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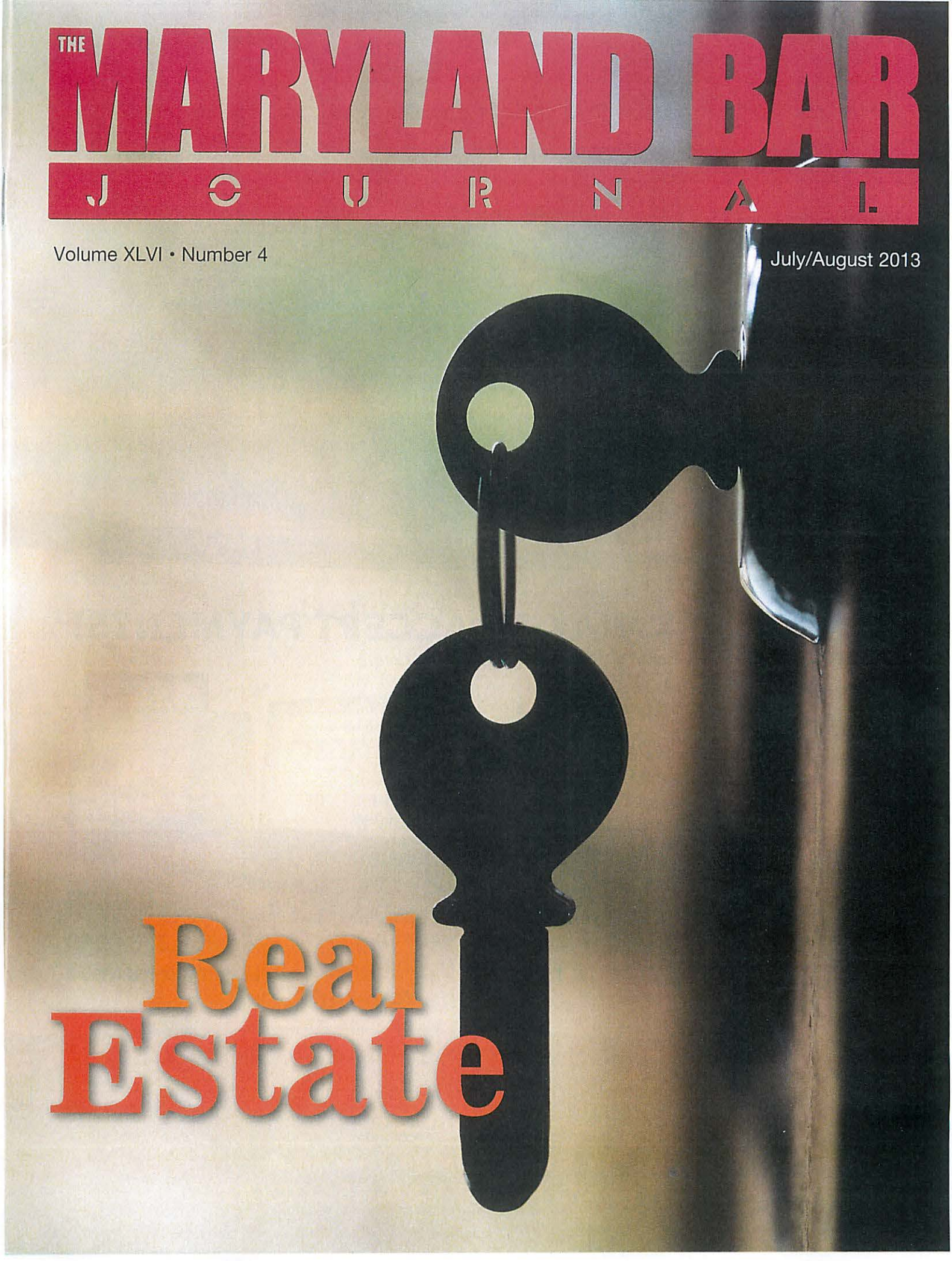

