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Recent Case: Pennsylvania Commonwealth Court Holds That a Lawyer May Be Liable for Malpractice for Failure to Ensure That a Mortgage is Properly Filed and Indexed

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Recent Cases

RECENT CASE: PENNSYLVANIA COMMONWEALTH COURT HOLDS THAT A LAWYER MAY BE LIABLE FOR MALPRACTICE FOR FAILURE TO ENSURE THAT A MORTGAGE IS PROPERLY FILED AND INDEXED

I. INTRODUCTION

Real estate lawyers beware! In a controversial opinion decided in April 2003, the Pennsylvania Commonwealth Court altered the way in which most attorneys will conduct closing negotiations.¹ In the case of *Antonis v. Liberati*, the court held that an attorney may be liable for malpractice merely because of the attorney's failure to ensure that a recorded document was properly indexed.² The decision has created a stir of controversy because of the effect that the court's holding could have on the customary protocols Pennsylvania lawyers follow during real estate closings.³ Given its reliance on a Pennsylvania Supreme Court case decided over ninety years ago and its failure to consider the modern practice of real estate filing, the Pennsylvania Commonwealth Court incorrectly decided the case, creating a dangerous precedent for attorneys involved in real estate transactions.⁴

II. A PRECARIOUS PRECEDENT

In *Antonis*, a lender retained an attorney to assist in the preparation and subsequent recordation of a mortgage.⁵ Following the preparation of the documents, the attorney delivered them to the office of the recorder of deeds for proper filing.⁶ During the period following delivery of the mortgage documents, the lender telephoned the attorney on several occasions in order to confirm that the documents had, in fact, been recorded.⁷ The attorney repeatedly assured the lender that "everything was in order"

1. See *Antonis v. Liberati*, 821 A.2d 666 (Pa. Commw. Ct. 2003) (finding real estate attorney liable for malpractice because of attorney's failure to ensure that mortgage instrument was properly recorded).

2. See *id.* at 670 (holding that responsibility for clerical error in filing of mortgage rested with attorney assisting in closing negotiations).

3. See, e.g., Harris Ominsky, *Attorney Can Be Held Responsible for Recorder's Error*, 229 LEGAL INTELLIGENCER 24, 6 (2003) (describing critical reaction to court's decision among real estate practitioners).

4. For a complete discussion of the court's analysis and its practical effect, see *infra* notes 49-79 and accompanying text.

5. See *Antonis*, 821 A.2d at 667 (describing facts of case).

6. See *id.* (discussing actions taken by parties following closing negotiations).

7. See *id.* (noting lender's concern that mortgage be properly recorded). In Pennsylvania, indexing is regarded as the final step of recording. See PA. STAT.

and that proper recordation of the mortgage had taken place.⁸ Unbeknownst to the lawyer, however, a clerk in the recorder's office had misspelled the mortgagor's last name in the process of filing.⁹ The error caused the mortgage to be indexed incorrectly and thus outside the scope of a subsequent purchaser's title search.¹⁰

The mortgagor later sold the property without disclosing the mortgage's existence and without paying off the debt owed to the lender.¹¹ When the lender read about the sale in the newspaper, he called the attorney to inquire about the status of his mortgage lien.¹² A few days later, the attorney informed him of the clerical error.¹³

The lender initially brought suit against the purchasers of the property for recognition of the mortgage.¹⁴ The purchasers, however, were able to successfully defend against the claim on the grounds that they had no actual or constructive notice of the obligation.¹⁵ The lender then sued

ANN. tit. 16 § 9852 (West 2001) (requiring recorder of deeds to keep index of all deeds, mortgages and other liens or encumbrances).

8. See *Antonis*, 821 A.2d at 667 (reciting attorney's assurances that mortgage had been properly handled by recorder's office).

