bank to facilitate the sale of a business. *Under the escrow instructions supplied by the buyer and seller parties to the escrow, the escrow holder was authorized to comply with the lender's instructions. The lender transmitted "closing instructions" to the escrow holder*, indicating the amount it would wire to the escrow holder upon demand and compliance with the lender's instructions. The instructions contained directions as to the disbursal of the money and indicated that any deviation from the instructions without the lenders express authorization would be at the escrow holder's risk. The escrow holder acknowledged receipt and acceptance of the instructions. (*Money Store,* at p. 726.) The escrow holder failed to comply with the closing instructions received from the lender, but instead complied with addendum instructions received from the buyer and seller without first

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connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert was found by the bankruptcy court to have extinguished Furnish's obligation under the note, Summit's injury was caused by Talbert's breach of its contractual obligation to Summit." (*Summit, supra,* 27 Cal.4th at pp. 715-716, fn. omitted.) The court noted: " 'In arguing for imposition of a duty, Summit emphasizes that CLTC knew Summit was the assignee of the note and deed of trust and knew or should have foreseen that payment to Talbert would injure Summit. However, foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct. (*Quelimane Co. v. Stewart Title Guaranty Co., supra,* 19 Cal.4th 26, 57-58.)' " (*Summit*, at p. 716, fn. 7.)

Summit "declin[ed] to adopt a rule that would, by subjecting an escrow holder to conflicting obligations, undermine a valuable business procedure . . . ." (*Summit, supra,* 27 Cal.4th at p. 716.)

obtaining the lender's express authorization. The court held that a contractual arrangement could arise when the lender agrees conditionally to provide loan funds and the escrow holder acknowledges acceptance of the conditions through receipt and acceptance of the lender closing instructions. (*Id.* at pp. 728-729.) *Money Store* distinguished *Summit* on the grounds that the lender in *Money Store* "had a direct contractual relationship" with the escrow holder. (*Money Store*, at p. 731.) The contract specified what the escrow holder was to do and the instructions from the buyer and seller authorized the escrow holder to comply with those directives. The lender's instructions were consistent with the buyer and seller's original instructions, yet the escrow holder complied with the addendum without providing the lender an opportunity to object. Applying the six-part test used in *Summit* for determining whether a general duty was owed, the *Money Store* court concluded the escrow holder's actions, as alleged, were morally blameworthy and that it was foreseeable the funds would be distributed contrary to the lender's instructions. There was a close connection between the escrow holder's action and the harm suffered. (*Ibid.*)

Markowitz, supra, 142Cal.App.4th 508, relied upon *Summit* in affirming a nonsuit of an owner's action against a title company that acted as a sub-escrow, based on the title company's failure to record a reconveyance of a deed of trust on the owner's real property securing a promissory note held by two other defendants. (*Markowitz*, at pp. 512, 521.) The appellate court found that, under the factual circumstances alleged, the owner could not establish that the title company owed any duty to him. (*Ibid.*)

In 1998, Donald and Debra Markowitz purchased a residence from the Kachlons, who received a promissory note for $53,000, secured by a second deed of trust on the residence. The promissory note was partially satisfied over the next few years. Following a dispute between the Markowitzes and the Kachlons as to the amount still owing on the promissory note, they reached a written agreement that the note was reduced by $41,000. In July 2002, City National Bank agreed to extend a $200,000 line of credit to Donald Markowitz, to be secured by a new second deed of trust on the residence. The bank required that the $53,000 promissory note be repaid in full and the

Kachlon deed of trust reconveyed. The bank retained the title company (Fidelity) to provide a policy of title insurance and to act as a sub-escrow to hold and exchange money and documents between Donald and the Kachlons. The Kachlons were sent a request for demand on the bank's letterhead requesting that they complete and sign the original of the beneficiary's demand and send the same to Fidelity, together with the original note and deed of trust, and a request for reconveyance of the deed of trust, signed by the owners of the note. (*Markowitz, supra,* 142 Cal.App.4th at pp. 512-513.) Mr. Kachlon delivered the beneficiary's demand for the sum of $12,000, the request for reconveyance, the original promissory note, and the original Kachlon deed of trust to Fidelity and received from Fidelity a check for $12,000, payable to the Kachlons. The bank instructed Fidelity to deliver to it the ALTA title insurance policy showing a liability of $200,000, covering the Markowitzes' property. The bank also stated Fidelity was authorized to record on July 24, 2002, showing the bank's deed in the second trust deed position. (*Id.* at pp. 513-514.) "Fidelity thereafter failed to ensure that a reconveyance was recorded, and did not inform Donald Markowitz that a reconveyance had not been recorded. Nonetheless, a new deed of trust in favor of the Bank was recorded, and the line of credit transaction concluded." (*Id.* at p. 514.) In 2003, Fidelity began a statutory procedure for clearing title, sending written notice to the Kachlons that their deed of trust had not been removed, and advising them that unless they objected, Fidelity was going to record a release of the obligation. The Kachlons reported to Fidelity that the promissory note had not been paid in full and they initiated a foreclosure proceeding, causing a notice of default to be recorded. The trustee dismissed the proceeding after seeing documents evidencing full satisfaction of the obligation. After another unsuccessful try, the Kachlons succeeded in substituting a trustee who caused a notice of default to be recorded claiming that $56,899.91 was due under the promissory note. (*Id.* at pp. 514-515.)

The Markowitzes sued the Kachlons, the successor trustee, the bank and Fidelity. As to Fidelity, the complaint alleged, among other things, that the bank had agreed to act as escrow and had arranged for Fidelity, its title company, to act as sub-escrow and that

Fidelity had agreed to assume the duties of an escrow holder. It further alleged that a fiduciary relationship was formed between Donald and Fidelity, which Fidelity breached by failing to properly ensure that the deed of trust was reconveyed and removed as a lien on the property and by failing to communicate to Donald that the deed of trust had not been reconveyed. The complaint also contained a cause of action for negligence, alleging that by assuming the duties of an escrow holder, Fidelity owed Donald a duty to exercise ordinary care, which it breached. (*Markowitz, supra*, 142 Cal.App.4th at pp. 515-516.)