# Real Estate

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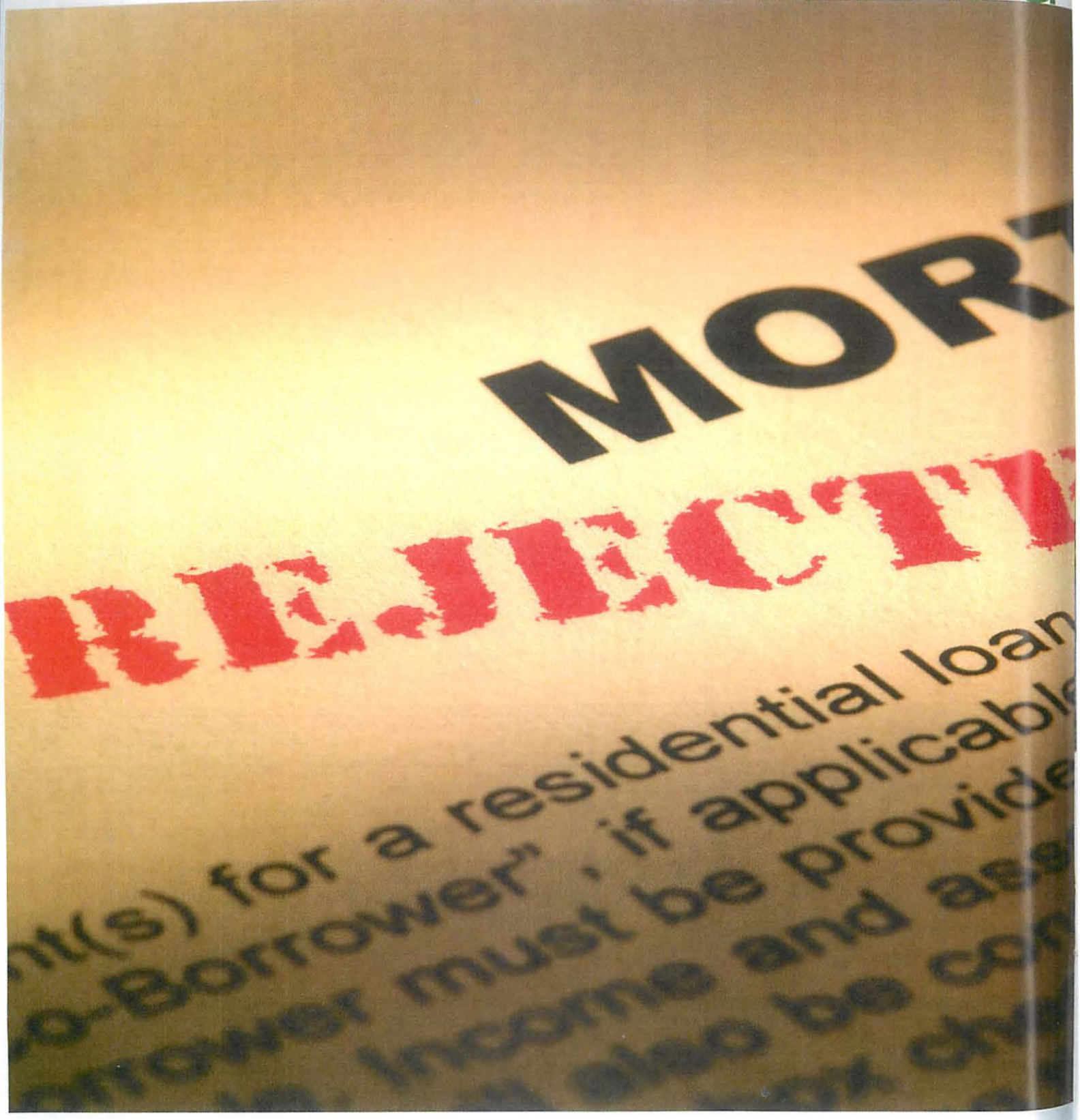
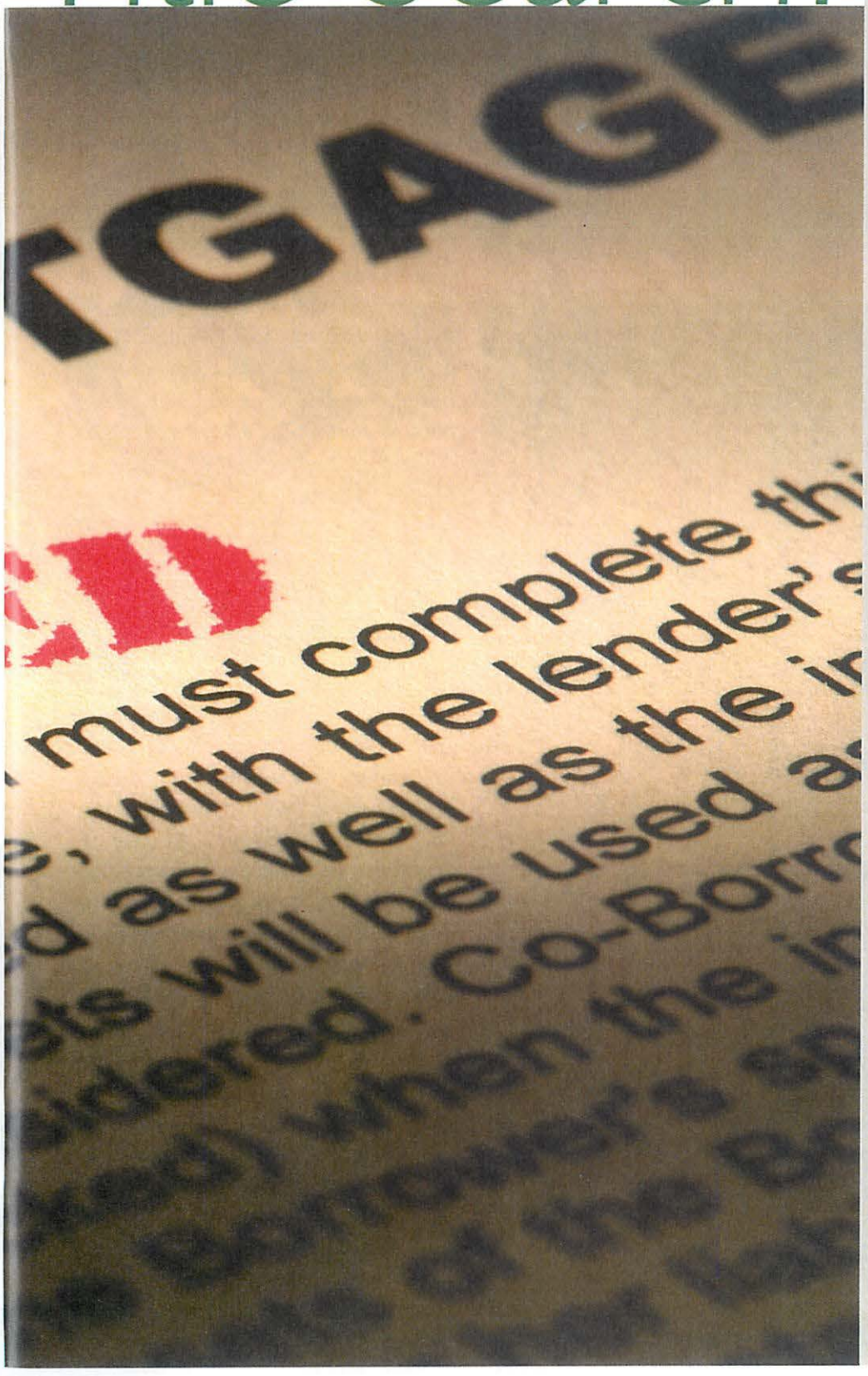