9. See *id.* (discussing error made by official in office of recorder of deeds during indexing and filing process).

10. See *id.* (describing effect of filing error). Pennsylvania is considered a "race-notice" jurisdiction; thus, a subsequent bona fide purchaser will take an interest in land free and clear of an encumbrance so long as the purchaser does not have actual or constructive notice of the encumbrance at the time of purchase. See PA. STAT. ANN. tit. 21 § 351 (West 2001) (establishing race-notice recording system for conveyances and contracts). In Pennsylvania, an entry in the index is treated as providing a subsequent purchaser with constructive notice of a recorded interest encumbering the property. See PA. STAT. ANN. tit. 16 § 9853 (West 2001) ("The entry of recorded deeds and mortgages in said indexes, respectively, shall be notice to all persons of recording of the same."). The court in *Antonis* obviously relied upon the negative inference created by section 9853 that an index without an entry indicates that there is no recording. See *Antonis*, 821 A.2d at 667 (accepting trial court's conclusion that misindexing of mortgage excused subsequent purchasers from conducting independent examination of records). This proposition has been flatly rejected by at least one Pennsylvania court. See *In re R.A. Beck Builders, Inc.*, 66 B.R. 666, 670-71 (Bankr. W.D. Pa. 1986) (declining to adopt negative inference as advanced by *Antonis* court). For a further discussion of the negative inference created by section 9853 and the recent shift away from this approach by Pennsylvania courts, see *infra* notes 67-79 and accompanying text.

11. See *Antonis*, 821 A.2d at 667 (discussing subsequent disposition of property).

12. See *id.* (noting lender's concerns upon learning of sale).

13. See *id.* (noting lawyer's response to lender's inquiry).

14. See *id.* (discussing lender's cause of action against subsequent purchasers of property).

15. See *id.* (absolving purchasers from liability). Being in a jurisdiction that employs a race-notice recording system, Pennsylvania courts have declined to enforce an adverse property interest when a subsequent purchaser buys the property without knowledge of the interest. See *Lund v. Heinrich*, 189 A.2d 581, 584 (Pa. 1963) ("An innocent purchaser for value, having neither actual nor constructive knowledge of claims of a third party, holds the title acquired free of any such secret equities.").

the attorney, the recorder of deeds and the mortgagor's estate in an action to recover the debt secured by the mortgage.¹⁶ The trial court found in favor of the lender against all parties and an appeal to the Pennsylvania Commonwealth Court followed.¹⁷

The Commonwealth Court first addressed the issue of liability as it pertained to the recorder of deeds.¹⁸ The court determined that the recorder of deeds was not statutorily liable for a typographical error made by a member of its staff.¹⁹ Moreover, the court noted that to hold public officers personally liable for a subordinate's negligent acts would impose an onerous and unbearable burden on those officials.²⁰ Thus, the court concluded, public policy prohibits such a cause of action.²¹ In addition, the court found that the recorder of deeds was immune from liability under the Pennsylvania Tort Claims Act, which absolves public employees from liability when their negligence has caused injury to another's property.²² The Commonwealth Court thus reversed the trial court's ruling that the recorder of deeds was liable to the lender for the filing error.²³

The court then turned to the issue of whether the attorney involved in the preparation of the mortgage documents had a duty to ensure that

16. See *Antonis*, 821 A.2d at 667-68 (enumerating additional defendants joined by lender). By the time the lender instituted his lawsuit, the mortgagor had died. See *id.* (noting claim against mortgagor's estate).

17. See *id.* at 668 (providing court's holding).

18. See *id.* (commencing court's analysis of case).

19. See *id.* (discussing court's findings as to liability of government official). The lender had argued that the recorder of deeds was liable under PA. STAT. ANN. tit. 16 § 9852 (West 2001); see also *Antonis*, 821 A.2d at 667-68 (stating legal basis for lender's claim). Section 9852 provides:

As soon as said indexes are prepared it shall be the duty of the recorder to index in its appropriate place and manner every deed and mortgage thereafter recorded in his office, at the time the same is recorded, and in case he neglects to do so he and his sureties shall be liable in damages to any person aggrieved

PA. STAT. ANN. tit. 16 (imposing liability upon recorder for failure to properly index mortgage).

20. See *Antonis*, 821 A.2d at 668-69 (providing court's rationale).

21. See *id.* (finding that holding recorder liable for negligent acts attributable to recorder's office would hinder efficient operation of government).

22. See *id.* at 669 (discussing immunity conferred upon public officials). Section 8541 of the Tort Claims Act provides: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 PA. CONS. STAT. (2002) (relieving government agencies of liability for negligent acts of their employees). Here, the court considered the note secured by the mortgage to be property for the purpose of construing the statute. See *Antonis*, 821 A.2d at 669 ("A note evidencing a debt is property as surely as is real estate or any other tangible thing."). The lender's inability to collect the debt owed on the note constituted injury to this property. See *id.* (providing justification for court's finding of government immunity from liability).

