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## Misindexed Documents

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# Misindexed Documents

By Roger Bernhardt

In July of this year, the state of Pennsylvania amended its recording statute to state that a document given to the recorder of deeds would be constructive notice only if it was “indexed properly as to the party in all alphabetical indexes.”<sup>1</sup> It did so in response to a decision last year by the Pennsylvania Supreme Court that a purchaser of property was charged with notice of an earlier mortgage that was recorded but had been wrongly indexed in the mortgagor column under the name of the beneficiary of the trust that held title, rather than under the name of the trustee. *First Citizens Nat’l Bank v. Sherwood*, 79 Atl2d 178. The high court based its holding on the earlier version of the statute which said that the “legal effect of...recording shall be to give constructive notice,” and since the statute did not also refer to indexing, that made the misindexing irrelevant to the constructive notice issue.<sup>2</sup>

Since a library that has not indexed its records is a pretty useless repository (unless it is so small that browsers don’t mind just wandering up and down the aisles hoping they will bump into something interesting), one can legitimately ask whether it should still be called a library. The answer depends on what kind of definition is used. If a library is defined functionally as a place where you can find the book you want, then a building without a card catalog does not stop it from holding itself out as a library, even if it is not much good to anybody. Compelled to choose between a practical and a literal reading of the state’s recording statute, the

Pennsylvania Supreme Court opted for judicial restraint over common sense, thereby forcing the legislature to correct the problem.<sup>3</sup>

The court’s outcome may seem silly, but a majority of states’ existing case law considers a record to be effective from the time the instrument is left at the recorder’s office. Their rationale is that indexing is merely a ministerial act, and non performance or malperformance of that act does not prevent constructive notice of a recorded but improperly indexed document, according to Patton & Palomar on land titles.<sup>4</sup> Since Article 9 of the Uniform Commercial Code takes the same position,<sup>5</sup> the majority rule is not likely to disappear despite its functional absurdity. That makes it relevant to ask how those who search titles should behave if they operate in one of these majority jurisdictions. The dissenting justices in *First Citizens* said that the rule amounted to “an impossible burden to place on the public.” I don’t know about how much the public feels burdened by the rule, but one can readily imagine how title searchers<sup>6</sup> must feel: since they know that their client will be charged with constructive notice of all documents in the records, even the ones they cannot find through a normal index search, the only way to absolutely assure that there is no constructive notice in a particular case is to start on page 1, volume 1 of the records themselves and go through every single page. The cost of such a search would generally far exceed the cost of the title except perhaps when urban high rises are involved.<sup>7</sup>

Computerizing the records might help, but it will not completely solve this problem; it will lead to the detection of some errors but not all. The computer can be taught to report out Smythe whenever Smith is searched, but in *First Citizens*, where both the beneficiary’s and the trustee’s names were spelled correctly, could it also have been taught to switch to the second name when the first was inputted?<sup>8</sup> To program the computer to anticipate all possible mistakes in indexing is to generate searches almost as large and unwieldy as going through the records themselves, page by page.<sup>9</sup>

Nor will use of a tract index solve everything. It is as easy to misindex an instrument by its parcel identifier as it is to mishandle parties’ names.<sup>10</sup> If the official records are indexed by both names and locater, the same mistake is unlikely to occur in both places, but that will help searchers only if they always go through both indexes every time.<sup>11</sup>

Title searchers who maintain their own title plants need not be too worried about what kind of jurisdiction they are in. A document misindexed by the government official is unlikely to have been similarly misplaced by the title company employee in that company’s own index.<sup>12</sup> If the title plant’s computer operates differently from the government system, and if it includes a tract index as well as (or even instead of) a names index, all the better. The only uncontrollable risk a searcher with its own plant runs in that case is when documents

handed to the recorder were not recorded or were not transmitted to the title plants. But not all title searches have title plants in every county. Plants don't exist at all in some states, and in others they operate only in the more populous counties.<sup>13</sup> Title searchers who make use of official government indexes are at real risk under the majority rule.

It might be possible for all abstracts, opinions and policies to expressly exclude the risks of "recorded" but misindexed documents from their coverage.<sup>14</sup> Such an exclusion should not violate any public policy, given that there is no meaningful way for a title searcher to protect anybody from that risk. Searchers would merely be saying to their clients "you take the risk created by the rule that misindexed documents give constructive notice; it's not our fault and there is nothing we can do about it."<sup>15</sup>

All of which leads to the real world outcome that the title searchers just swallow hard and take the hit. They already insure against the off-record risks that signatures that may have been forged and that documents may not have been delivered, without knowing whether that happened. In majority rule jurisdictions they must also insure against documents that they could not find because the government messed up.