# LIABILITY Title Search?




**By Douglas M. Bregman**

In *Columbia Town Center Title Company v. 100 Investment Limited Partnership*, 203 Md. App. 61 (2012) ("*Columbia*"), the Court of Special Appeals of Maryland held that a title insurance policy holder has no cause of action in tort against a title company or its agents for a negligent title search conducted prior to issuing a title commitment to the insured. The Court of Appeals granted *certiorari*, recently affirming the decision in part and reversing it in part. *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, No. 19/12 (Md. Jan. 29, 2013) ("*100 Investment*"). Though the Court of Appeals reversed the Court of Special Appeals and agreed with the circuit court that the companies of the title search agents could be liable for their negligent search, the Court did not expressly state whether a title insurer could ever be held vicariously liable for its agents' negligence, instead agreeing with the Court of Special Appeals only to the extent that, given the specifics of the case in question, this insurer could not be held vicariously liable.


## Background

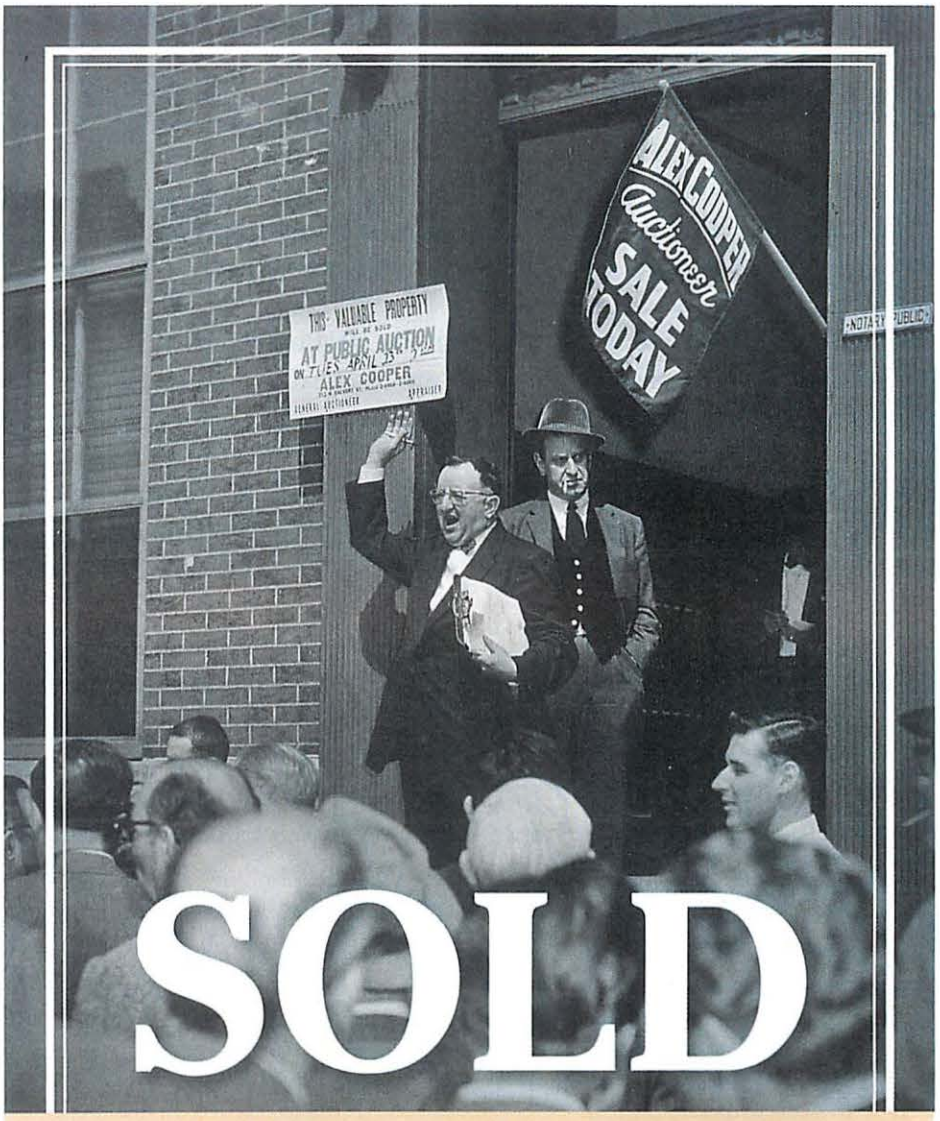
In *Columbia*, a partnership purchased a parcel of property, part of which had been previously conveyed to a third party. The title agents that conducted the title searches for the partnership (issuing title insurance policies) failed to discover the earlier conveyance of part of that parcel, which had been properly recorded in the land records. The partnership did not learn of the prior conveyance until years later. By that point, the partnership no longer owned the parcel because it had conveyed the property to another developer, who had constructed five townhomes on the parcel and conveyed each to individual homeowners. However, to cure the title problem, the partnership purchased the disputed parcel from its owner for $175,358.56, and also incurred $16,162.32 in associated expenses, including attorney's fees.

The title insurer filed suit in the U.S. District Court for the District of Maryland, seeking a declaratory judgment regarding its liability under the insurance policy. The district court granted summary judgment for the partnership, awarding damages of $200,000 for the cost of repurchasing the parcel and for the litigation expenses incurred in connection with the trespass suit. On appeal, the Fourth Circuit affirmed in part and reversed in part, holding that while the title insurer was responsible for reimbursing the partnership for its defense costs in the trespass suit, it had no obligation to compensate for the cost of re-purchasing the parcel. Thus, the court ruled that when the partnership decided to "re-purchase" the parcel, it went beyond its responsibilities outlined in the deed and

therefore had acted outside the scope of coverage of its insurance policy. *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759, 764–66 (4th Cir. 2004).