23. See *Antonis*, 821 A.2d at 668 (providing court's final determination as to recorder's liability).

the mortgage was indexed correctly.²⁴ In a case of first impression in Pennsylvania, the attorney argued that the trial court erred in finding that such a duty existed.²⁵ He contended that expert testimony was needed to ascertain the standard of care for attorneys during closing negotiations, and that absent that testimony, the plaintiff had not proven that a duty existed to the lender to ensure that the mortgage and note were properly indexed.²⁶ The attorney also argued that even if he had breached a duty owed to the lender, the mortgagor's fraud in not disclosing the mortgage to the subsequent purchasers was an intervening cause of the lender's loss.²⁷

The court rejected the attorney's assertions that an expert was needed in order to ascertain the standard of care owed to the lender.²⁸ Instead, the Commonwealth Court relied on a 1909 Pennsylvania Supreme Court case as authority for the proposition that an attorney could be liable for failing to correct an improperly indexed mortgage.²⁹ The case, *Prouty v. Marshall*,³⁰ involved a mortgage that had been incorrectly recorded and indexed because the wrong initial had been inserted for the mortgagor's name.³¹ The *Prouty* court held that the consequences of failing to index properly fell on the mortgagee, rather than on the innocent purchaser.³² In so holding, the court reasoned that the lender, as the holder of the mortgage, must ensure that the mortgage is properly recorded and indexed:

It is an easy matter for a mortgagee, or a grantee in each particular instance, either in person *or by a representative*, to look at the record, and see that the instrument has been properly entered There is every reason why it should be made the duty of the mortgagee to see that his instrument is properly recorded The obligation of seeing that the record of an instrument is correct must properly rest upon its holder. If he fails to protect himself, the consequence cannot justly be shifted upon an innocent purchaser.³³

The Commonwealth Court reasoned that the phrase "or by a representative" from *Prouty* established a duty on the part of the attorney to

24. *See id.* at 669 (continuing with court's analysis).

25. *See id.* (noting issues raised by attorney in defense to lender's action).

26. *See id.* (detailing attorney's argument in favor of dismissal).

27. *See id.* at 670 (discussing intervening nature of subsequent purchase).

28. *See id.* (stating that issue of negligence was "clear enough to be concluded as a matter of law" and that expert testimony was not necessary to supplement that understanding).

29. *See id.* at 669-70 (construing ninety-year-old precedent as authority for holding).

30. 74 A. 550 (Pa. 1909).

31. *See id.* at 550 (discussing facts of case).

32. *See id.* at 551 (providing holding of court).

33. *Id.* (emphasis added).

ensure that the mortgage documents were properly recorded and indexed.³⁴ Moreover, based on the authority of the *Prouty* holding, the court determined that expert evidence was not needed to resolve the standard of care applicable in the *Antonis* case.³⁵

Drawing on language from the *Prouty* opinion, the court held that the lender's attorney had an affirmative duty to ensure that the mortgage was indexed correctly after the closing.³⁶ When the attorney failed to check whether the recorded document was properly indexed, he breached that duty and could be held liable for malpractice.³⁷ The fact that the mortgagor committed fraud when he later failed to disclose the mortgage to the subsequent purchasers was irrelevant.³⁸ The court reasoned that absent the breach of the attorney's duty, the mortgagor would not have been able to defraud the new buyers.³⁹

III. THE CUSTOMARY ROLE OF REAL ESTATE LAWYERS

The *Antonis* decision has been characterized as "scary" because of its potential to drastically modify the way in which most real estate attorneys conduct closing negotiations.⁴⁰ Typically, once the closing negotiations conclude, lawyers do not follow up with the recording office to ensure that a mortgage (or other instrument) has been properly filed and indexed.⁴¹ There are several reasons for this tendency. First, it is generally understood in practice that once a deed is delivered to the recorder of deeds, proper recordation of the document is no longer the lawyer's responsibility.⁴² Rather, the burden of ensuring proper recordation and indexing shifts to the actual government body charged with the maintenance of an accurate recording system, or alternatively, to the party seeking the protec-

34. See *Antonis*, 821 A.2d at 670 (explaining basis for court's decision to impose liability upon defendant attorney).

35. See *id.* (determining that *Prouty* opinion clearly established duty owed by attorney).

36. See *id.* (holding that *Prouty* "imposed an obligation on [the attorney] by law to ensure that the documents were properly recorded and that expert testimony was, therefore, not required").