In affirming the nonsuit based upon the facts presented in Donald's opening statement, the appellate court concluded that "Fidelity did not breach any fiduciary duty owed to Donald, or otherwise owe a duty of care which it negligently performed." (*Markowitz, supra,* 142Cal.App.4th at p. 521.) The appellate court reasoned that an escrow existed, with Fidelity functioning as a sub-escrow holder, that Donald had an interest in the escrow, but that he was not a party to the escrow or to the escrow instructions. "He did not submit any instructions to Fidelity, written or oral, and he had little or no contact with Fidelity. His contact was with the Bank." (*Id.* at p. 526.) Donald countered that the bank had instructed Fidelity to record a new deed of trust in favor of the bank only when the bank's deed of trust would be recorded in the second position, necessarily requiring removal of the Kachlon deed of trust. (*Ibid.*) According to *Markowitz,* "[t]he defect in Donald's argument [was] that he was not a party to the escrow instructions on which he relies. Fidelity's duties arising out of those instructions were defined, and limited, by the terms of those instructions. Donald points only to the written instructions given to Fidelity by the Bank; he does not allege that he gave Fidelity any written or oral instructions regarding carrying out the escrow." (*Id.* at p. 527.) The court explained that "the duty arising from the instruction authorizing recordation of the Bank's deed of trust 'showing . . . in the second trust deed position' was owed to the Bank, not to Donald." (*Ibid.*) That Fidelity apparently breached its duties owing to the bank, did not trigger a duty to Donald. (*Id.* at p. 529.) Nor was Donald a third party beneficiary of the escrow instructions as the language of the instructions did not expressly evince the intent to benefit him, but rather, was aimed at protecting the bank

from the existence of defects in title and unknown encumbrances. (*Id.* at p. 527.) Rather, Donald was an incidental beneficiary of the bank's instruction. (*Id.* at pp. 527-528.)

"Because Donald was not a party to the escrow and did not submit escrow instructions to Fidelity, Fidelity was not acting as his agent with respect to the transaction. There were no instructions submitted by him, or to which he was a signatory, with which Fidelity was obligated to comply, or which it was obligated to carry out with reasonable care in the exercise of ordinary skill and diligence." (*Markowitz, supra,* 142 Cal.App.4th at p. 528.)

In the trial court below, Gateway argued that the court should not follow *Markowitz, supra,* 142 Cal.App.4th 508. On appeal, Gateway argues that *Markowitz* is distinguishable and that factors missing in that case exist here. Gateway had contact with Ticor on each of the 11 loans through the wire transfers (identifying the escrows, the amounts funded to each, the purported borrowers and Gateway as the originating party) and provided money directly to Ticor to fund the loans. Gateway asserts that these factors made it a party to the escrows under Financial Code section 17003. *Markowitz* appears to us to be on point in critical respects.

Gateway bases its claim to be a party to the escrow on the definition of an "escrow" contained in section 17003 of the Financial Code, upon its having funded the escrows, and upon Ticor's admission that it knew Gateway was the source of funds used by CHL to close the transactions. As *Markowitz* and *Summit* recognize, the fact that an escrow exists and that the plaintiff has an *interest* in an escrow does not suffice to transform the plaintiff into a *party* to the escrow to whom duties are owed by the escrow holder. (*Markovitz, supra,* 142Cal.App.4th at p. 526; see *Summit, supra,* 27 Cal.4th at pp. 711-716.) Nor does the breach of a duty owed to a party to the escrow that impacts or injures one with an interest in the escrow suffice to transform that non-party into a party. (*Markovitz,* at p. 529.)

Gateway also equates the incoming wire-advices to Ticor with escrow instructions from Gateway to Ticor. It is undisputed that the purpose of the escrows at issue was to facilitate loans from CHL to borrowers. Gateway was not a party to those transactions.

Gateway cites *Wasmann v. Seidenberg* (1988) 202 Cal.App.3d 752 (*Wasmann*), in support of its claim that its deposit of funds with Ticor and Ticor's acceptance of those funds created a duty of care and a fiduciary relationship. In *Wasmann,* following successful settlement negotiations in a dissolution proceeding, the husband's attorney sent an executed grant deed to the wife's attorney, along with specific instructions that the deed was not to be recorded until payment of an agreed-upon sum by the wife to the husband. (*Id.* at pp. 754-755.) The wife obtained the deed and recorded it without payment. The appellate court held that the attorney's acceptance of the grant deed, entrusted to him during settlement negotiations, gave rise to a fiduciary's duties as an escrow holder requiring the attorney to comply strictly with the escrow instructions. (*Id.* at pp. 755-756.) *Wasmann* held that the attorney took on the duties of an escrow holder to the parties to the escrow when he accepted the deed and the accompanying instructions on how and when the document was to be recorded. In contrast, Gateway gave no instructions to Ticor, and Ticor complied with CHL's instructions directing funds to be paid to CHL upon close of escrow. *Wasmann* does not describe an escrow holder's duty to a non-party such as Gateway that did not provide escrow instructions to the escrow holder.