The partnership then filed suit in the Circuit Court for Howard County against the title agents and title insurer, alleging that the title agents negligently failed to discover and report the deed for the sale of the parcel during the course of their title searches and that the title insurer was vicariously liable for its agents' negligence. The circuit court ultimately found that the title agents were liable for their failure to conduct a thorough title search and that the title insurer could be held vicariously liable. The circuit court entered judgment in the amount of the purchase price plus the costs incurred by the partnership for the purchase of the parcel.

In *Columbia*, the Court of Special Appeals reversed this determination by the circuit court, holding that the title agents could not be held liable for their title review negligence because the title agents did not owe a duty in tort to the insured under the insurance policy. The court reasoned that: (1) a title agent, unlike an attorney rendering a title opinion on which a client may rely, does not exercise professional skill and judgment and, thus, does not owe a duty of reasonable care; and (2) a title insurer cannot be vicariously liable for its agents' failure to identify a title defect because a title insurance policy constitutes a contract for indemnity and does not guarantee the state of the title. The Court of Special Appeals reinforced this second holding, finding that in this case the cause of action against the insurer must also fail due to the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presence of an exculpatory clause in the agreement between the partnership and the insurance company.

Judge Meredith authored a dissenting opinion in which he noted that title examination and deed preparation are "services that have historically been performed by attorneys," and, therefore, through an action in tort, "the title companies should be held to the same duty of care that would have applied if the [Partnership] had hired a licensed attorney to provide those services." However, Judge Meredith agreed that the insurer could not be held vicariously liable for its agents' negligence.

## Prior Case Law on Liability in Tort and Contract

In Maryland, "[t]he mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort." *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 654–55 (1999). However, in some situations, a duty imposed by law and enforceable in tort overlaps with a contractual obligation. For example, "[w]here a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of circumstances surrounding or attending the transaction, the breach of such a duty is a tort." *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 534 (1986).

In *Jacques*, the plaintiffs, the Jacqueses, faced a dilemma. They had to either accept a high-interest personal loan or risk the loss of their $10,000 deposit after the defendant bank mistakenly approved them for a $74,000 loan and later adjusted the available loan amount down to only $41,400 – an amount too low for the Jacqueses' real estate purchase. The Jacqueses sued the bank.

A jury returned a verdict in favor of the Jacqueses on a negligence claim, awarding them $10,000 in compensatory damages. The Court of Special Appeals reversed, holding that the bank had no independent duty of care in evaluating the plaintiffs' loan application. The Court of Appeals reversed the Court of Special Appeals, finding that a duty was indeed owed. The Court noted that although a negligent breach of contract itself does not sustain an action sounding in tort, under the circumstances of the case, there was an implied promise to use reasonable care in the processing of the Jacqueses' loan application.

The Court of Appeals began its analysis by noting that "in determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties." *Id.* Furthermore, "where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability." *Id.* Such a nexus is generally satisfied by a showing of privity or its equivalent.

The Court rejected the bank's argument that the "relationship" necessary to create a duty was absent for lack of contractual privity, and concluded that there was an implied contract between the parties because the bank undertook to process the Jacqueses' loan application in exchange for monetary consideration. Moreover, the Court reasoned, implicit in the bank's agreement to process the loan application was an agreement to do so with reasonable care. However, the Court's analysis did not end there. It also noted three additional considerations, each focused on the nature of the parties' relationship.

First, the Court noted that the Jacqueses were particularly vulnerable and dependent upon the bank's exercise of due care because the Jacqueses were contractually bound to accept whatever loan amount the bank would authorize or they would forfeit their $10,000 deposit. Second, the Court highlighted the professional skill required by the bank, equating it to that required by physicians, attorneys, and accountants. According to the Court, the law generally recognizes a tort duty of care arising from contractual dealings with these professionals. Moreover, Maryland courts have recognized that in instances in which a person holds himself out as possessing a requisite skill, a tort duty to act with reasonable care will be imposed. *Id.* at 541 (citing *St. Paul at Chase Corp. v. Mfrs. Life Ins. Co.*, 262 Md. 192, 219–20 (1971), *cert. denied*, 404 U.S. 857, 92 S. Ct. 104 (1971)). The third consideration dealt with the "public nature" and regulation of the banking industry, which is not relevant here.