37. See *id.* (finding attorney liable for damages arising from misindexed mortgage).

38. See *id.* (dismissing attorney's assertions that mortgagor's fraudulent conveyance of property relieved attorney of liability).

39. See *id.* (stating that attorney's negligence was overriding cause of lender's loss).

40. See *Ominsky*, *supra* note 3, at 6 (discussing criticism generated by *Antonis* holding).

41. See *id.* (citing informal survey of Pennsylvania lawyers).

42. See PA. STAT. ANN. tit. 16 §§ 9851-52 (West 2001) (reciting recorder's statutorily imposed duty to properly index submitted mortgages); *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 486 (Pa. Commw. Ct. 1995) (indicating that it is duty of recorder of deeds to ensure proper recording and indexing of mortgage once mortgage is delivered to recorder's office).

tion of that recording system (*i.e.*, the mortgagee).⁴³ In those cases in which the government body fails to properly record the document, it is the government office or the mortgagee itself, and not the attorney assisting in the real estate transaction, that is responsible for damages arising from the error.⁴⁴

Second, the introduction of title insurance over the course of the last twenty years has alleviated much of the concern over proper recordation of land interests following closing negotiations.⁴⁵ In Pennsylvania, where title companies frequently act as closing agents in residential sale transactions, the title company generally insures the mortgage lien as of the closing date.⁴⁶ In these situations, the title company insures both the proper

43. See Commonwealth *ex rel.* Orris v. Roberts, 141 A.2d 393, 400 (Pa. 1958) (establishing rule in Pennsylvania that duty to see that instrument is properly recorded and indexed resides with holder of instrument even after it is delivered to the prothonotary). In Pennsylvania, the burden of ensuring that a valid and complete recording has taken place remains with the party submitting the instrument for recordation. See Lansdowne v. G.C. Murphy Co., 517 A.2d 1318, 1322 (Pa. Super. Ct. 1985) (stating that "the obligatory aspects remain the onus of the party seeking to have an instrument recorded by seeing to it that 'it is both properly recorded and properly indexed'" (quoting *Orris*, 141 A.2d at 400)). In addition, it is important to note that in many jurisdictions, liability will attach to the recorder of deeds when the recorder's failure to properly index a conveyance leads to injury on the part of the party relying on the recording system for protection of the party's interests. See, *e.g.*, Haner v. Bruce, 499 A.2d 792, 794 (Vt. 1985) (finding that holder of interest in real estate is entitled to rely on recorder to correctly file and index conveyance). Pennsylvania has enacted a statute imposing such liability on the recorder of deeds for negligence committed in the misindexing of a mortgage, although the Commonwealth Court elected not to apply the statute in the present case. See *Antonis*, 821 A.2d at 668-69 (declining to extend plain language of statute due to public policy considerations).

44. See PA. STAT. ANN. tit. 16 §§ 9851-52 (providing for liability of recording official); *Orris*, 141 A.2d at 400 (providing for liability of obligee). Based upon the statutorily imposed duty of the government recorder to properly file and index submitted mortgage documents, as well as the determination made by the Pennsylvania courts to hold owners personally accountable for the complete recordation of their interests, Pennsylvania attorneys would be justified in assuming that their obligations to a mortgagee terminated upon the close of the mortgage negotiations.

45. See Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407, 431, 439-40 (2000) (noting utility of title insurance in protecting against undisclosed or undiscoverable risks, including those arising from filing error); Charles B. Sheppard, *Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a Quality of Title to Real Property Liable for a Defect in the Title Caused by Conduct of the Assured?*, 79 N.D. L. REV. 311, 342 (2003) (describing title insurance as "dominant" form of protection against risk of title defect available in marketplace); Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 682-83 (2003) (discussing value of title insurance in alleviating risks associated with recording problems).