Nor does *Pasternak v. Boutris* (2002) 99 Cal.App.4th 907, advance Gateway's claim to being a party to the escrow. There, the receiver for an escrow company sued to recover from a nonprofit mutual benefit corporation (EAFC) indemnification for losses caused by the fraudulent misappropriation of funds by the escrow company's president. The escrow company's president had colluded with the owner of PCO, a company arranging for loans by individuals, theoretically being used to buy qualified life insurance policies from terminally ill persons in exchange for viatical settlements. The pivotal issue on the indemnity claim was "whether [the officer's] misappropriations of lender funds involved a loss (or losses) covered by EAFC, because the funds were taken from escrows as defined by [Financial Code] section 17003." (*Id.* at p. 918.) The court held escrows had been created by the transactions in which individual lenders delivered money to the escrow company to be held for the purpose of transferring their money to

PCO upon PCO's deposit with the escrow company of specified documents relating to the purported viatical settlements. (*Id.* at p. 919.) Lender agreements, deposit receipts and instructions and escrow agreements also were deposited into each escrow. (*Id.* at p. 917.) The appellate court rejected the argument that no escrows had been created because the viatical settlements were a sham and PCO had no legitimate purpose in setting up the escrows, as it never intended to transfer anything of value. (*Id.* at p. 919.) According to the court, the lenders genuinely intended to transfer their monies, deposited with the escrow company for that purpose, to PCO to enable the viatical settlements and pay the lenders' interest. (*Ibid.*) The court also held that Financial Code "section 17003 does not require a completed delivery from escrow in order for there to be an escrow. Rather, the existence of an escrow, as defined, requires only that the transaction contemplate such delivery. The delivery that must occur is the initial deposit." (*Ibid.*) Consequently, the escrows from which the officer misappropriated funds constituted escrows within the meaning of the statute and warranted indemnity by EAFC. (*Id*. at p. 921.) The case did not involve, nor did the court address, any issue regarding who was a party to the escrow. *Pasternak* does not suggest that a third party, such as Gateway, becomes a party to the escrow simply by transmitting funds to or on behalf of a party, such as CHL.

It is undisputed that none of the general or specific escrow instructions came from Gateway. The escrow instructions supplied by CHL did not mention Gateway, nor did they suggest that Ticor was required to take instruction from Gateway in connection with any of these transactions. As the lender (or broker) that originated the loans in its own name, it was CHL, and only CHL, that instructed Ticor as to each of the escrows; any impact that the transactions had on Gateway was " 'collateral to the primary purpose of the escrow' " and so outside the scope of the escrow holder's duty of care. (*Summit, supra,* 27 Cal.4th at p. 715.)

Nor do the wire-advices of credit equate to escrow instructions from Gateway in this case. Escrow instructions provide *conditions* relating to the escrow transaction. (See *Norris v. San Mateo County Title Co.* (1951) 37 Cal.2d 269, 273 [standard form of

escrow instructions provide for the exchange of money and a deed upon stipulated conditions]; 3 Miller & Starr, Cal. Real Estate, *supra,* § 616, p. 37 ["Escrow instructions contain conditions. When the parties deposit their money and documents with an escrow agent, they give instructions to hold the items deposited until certain conditions occur, and to deliver them to the other party when the conditions have been satisfied"].)

Unlike the lender's instructions in *Money Store, supra,* 98 Cal.App.4th 722, CHL had not authorized the escrow holder to accept instructions from Gateway or any other entity. The wire transfers contained no "closing instructions" or other instructions to the escrow holder directing disbursals of the funds on satisfaction of certain conditions. Indeed, the wire transfers here contained no actual conditions relating to the transaction to be satisfied before close of the escrow. They simply identified the escrows into which funds were being deposited and the amounts to each. To accept Gateway's contention that the wire-advices at issue here constituted escrow instructions has the potential to transform every lender or funder of a transaction into a party to the escrow and every wire-transfer of funds—or any communication with the escrow holder—into escrow instructions.[12]

An additional and independent basis for rejecting the claim that the wire-advices were escrow instructions to Ticor is the court's sustaining of objections to the declaration of Gateway executive Michael Kenny, wherein Kenny stated that "Gateway Bank . . . provided Ticor directly with written instructions in the form of an Incoming Wire-Advice

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[12] Gateway's assertion in a footnote that "[e]scrow instructions may be implicit from the nature of the transaction and need not be express" is not supported by the authority cited. In *Claussen v. First America Title Guaranty Co.* (1986) 186 Cal.App.3d 429, a trial court found that a lender's agent's oral inquiry whether a down payment by the buyer had been received by the escrow amounted to an instruction to the title company not to close escrow without receiving the down payment. In reversing, the Court of Appeal found insufficient evidence for that finding. The inquiry could not reasonably be characterized as an instruction. In reaching this conclusion, the appellate court recognized "that escrow instructions may be oral, even when some are in writing [citations] and that some escrow instructions may be *implicit in the express instructions given.* [Citation.]" (*Id.* at p. 436, italics added.) Nowhere did the court either say or imply that the instructions may be implied from the nature of the transaction itself.

of Credit for each of the eleven loans at issue." Gateway did not challenge that ruling in its appellant's opening brief, although it cited to the excluded Kenny evidence. The first time Gateway argues that the court abused its discretion in excluding Gateway's evidence is in its appellant's reply brief. There, Gateway states that it "implicitly argued that the lower court committed error in failing to properly consider" this evidence. We do not agree that reliance in an opening brief upon evidence to which the trial court has sustained objections suffices to challenge the court's rulings sustaining the objections. In failing to challenge in its opening brief the court's exclusion of the Kenny declaration regarding the incoming wire-advices, appellant has waived any error in the court's evidentiary ruling. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 9:78-9:78.3, pp. 9-25 to 9-26.)

For similar reasons, Gateway has waived its challenge to the court's sustaining of Ticor's objections to portions of the deposition testimony of Rose Henninger. Gateway relies upon this testimony as material evidence that Gateway was a "party" to the escrow. In its opening brief, Gateway quotes from Henninger's testimony and then states only: "Astonishingly, the lower court deemed Ticor's testimony to be 'not material evidence that Gateway was a party to the escrows.' . . . To the contrary, Ms. Henninger's candid acknowledgements are party admissions that Ticor recognized that Gateway was a party to the escrow transactions." This statement, absent any authority or further discussion, is inadequate to raise a challenge to the court's evidentiary ruling. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 9:78-9:78.3, pp. 9-25 to 9-26.)