The *Jacques* decision thus held that a duty in tort will arise, separate from any contractual duty, when the nature of the parties' relationship is such that one party relies, to his detriment, on the implied promise of the other party. This is particularly true in instances in which the promising party is a professional whose

services require the exercise of professional skill and judgment. The question in *Columbia* was whether title agents' services required such an exercise.

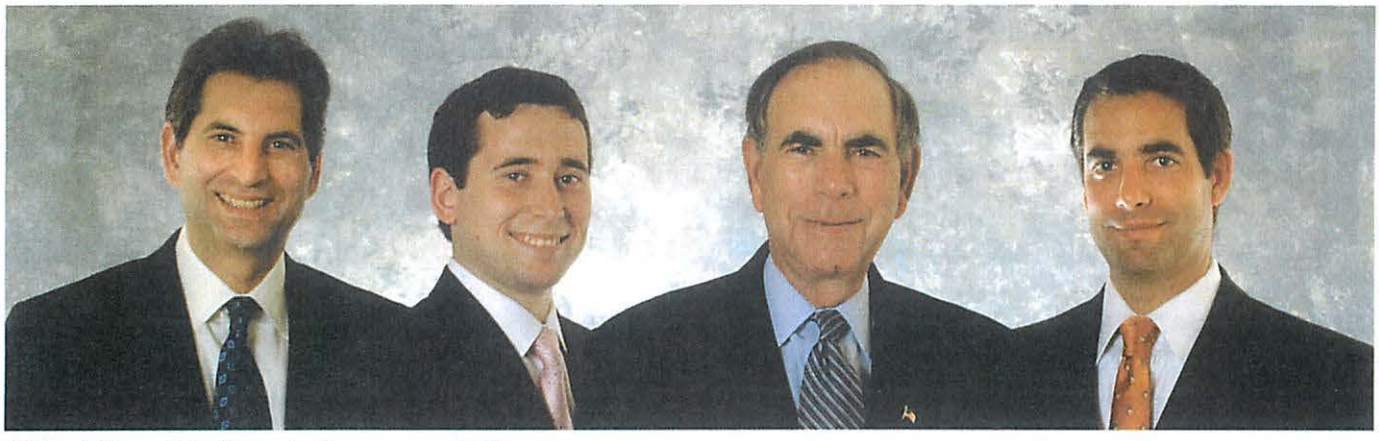
In addition to the title agents' liability, the *Columbia* case also required a decision on whether the title insurer, could be vicariously liable for its agents' negligence. In Maryland, there was no Court of Appeals decision that directly addresses the issue, and other jurisdictions are split on the matter, specifically as it pertains to title agents that perform a title search. Many courts have found that a title insurance agent and company have a tort duty, directly or vicariously, to search for and disclose all recorded title defects. *See U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010); *Tess v. Lawyers Title Ins. Corp.*, 557 N.W.2d 696 (Neb. 1997); *Soutullo v. Commonwealth Land Title Ins. Co.*, 646 So. 2d 1352 (Ala. 1994); *Crawford v. Safeco Title Ins. Co.*, 585 So. 2d 952 (Fla. Dist. Ct. App. 1991); *Heyd v. Chicago Title Ins. Co.*, 354 N.W.2d 154, 158–59 (Neb. 1984); *Banville v. Schmidt*, 112 Cal. Rptr. 126, 134–35 (Ct. App. 1974).

## Court of Special Appeals' Majority Opinion in *Columbia*

In light of the case law discussed above, the majority of the Court of Special Appeals panel determined that the facts of *Columbia* did not require extending an independent tort duty to title agents. Furthermore, the court held that even if the partnership's tort claims against the title agents were cognizable, the insurer would not be vicariously liable.

The court began its analysis by stating that, in light of the contractual relationship between the title companies and the partnership, it would assume that there was indeed an "intimate nexus" between the parties. Mirroring the *Jacques* opinion, the majority continued its analysis of the parties' relationship by considering two additional factors to determine if the circumstances justified imposing a tort duty independent of the parties' contract.

First, the majority reasoned that although some states have created a statutory obligation imposing a duty of care on title agents, the Maryland General Assembly had not done so. Second, with respect to public policy – which, the court

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acknowledged, ordinarily imposes a duty of reasonable care in the exercise of professional skill and judgment in the case of attorneys, physicians, architects, and accountants – the court determined that the same level of expertise and skill is not required of title agents.