While this is not the first time that someone else may have to pay for mistakes by government officials, it is truly "doubly" painful to have to do so, because the rule that says a document gives constructive notice even though no one is likely to ever have actual notice of it does no one any good. No party taking an instrument to the local recorder's office wants to see it

misindexed or significantly profits when it is. Depositors of documents are spared the inconvenience of double checking, but that benefit to them is so outweighed by the burden on everyone else as to make the majority rule a truly absurd policy.

If lawmakers were only forced to have to search their own titles, this rule would be repealed tomorrow!

<sup>1</sup> Or "is indexed properly in an index arranged by uniform parcel identifiers," if there is one.

<sup>2</sup> In getting to that result, the court had to deal with two dissenters who believed that mortgages, and other nonpermanent interests in property, came under a different statute that did require indexing.

<sup>3</sup> Amending the statute should not have been ideologically difficult since it is hard to imagine anyone who would want to oppose a rule that validated misindexed documents. (Unless the statute was written to apply retroactively, even the prior mortgagee who lucked out here should not resist that correction.)

The Pennsylvania Bar Association Real Property, Probate & Trust Law newsletter of spring 2006, issue #61, contains an excellent article on the legislative efforts that the amendment required. Its author, Arnold B. Kogan of Harrisburg, PA (abk@goldbergkatzman.com) was kind enough to supply the article to me.

<sup>4</sup> Patton & Palomar §68. While the book observes that the "modern trend" is the other way, the same result was reached in Idaho just two years ago, *Miller v. Simonson*, 92 P3d 537 (2004). And there were also similar recent decisions out of Florida, Kansas, Louisiana, Vermont, and West Virginia.

<sup>5</sup> Section 9-517 states "The failure of the filing office to index a record correctly does not affect the effectiveness of the file record" And the official comment to the section explains "This section provides that the filing office's error in misindexing a record does not render ineffective an otherwise effective record. As did former Section 9-401, this section imposes the risk of filing-office error on those who search the files rather than those who file."

Indeed, since §9-516 provides that "communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing," it looks like it does not matter if the document never makes it into the records at all, so long as it was dropped off at the filing office. For all Article Nine cares, the secretary of state could have thrown it into the wastebasket as well as put it into the records, neither filing nor indexing it.

The original reason for the UCC rule was apparently to avoid the overburdening of filing offices by parties always coming back to double

check their filings, over such an unlikely problem. That concern may have been sensible in 1963 when the UCC was first enacted and a computer had not yet been invented, but seems unjustified today when UCC searches can be done online by anyone, without pestering any official.

<sup>6</sup> I.e., professional title searchers, title companies, abstractors, and attorneys.

<sup>7</sup> Even that might not be good enough if the jurisdiction holds that documents properly left with the recorder are recorded, whether or not the recorder ever entered them into the records at all.

<sup>8</sup> In that particular case, I suspect that the trustee's name was not anywhere in the index.

<sup>9</sup> Smythe for Smith is easy, but should it also include J.A. Smith for A. J. Smith, or the maiden name of Smith's wife or the name of Smith's company? Does it include Smiths listed in the grantee column when the search was for grantors named Smith? Does it include a document executed by Smith that was not on the page of the records where the index said would be, or that was not entered into the index at all?

<sup>10</sup> Given the complexity of parcel identifiers, mistakes are probably all the easier to occur.

<sup>11</sup> The issue of whether a document properly indexed only in a names index and not in a tract index (or vice versa) is relevant only in a jurisdiction that makes indexing essential to notice. Under the majority rule, it doesn't matter whether the document was indexed in both, or just one, or in neither index.

<sup>12</sup> In a minority jurisdiction, this could lead to the ironic result of the client have actual notice of a misindexed document because the searcher actually reported it out, even though it does not give constructive notice because it is officially invisible (and will not be seen by anyone who looks only at official records).

It is somewhat bizarre that judicial outcomes are based on the official records when so much of the time the underlying actual searches were made through a private entity's nonofficial records.

<sup>13</sup> In Pennsylvania, so far as I can tell, there are title plants only in Philadelphia and Pittsburgh.

<sup>14</sup> The policy would add – as an additional exclusion – something like "any interest represented by a document that is treated as having been properly entered into the official records but could nevertheless not be discovered by a search of the official indexes."

<sup>15</sup> If there were such an exclusion, it would be hard to estimate the price of any overriding endorsement, since it would be pure risk taking, and not based on any kind of extra effort the title company could do to reduce the hazard. Perhaps the underwriters could calculate the probably frequency of mistakes by the recorder's office plus their average cost, and then, in true insurance fashion, spread that risk among all who purchase the endorsement.