In any event, Gateway has not carried its burden of demonstrating the court abused its discretion in sustaining the objection to Henninger's testimony. Henninger, a Ticor accounting manager—designated by Ticor as its "person most knowledgeable" on topics including the handling of funds transferred to Ticor in connection with escrows during the relevant time periods, including receipt and disbursement of funds, bookkeeping records, and company policies and procedures—testified in her deposition that she would interpret the incoming wire transfer she was shown as indicating that money was being wired to Ticor from Gateway as a lender and that "we would just interpret Gateway to be

a party in this transaction." However, before she so testified, Henninger also testified that she would "[n]ot necessarily" interpret the wire transfer as Gateway intending to lend money secured by the real property that's part of the escrow, "because in accounting we wouldn't interpret who the lender is by looking at an incoming wire advice. We're just referencing for escrow where the funds came from, but we wouldn't be able to try to determine who the lender is." Henninger further testified that "looking at an incoming wire advice, that doesn't guarantee that who is sending the money is necessarily a lender in this transaction. At least for us not to make that determination, no, we would not."

In her declaration below, which expands upon and clarifies her deposition testimony, Henninger declared that "escrow officers were responsible for processing escrow transactions," that she did not become familiar with the details of any individual escrow transactions, and that she did not consider herself qualified to serve as an escrow officer or escrow assistant. She further averred that she was never called upon to investigate or to determine the identity of any party to an escrow transaction. "The role of the accounting department was limited to processing incoming and outgoing wires at the direction of Ticor's escrow officers." Regarding the excerpts of her deposition wherein she reviewed the incoming wire-advice exhibit and stated her interpretation that Gateway was a "party" involved in the transaction, Henninger clarified that the deposition excerpts were misleading. "Neither at the time I supervised the accounting department nor at the time of my deposition was I in any position to say with knowledge who was or was not a 'party' to any particular escrow transaction. I understood the question at my deposition to ask for my *speculation* and that is precisely what I provided in the excerpted testimony. I did not then or now have any knowledge as to what role, if any, Gateway Bank FSB played in any escrow transaction closed by Ticor." (Italics added.)

The court admitted Henninger's declaration over Gateway's objections and sustained objections to that part of Henninger's deposition testimony relied upon by Gateway on the ground that it was not material evidence that Gateway was a party to the escrows. The court reasoned that that Henninger "was not involved in the formation of

the contracts, so there is no foundation for her conclusory testimony." It found that Henninger's testimony did not directly contradict her deposition testimony and observed that Henninger was permitted to explain her deposition answers. (See *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1524-1525.) The trial court did not abuse its discretion in sustaining the objections to Henninger's deposition testimony.

Gateway contends that regardless whether it was a party to the escrow, the duty analysis of *Biakanja, supra,* 49 Cal.2d 647, 650, applied by the Supreme Court in *Summit, supra,* 27 Cal.4th at page 715, would in this case result in imposition of a duty of care by Ticor toward Gateway. Ticor contends that we are bound by *Summit*'s analysis of the six factors to conclude that the escrow holder has no duty toward a nonparty. Ticor also points out that *Markowitz, supra,* 142 Cal.App.4th 508, did not use the six-factor duty analysis, but relied upon the holding of *Summit* to conclude no duty was owed by the escrow holder to the nonparty plaintiff in the circumstances. Having concluded that the material undisputed facts establish that Gateway was not a party to the escrow, the Supreme Court's *Summit* analysis appears to us to be controlling. However, in an abundance of caution, we note the six-factor duty analysis is consistent with our refusal to impose a duty upon Ticor with respect to Gateway.

As we have related, *Summit* first reiterated the general rule that a " 'duty to manage business affairs to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law.' [Citation.]" (*Summit, supra,* 27 Cal.4th at p. 715.) We agree with the trial court here that application of the six-factor *Biakanja* test provides no reason to depart from the general rule. First, the escrow transactions were not intended to affect or benefit Gateway. The escrows were opened to facilitate loans from CHL to borrowers, and the impact the transactions may have had on Gateway was collateral to the primary purpose of the escrows. Second, it is certain that Gateway suffered financial injury. However, the third factor, the foreseeability of harm to Gateway, does not support imposition of a duty. The trial court reasoned that foreseeability of harm was not strong "because warehouse lenders can condition the provision of funds upon obtaining sufficient documentation of the validity of the

underlying consumer loan." Whatever the merit of this proposition, we believe the foreseeability of harm was not strong as Ticor could not have foreseen that CHL would engage in such massive fraud, anymore than the escrow holder in *Summit* could have foreseen that the original lender-assignor would not release the funds to the new lender-assignee. Although Ticor knew that Gateway was the supplier of funds for the transaction, and arguably should have foreseen that failure to confirm the identities of the borrowers could injure Gateway, the " 'foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct.' [Citation.]" (*Summit, supra,* 27 Cal.4th at p. 716, fn. 7.) Fourth, we agree with the trial court that "there is minimal moral blame attached to Ticor's conduct." The relationship between Ticor and Gateway was not one that would create an obligation to protect the interests of nonparties such as Gateway. Fifth, the connection between Ticor's conduct and the resulting harm to Gateway is not close. Gateway's damage arose from its relationship with CHL, not Ticor. Ticor did not control that relationship. Moreover, it was CHL, not Gateway, that provided the escrow instructions that were allegedly breached. Sixth, the policy of preventing future harm does not support imposition of a duty upon the escrow holder to protect nonparties to the escrow from financial harm, at the cost of potentially "subjecting an escrow holder to conflicting obligations [and] undermin[ing] a valuable business procedure." (*Summit, supra,* 27 Cal.4th at p. 716.)[13]

B. *Third Party Beneficiary*

Gateway maintains that even if it was not a party to the escrow, it was entitled to recover as a third party beneficiary. Gateway contends the trial court ignored disputed issues of material fact when concluding that the contracts contained nothing to indicate the parties intended to benefit Gateway and that Ticor's knowledge that Gateway would

[13] Gateway argues that the purpose of the escrows was to ensure that upon funding, it as the lender, would have a valid and enforceable first lien in the event the loan was not repaid. Although that may have been the purpose of the escrows *from Gateway's perspective*, that was the purpose of the Gateway-CHL Master Agreement. The ostensible purpose of the *escrow* was to effect the refinancing of loans by CHL to the borrowers.

benefit from the transactions was insufficient to show that Gateway was an intended beneficiary. We agree with the trial court's assessment.