With regard to the claim against the title insurer, the court reasoned that holding the title insurer vicariously liable would be improper because: (1) the title search was being performed for the benefit of the title insurer in underwriting the policy rather than for the purpose of providing title information to the partnership; (2) relying on its opinion in *Stewart Title Guaranty Co. v. West*, 110 Md. App. 114, 131 (1996), such liability would improperly convert a title insurance policy from a contract for indemnity into a guarantee of marketable title; and (3) the parties' agreement in this case contained an exculpatory clause which expressly precluded the partnership from accusing the insurer of vicarious liability for its agents' negligence.

## Court of Appeals' 100 Investment Opinion

The partnership successfully petitioned the Court of Appeals to review the Court of Special Appeals' decision . In rendering the decision of a unanimous court on January 29, 2013, Judge Greene generally adhered to the dissenting opinion of Judge Meredith in the court below as he explained why the title agents were, in fact, negligent for failing to discover the prior conveyance of the parcel. First, because the partnership relied on the accuracy of the title search in deciding to purchase the property, the Court found that the requisite "intimate nexus" between the partnership and the title agents was present. *100 Investment*, No. 19/12, slip op. at 23-26. The Court then stressed that the duties of title examiners equate to "paralegal information services" – "'services that have historically been performed by attorneys,'" – and thus "'the title companies should be held to the same duty of care that would have applied if the [Partnership] had hired a licensed attorney to provide those services.'" *Id.* at 32 (quoting *Columbia*, 203 Md. App. at 105-06 (Meredith, J., dissenting)). Thus, because this duty of reasonable care was in place, and because the title agents breached that duty in negligently searching the land records, the agents were liable to the partnership for the damages that ensued. *Id.* at 34.

Despite its decisive ruling on the liability of the title agents, the Court did not directly answer the question of whether an insurer could be held vicariously liable for its agents' negligence. Rather than discuss, as a general matter, whether such a theory of vicarious liability should be recognized by the courts of Maryland, the Court instead focused on the specific terms of the insurance policy purchased by the partnership. In borrowing the tertiary reasoning of the Court of Special Appeals below, the Court highlighted the policy's exculpatory clause that limited the title insurer's liability to claims of loss or damage relating to the status of the title that stemmed from "the provisions and conditions and stipulations of [the] policy." *Id.* at 36. Based solely on the presence of this clause in the parties' contract, the Court found that the title insurer could not be vicariously liable for the negligent actions of its agents.

## The Unanswered Question – Should Title Insurers Be Held Vicariously Liable for Their Agents' Negligent Title Searches?

The Court of Appeals' *100 Investment* opinion makes clear that unambiguous exculpatory clauses in title insurance policies will, in most cases, alleviate any threat of vicarious liability to insurers for the negligent actions of their title agents. The question remains, however, whether such vicarious liability could ever be found by a Maryland court in a case like this in the absence of such an exculpatory clause.

In rendering as narrow a decision as it did, the Court of Appeals ultimately left real estate purchasers, legal practitioners, and judges with little guidance as to how future cases involving these same issues should be decided. On one hand, it is noteworthy that the Court refused to adopt the Court of Special Appeals' broad rationale, which found that insurers should universally be free from vicarious liability for their agents' negligent title searches. Significantly, unlike the Court of Special Appeals, the Court of Appeals did not express concern that recognizing this form of tort liability could convert a title insurance policy from a contract for indemnity into a guarantee of marketable title.

On the other hand, despite its recognition of a few narrow exceptions under which such terms in a contract will not be enforced, the Court essentially gave its imprimatur to the use of simple excul-


patory clauses in title insurance policies as a means for insurers to escape any threat of such vicarious liability. Citing *Wolf v. Ford*, 335 Md. 525 (1994), and *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254 (1996), the Court stressed that, based on "the public policy rationale of freedom to contract," "[i]t is well settled in Maryland that exculpatory clauses are generally valid." *100 Investment*, No. 19/12, slip op. at 37. This standard, therefore, appears to put the onus on the insured – a party that may not always be the sort of "sophisticated commercial entit[y] that ha[s] likely engaged in similar real property transactions in the past," that the partnership happened to be in this case – to ensure that no such clause is present in its policy. *Id.* at 41.

## Conclusion

While the Court of Appeals' decision in *100 Investment* found that title agents who issue title insurance policies after performing a title search, have a duty of reasonable care to their clients when conducting their practice, like attorneys, doctors, architects, and accountants, the Court simultaneously left open the question of how, if ever, an insurer could be found vicariously liable for the negligence of the insurer's agents in conducting their title searches.

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