As the Supreme Court explained in *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524: "A third party beneficiary may enforce a contract made for its benefit. (Civ. Code, § 1559[[14]].) However, '[a] putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit' it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436 . . . .) Ascertaining this intent is a question of ordinary contract interpretation. (*Ibid.*) Thus, '[t]he circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement.' [Citation.]" (See also *Markowitz, supra*, 142 Cal.App.4th at p. 527.)

"Under long standing contract law, a 'contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) Although 'the intention of the parties is to be ascertained from the writing alone, if possible' (*id.*, § 1639), '[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates' (*id.*, § 1647). 'However broad may be the terms of a contract, it extends only to those things . . . which it appears that the parties intended to contract.' (*Id.*, § 1648.)" (*Hess v. Ford Motor Co., supra*, 27 Cal.4th at p. 524; accord, *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022-1023; *Markowitz, supra,* 142 Cal.App.4th at p. 527.)

" 'Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract.' (*Prouty*[*v. Gores Technology Group* (2004)] 121 Cal.App.4th [1225,] 1233.) But if 'the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered,' appellate review is de novo. [Citations.]" (*Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th at p. 1025.)

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[14] "A contract, made *expressly* for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Civ. Code, § 1559, italics added.)

It is undisputed the escrow instructions upon which Gateway relies, do not mention Gateway. CHL did not identify Gateway on any of its loan or escrow documents. Gateway did not provide any escrow instructions to Ticor. There is no evidence that CHL ever communicated to Ticor any purported intention to benefit Gateway. All of the escrow instructions directed Ticor to disburse the escrow funds to CHL on closing.

Gateway marshals the following evidence to support its claim: The Master Agreement between CHL and Gateway contemplated the use of escrows and Gateway's approval of the escrow agreements; Ticor's internal bulletins state that "the new lender *and future assignee lender*" rely on the accuracy of the escrow documents (italics added); the escrow instructions submitted by CHL require Ticor to provide hazard insurance to include the "loss payee" as "CHL MORTGAGE GROUP INC., IT'S SUCCESSORS AND/OR ASSIGNS"; and ALTA policies required by the escrow instructions insure successor lenders. This evidence is not sufficient to establish a triable issue of material fact that the parties to the escrow *intended* to benefit Gateway by that contract.

The Master Agreement is a separate contract between CHL and Gateway without Ticor's involvement. That has no bearing on Ticor's intent to benefit Gateway in connection with the escrow agreement it entered with CHL.[15] The Ticor internal bulletins are not part of the agreement between Ticor and CHL and no intent to benefit Gateway may be inferred from those bulletins. Nor is the reference in the escrow instructions to "successors and/or assigns" of CHL sufficient to raise a material question whether the parties intended to benefit Gateway by the escrow. That single reference appears in the escrow agreement provision requiring the borrower to obtain a hazard insurance policy identifying CHL and its "successors and/or assigns" as the "loss

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[15] Nor does Gateway's reliance upon Henninger's testimony that Gateway would be looking to Ticor "to have a security interest to secure those funds in connection with the escrow transaction" advance its argument. As we have observed heretofore, the court properly found the Henninger evidence inadmissible. Henninger was not involved in the formation of the contracts and there was no foundation for her conclusory and speculative testimony.

payee/mortgagee". The clause does not identify Gateway or any agreement between CHL and Gateway. Moreover, at most, any benefit would be limited to some interest in a hazard insurance policy, rather than an interest in Ticor's performance of its escrow obligations. As a matter of law, that single reference was insufficient to make Gateway a third party beneficiary of the escrow agreement.

Gateway cites *Prouty v. Gores Technology Group, supra,* 121 Cal.App.4th at pages 1232-1233, for the proposition that a person may qualify as a third party beneficiary to a contract, even when not expressly named therein. Specifically, the *Prouty* court stated: " 'It is not necessary that the beneficiary be named and identified as an individual; a third party may enforce a contract if he can show he is a member of a class for whose benefit it was made. . . . [¶] The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citation.] [¶] This rule is codified: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' (Civ. Code, § 1559.) 'The word "expressly," by judicial interpretation, has now come to mean merely the negative of "incidentally." ' (*Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 70.) Also, the contract need not be exclusively for the benefit of the third party. He does not need to be the sole or the primary beneficiary. [Citation.]" (*Prouty v. Gores Technology Group*, at pp. 1232-1233; accord, *Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th 1004, 1022-1023.)

Relying upon the provisions of the Master Agreement requiring Gateway's prior approval of the escrow instructions, Gateway argues that *CHL intended* to benefit Gateway and that "CHL did not have to communicate to Ticor" CHL's intention to benefit Gateway. Gateway further states that it was sufficient that Ticor knew Gateway was the funding source of the loans. Gateway is only half right. It is true that "[w]hile

intent is pivotal, there is no requirement that 'both of the contracting parties must intend to benefit the third party . . . .' [Citation.] Rather, 'it is sufficient that the promisor [—here Ticor—] *must have understood* that the promisee [—here CHL—] had such intent.' [Citations.])" (*Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th at p. 1023, italics added.)

In this case, the facts relied upon by Gateway are insufficient to raise a triable issue of fact that the escrow instructions were intended to benefit Gateway and that Ticor understood that CHL intended to benefit Gateway.

"Under the intent test, 'it is not enough that the third party would incidentally have benefited from performance.' (*Souza v. Westlands Water Dist.* [(2006)] 135 Cal.App.4th [879,] 891.) 'The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party.' [Citation.] 'The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited.' (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590.)" (*Spinks v. Equity Residential Briarwood Apartments, supra,* 171 Cal.App.4th at p. 1022.)

As was the case in *Markowitz, supra,* 142 Cal.App.4th at pages 527-528, the language of the instructions did not evince the intent to benefit nonparty Gateway, whether by name or as a member of a named class of persons. Any benefit to Gateway was merely incidental to the escrow agreement.

C. *Fraud and Negligent Misrepresentation Causes of Action*

The court granted summary judgment on the causes of action for fraud and negligent misrepresentation on the basis that, as a matter of law, the promises in the escrow instructions were not made to Gateway. We agree. Gateway contends that Ticor had reason to expect that its escrow instructions and the obligations undertaken by Ticor as escrow holder under those instructions would be communicated to Gateway and that Ticor deceived Gateway when it agreed, among other things, not to close the escrow until all the conditions in the closing instructions had been satisfied.

Escrow instructions are not representations by the escrow company to nonparties to the escrow. Rather, they are directions *to the escrow company from the parties* to the escrow that the escrow holder agrees to follow. (See *Summit, supra,* 27 Cal.4th at p. 711; *Markowitz, supra,* 142 Cal.App.4th at p. 526 [agency created by an escrow is " 'limited to the obligation of the escrow holder to carry out the instructions of each of the parties' " to that escrow].)

It is undisputed that the only representations upon which Gateway claims reliance were contained in escrow instructions provided by CHL to Ticor. Gateway offered no evidence that anyone at Ticor made any representation to Gateway in connection with the transactions.

Summary judgment was properly granted on Gateway's fraud and negligent misrepresentation causes of action.

D. ***Unfair Competition Cause of Action and Conspiracy Claim***

Gateway's cause of action for unfair competition (Bus. & Prof. Code, § 17200) and its conspiracy claim both fall, together with its deception-based tort claims, upon the determinations that Ticor owed no duty of care to Gateway and that Ticor made no representations to Gateway.

As to its unfair competition cause of action, we agree with the trial court that there was no disputed issue of material fact that Ticor's actions were not directed at the public and members of the public were unlikely to be deceived. Indeed, the record here provides no evidence that Ticor made representations to either Gateway or to the public at large. Gateway contends "[t]he same triable issues of fact addressed with regard to the other causes of action likewise preclude summary adjudication here." Having rejected Gateway's claims to have established a triable issue of fact on its negligence, third party beneficiary, fraud and negligent misrepresentation claims, we necessarily reject its unfair competition claim.

In the absence of a triable issue of fact as to the existence of tortuous conduct by Ticor as to Gateway, there can be no conspiracy cause of action as a matter of law. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1018-1019.)

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors. [¶] Standing alone, a conspiracy does not harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

We conclude the trial court did not err in granting summary judgment in favor of Ticor.

III. Chicago Title

Gateway challenges the court's grant of summary judgment in favor of Chicago Title on Gateway's claims under the title insurance policies. "In California, ' "[t]itle insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. [Citations.] [¶] Accordingly, when the contingency insured against under the policy occurs, the title insurer is not, by that fact alone, liable to the insured for damages in contract or tort, but rather is obligated to indemnify the insured under the terms of the policy. When the policy insures the lien of a deed of trust and the insured lien is junior to a lien undisclosed but insured against by the policy, the compensable loss is limited by the terms and conditions of the policy." [Citations.]' [Citation.]" (*First American Title Ins. Co. v. XWarehouse Lending Corp.* (2009) 177 Cal.App.4th 106, 113. (*First American*).)[16]

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[16] " 'Title insurance insures losses suffered "by reason of . . . (a) Liens or encumbrances on[, or defects in the title to said] property; (b) Invalidity or unenforceability of [any] liens or encumbrances [thereon] or (c) Incorrectness of searches relating to the title . . . ." ([Ins. Code,] §§ 104 & 12340.1.)" (*First American, supra,* 177 Cal.App.4th at p. 113.)

The court granted Chicago Title's motion for summary judgment on two bases: First, it concluded Chicago Title had the right to rescind the policies where the fraud of the insured rendered the title insurance policies void *ab initio*.[17] Second, the court granted summary judgment for Chicago Title on the alternative ground that Gateway could not show it was the owner of the indebtedness secured by the insured mortgage. Because no money had been actually loaned to the purported borrowers, the forged notes at issue did not create any indebtedness within the meaning of the policies.

Recently, in *First American, supra,* 177 Cal.App.4th 106, another division of this court held on materially identical facts that this second basis warranted declaratory relief in favor of the title insurer. All parties agree that, if followed, *First American* is dispositive of this appeal. We find the opinion persuasive and follow it.[18]

As in this case, the underlying facts of *First American, supra,* 177 Cal.App.4th 106, involved massive fraud by CHL. CHL's fraud affected a plaintiff warehouse lender (XWarehouse Lending Corp., formerly known as Access Lending Corp.) in the same position as Gateway and a title insurer (First American) that had issued two 1992 ALTA title insurance policies for the mortgage loan securing the purported indebtedness. In *First American,* the warehouse lender allegedly purchased two CHL loans pursuant to a master repurchase agreement between the warehouse lender and CHL. Each promissory note in the principal sum of the loan from the named borrower to CHL was secured by a deed of trust on real properties allegedly held by the named borrowers as owners. The warehouse lender wired moneys directly to escrow accounts created for each of the two loans. "At each loan closing, the escrow agents released the moneys 'as a "payoff" ' to CHL, who was to use the moneys to refinance the named borrowers' existing loans. First

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[17] The court also concluded that Insurance Code section 650 did not prevent Chicago Title from asserting its right to rescind after Gateway's filing of the action, because Chicago Title had raised rescission and fraud as defenses in its cross-complaint.

[18] *First American* noted that "Gateway Bank has a pending appeal in Division Two of this court from a judgment regarding title insurance claims arising from loan transactions involving CHL. (*Gateway Bank v. Ticor Title Co. of California* (A121398) (*Gateway*).)" (*First American, supra,* 177 Cal.App.4th at p. 112, fn. 4.)

American issued title insurance policies for the mortgage loans with CHL designated as the named insured." (*First American*, at p. 111.) However, as in the instant case, "CHL never disbursed any funds either directly to the named borrowers or otherwise used the funds to pay off any existing loans of the named borrowers." (*Id.* at p. 111, fn. omitted.)

The trial court granted summary judgment on First American's declaratory relief action on the grounds that the title insurer had no duty to defend or indemnify the warehouse lender, because the latter was not an insured and therefore, was not entitled to relief under the policies. (*First American, supra,* 177 Cal.App.4th at p. 112.) The Court of Appeal affirmed, holding that the indebtedness referred to in the ALTA title insurance policy's definition of an "insured" could only be reasonably read as referring to the indebtedness between the named borrowers and the lender CHL, not to the transfer of funds by the warehouse lender through the escrows to CHL. (*Id.* at p. 115.)[19] The court held that "in order for an entity to meet the definition of an insured under the title insurance policy issued by First American, there must be an existing indebtedness between the named borrower and the lender. . . . Unless there is an existing indebtedness between the named borrower and the lender the mortgage has no existence. (*Coon v. Shry* (1930) 209 Cal. 612, 615.)" (*First American*, at p. 116.) "Because there was no transfer of funds between CHL and the named borrowers . . . that created an indebtedness

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[19] The 1992 standardized ALTA Loan (Lender's) Policy for Title Insurance at issue in *First American* is the same standard policy at issue in this case. Both contain the same definition of "insured" as " '(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness . . . .' The policy does not define the word 'indebtedness.' " (*First American, supra,* 177 Cal.App.4th at p. 114, fn. omitted.) "In 2006, ALTA amended its standard form policy by revising the definition of an insured, and adding a definition of the word 'indebtedness.' In the 2006 ALTA form policy, an insured is now defined, in pertinent part, as '[t]he Insured named in Schedule A,' and also includes '(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness . . . .' The word 'indebtedness' is now defined, in pertinent part, as '[t]he obligation secured by the Insured Mortgage . . . and if that obligation is the payment of a debt, the Indebtedness is the sum of [¶] (i) the amount of the principal disbursed as of Date of Policy; [¶] (ii) the amount of the principal disbursed subsequent to Date of Policy . . . .' ([Citation], quoting ALTA Loan (Lender's) Policy (2006).)" (*First American,* at p. 114, fn. 6.)

secured by the insured mortgage, [the warehouse lender] does not meet the definition of an insured under First American's title insurance policies." (*Id.* at pp. 116-117.)

Because the *First American* court found no ambiguity in the policy as to the meaning of "insured" and the required "indebtedness," it did not apply the rule that an insurance policy must be interpreted to include coverage the public may reasonably expect. (*First American, supra*, 177 Cal.App.4th at p. 117.) Nor did it find merit to the claims of amicus California Bankers Association that its holding that the warehouse lender was not entitled to title insurance coverage might have an adverse effect on the secondary mortgage market, as "such considerations have nothing to do with our determination that [the warehouse lender] was not an insured and, therefore, not entitled to coverage under First American's title insurance policies. [Citation.] 'The answer is to be found solely in the language of the policies, not in public policy considerations.' [Citation.]" (*Id.* at p. 119.)[20]

Nevertheless, the court also concluded that "the reasonable expectations of the parties would not support coverage for [the warehouse lender's] losses and litigation defense costs relating to the [purported borrowers'] loans." (*First American, supra,* 177 Cal.App.4th at p. 117.) Rejecting the warehouse lender's assertion that it was defects in the lien instruments (the mortgages and deeds of trust) that gave rise to the loss in coverage, rather than the forged promissory notes, the court concluded: "Any losses suffered by [the warehouse lender] are not due to defects in the title or mortgage liens, but are entirely due to the failure of an existing indebtedness between the named borrowers and CHL. (See *Blackhawk Production Credit v. Chicago Title* (1988) 144 Wis.2d 68 [423 N.W.2d 521, 526] ['If the interest held by [the insured mortgagee] was valueless without the superior lien, it cannot claim any lost value because the lien existed.'].) This is so because even if title had been perfect and the liens existed as they should have been insured by the policies, [the warehouse lender] would be in the same position as it currently stands. The liens would not be subject to foreclosure because no

[20] California Bankers Association raises the same claim here in its amicus brief in support of Gateway.

indebtedness existed between the named borrowers and CHL." (*First American*, at p. 117.)

Two premises the *First American* court found "persuasive" supported its determination that there was no coverage under the facts. "First, as explained by the court in *Bank of Miami Beach v. Fidelity & Casualty Co. of New York* (Fla. 1970) 239 So.2d 97, 99: '[A] mortgage lien and a mortgage debt are two entirely different legal concepts or "species." A provision [in a title insurance policy] guaranteeing that the mortgage constituted a "valid mortgage lien" might be held to cover a loss resulting from fraud, mistake, duress, or misrepresentation in the procurement of the *mortgage* . . . but such a guarantee of the validity of the mortgage *lien* cannot and should not be construed as guaranteeing that the insur[e]r has made a careful investigation of the origin of the mortgage *debt* and guarantees its payment or validity. If such coverage is contemplated, the policy should specifically so provide.' (See also *Lawyers Title Ins. Corp. v. JDC (America) Corp*. (11th Cir. 1995) 52 F.3d 1575, 1583 [a lender's title insurance policy insuring against the invalidity or unenforceability of the insured mortgage lien 'insures against defects in the mortgage itself, but not against problems arising from or related to the underlying debt.'].) Second, the reasonable expectations of the parties would not support a determination of coverage. As explained by the court in *Pacific American Construction v. Security Union Title* [(1999) 199 UT 87,] 987 P.2d 45: 'It would be unreasonable to expect a title company to insure a debt about which it typically would have only limited knowledge and over which the lender would have sole control.' (*Id*., 987 P.2d at pp. 47-48, fn. omitted.) It is '[a] lender—not a title company—[that] is in the best position to insure that the debt underlying a mortgage is valid. . . . [A]bsent specific policy language to the contrary, the lender bears the risk that the mortgage debt is invalid.' (*Id*. at p. 48; see *Bank of Miami Beach v. Fidelity & Casualty Co. of New York, supra,* 239 So.2d at p. 99.)" (*First American, supra,* 177 Cal.App.4th at p. 118.)

We agree with *First American* that "it would not be reasonable" for a warehouse lender in Gateway's "position as a purchaser of the purported loans originated by CHL," to reasonably "expect that a title insurance policy issued to CHL would insure against a

loss caused by CHL's failure to perform its obligations to disburse [Gateway's] funds either directly to the named borrowers or for the benefit of the named borrowers. (*Gerrold v. Penn Title Ins. Co.* [(App.Div. 1994) 271 N.J. Super. 50,] 637 A.2d [1293,] 1296.)" (*First American, supra*, 177 Cal.App.4th at pp. 118-119.) Like the warehouse lender in *First American,* Gateway controlled its transactions with CHL and included in its Master Agreement with CHL provisions intended to protect it from losses. Among other things, The Master Agreement required CHL to warrant that the loans being sold were valid first liens and that the mortgage notes were legitimate and had been executed by the mortgagor. Gateway also required CHL to procure fidelity bonds to protect Gateway from a "breach of fidelity by [CHL]" and "against any loss or damage from . . . fraud, theft [or] misappropriation . . . ." (See *First American, supra,* 177 Cal.App.4th at pp. 118-119.)

First American distinguished cases upholding the right of a named insured or its assignee to recover from a title insurer for a loss due to a forged note or forged deed of trust or mortgage on the basis that in those cases, "moneys had been actually disbursed or credited to the named borrower by either the lender or its assignee. [Citations.]" (*First American, supra,* 177 Cal.App.4th at p. 116, fn. 8.)[21] Gateway asserts in supplemental

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[21] "[The warehouse lender] relies on cases in which the courts have upheld the right of a named insured or its assignee to recover from a title insurer for a loss due to a forged note or forged deed of trust or mortgage. However, in those cases, and unlike this case, moneys had been actually disbursed or credited to the named borrower by either the lender or its assignee. (See *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.* (7th Cir. 1988) 840 F.2d 526, 530 [lender gave credit to borrower who had been previously adjudged incompetent]; *Lawyers Title Ins. v. First Federal Savings Bank* (E.D.Mich. 1990) 744 F.Supp. 778, 780 [lender issued checks to defrauding borrower]; *Coast Mutual B.-L. Assn. v. Security T. I. & G. Co.* (1936) 14 Cal.App.2d 225, 226, 228 [57 P.2d 1392] [lender disbursed moneys to defrauding borrower]; *California Pac. T. & T. Co. v. MacArthur* (1934) 1 Cal.App.2d 323, 324, 326 [36 P.2d 413] [lender issued check to defrauding borrower]; *Keyingham Investments, LLC v. Fidelity National Title Ins. Co.* (Ga.Ct.App. June 1, 2009) 680 S.E.2d 442 [2009 Ga.App. Lexis 608, pp. *1–*3, *11–*12] [lender's assignees allowed to pursue title insurance claim of lender who disbursed funds to defrauding borrower]; *Greenpoint Mortgage v. Stewart Title Ins.* (N.Y.App.Div. 2008) 49 A.D.3d 687 [854 N.Y.S.2d 185, 187] [moneys of the lender's assignee were

briefing, that those cases, upon which Gateway also relies, do not support *First American*'s distinction, because in several of them the money was not disbursed to the "*named* borrowers," but to "fraudfeasors who were not the named borrower and/or the debt was invalid." (Italics added.) In all of the cases, the lender actually disbursed funds or credit to the borrower or to one purporting to act in the name of the borrower, whether acting fraudulently or not. Consequently, in all of the cases distinguished by *First American* there *was* an indebtedness; none of the cases conclude that the underlying debt was either invalid, never existed, or had been otherwise extinguished, and none addressed the question before us—whether coverage exists under the insurance policies in the absence of an existing indebtedness. Rather, all focused on the invalidity or unenforceability of the lien of the insured mortgage.

As summarized in Palomar, Title Insurance Law (Thompson Reuters 2008) section 4:11.1, "coverage under the policy terminates if the underlying indebtedness is extinguished for any . . . reason. *For example, where it was proven that the originating lender had never funded the loan, the assignee of a note and mortgage had no claim under the title insurance policy.* [Citing *Gerrold v. Penn Title Ins. Co., supra,* 637 A.2d 1293.] And, where a bankruptcy court ruled that a mortgage assignee's prior sales of a debtor's personal property had extinguished all the debtor's indebtedness to the assignee, the absence of any 'indebtedness secured by the insured mortgage' prevented any liability under the title policy for the assignee's inability to enforce the insured mortgages. [Citing *McClellan Realty Corp. v. Institutional Investors Trust* (M.D. Pa. 1988) 714 F.Supp. 733, affd. (3d Cir. 1989) 879 F.2d 858.]" (Palomar, Title Insurance Law, supra, § 4:11.1, pp. 4-37 to 4-38, italics added, fns omitted.)

For the reasons set forth in *First American, supra,* 177 Cal.App.4th 106, we conclude that Gateway is not an insured under the title insurance policies issued by Chicago Title. Consequently, Chicago Title has no duty to indemnify Gateway for its losses.

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disbursed to named borrower who signed promissory note but forged wife's name on mortgage securing the note].)" (*First American, supra,* 177 Cal.App.4th at p. 116, fn. 8.)

In light of that conclusion, it is unnecessary for us to determine whether the court erred in granting summary judgment on the ground that Chicago Title properly rescinded the 1992 ALTA title insurance policies as void *ab initio*, based on the fraud of the named insured, even as to an alleged bona fide purchaser for value such as warehouse lender Gateway. Respondent Chicago Title and amicus CLTA urge us to address this issue. We decline the invitation, as that alternative basis for the trial court's grant of summary judgment has both practical and policy implications beyond those we have addressed here. We state no view on whether the court properly granted summary judgment on that basis. Nor do we address the related issue of the propriety of Chicago Title's rescission under Insurance Code section 650.

DISPOSITION

The judgments are affirmed. Respondents Chicago Title and Ticor are awarded their costs on this appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.