46. See MADISON, ET AL., *MODERN REAL ESTATE FINANCE AND LAND TRANSFER: A TRANSACTIONAL APPROACH* 102-03 (2d ed. 1999) (indicating that owner is insured as of closing date); Malloy & Klapow, *supra* note 45, at 431, 439-40 (providing that title insurance companies generally insure against issues arising post-closing); Jo-

filing and indexing of the mortgage.⁴⁷ Thus, real estate attorneys, as well as lenders, have come to rely on the protection provided by title companies during the closing process.⁴⁸ It does not appear that a title company was involved in the *Antonis* case.

IV. AN IMPROPER HOLDING

A. *The Extraordinary Step of Extending Liability to the Real Estate Lawyer*

Based on the protections against liability typically afforded real estate lawyers during the post-closing period, most lawyers do not regularly follow up with the recorder's office to ensure that a mortgage has been properly indexed.⁴⁹ As the *Antonis* case makes clear, this customary practice may now be a hazardous one. As is found in most states, Pennsylvania confers a statutory duty on the recorder of deeds to make certain that documents submitted to the recorder's office are properly filed and indexed.⁵⁰ Failure to comply with the statute may constitute grounds for imposing liability.⁵¹ The court in *Antonis*, however, chose not to adhere to the statute's plain language because of its apparent inconsistency with the Pennsylvania Tort Claims Act.⁵² The Tort Claims Act shields a local agency from liability for "damages on account of any injury to a person or property caused by an act of the local agency."⁵³

While there may be a need to shield government officials from liability as a matter of public policy, the burden of ensuring the correct recording and indexing of interests in real property has never before been shifted to an attorney.⁵⁴ Rather, in those cases in which the Pennsylvania

soph Shade, *Petroleum Land Titles: Title Examination and Title Opinions*, 46 BAYLOR L. REV. 1007, 1011 (1994) (stating that title insurance policy is effective from date of execution).

47. See Malloy & Klapow, *supra* note 45, at 431, 439-40 (describing risk allocation between title insurance company and later title searcher when recorder's office has improperly filed conveyance).

48. See Sheppard, *supra* note 45, at 343-44 (noting prevalence of title insurance in modern real estate transactions); Szypszak, *supra* note 45, at 683 (stating that "[i]t is a matter of common knowledge and experience that in the usual situation, title insurance is indispensable to the occurrence of the real estate sale") (quoting *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974)).

49. For a further discussion of the rationale underlying this practice, see *supra* notes 40-48 and the accompanying text.

50. See PA. STAT. ANN. tit. 16 § 9852 (West 2001) (holding recording officer responsible for misindexing of deeds and mortgages).

51. See *id.* (imposing liability should misindexing lead to economic injury).

52. See *Antonis v. Liberati*, 821 A.2d 666, 668-69 (Pa. Commw. Ct. 2003) (finding that Tort Claims Act conferred immunity to government officials acting within their official capacities).

53. 42 PA. CONS. STAT. § 8541 (2002) (sheltering officials from liability when their official acts result in injury to third parties).

54. Following a comprehensive review of Pennsylvania case law, it appears that attorneys have never been understood to possess an inherent duty to check the recording office to ensure that proper filing and indexing of a mortgage has

courts have declined to extend liability to the recorder of deeds, the burden for ensuring proper indexing has remained with the person offering the instrument for recordation.⁵⁵ Thus, it is generally regarded as the mortgagee's responsibility to ensure that the mortgage is properly recorded.⁵⁶ To the extent that the *Antonis* court employs the Pennsylvania Tort Claims Act as justification for departing from this general rule, the case creates a dangerous precedent. Real estate lawyers must prepare for the possibility that when a transaction is closed without the protection of title insurance, they—rather than the mortgagee or recorder of deeds—may be held personally liable upon commencement of an action to enforce a mortgage lien.⁵⁷

The *Antonis* court based its decision to hold the lawyer personally liable for the loss of the lender's mortgage in the case of *Prouty v. Marshall*, in which the Pennsylvania Supreme Court found that the consequences of misindexing were to be sustained by the mortgagee rather than the innocent purchaser.⁵⁸ In an unprecedented and perhaps extraordinary step, the Commonwealth Court relied on that holding to extend liability to the

taken place. It is important to note that such a case differs from those in which an attorney has given an express representation about the marketability of title, as in the preparation of a title opinion. See Sheppard, *supra* note 45, at 339-42 ("Attorneys who perform searches of chains of title, who render opinions of title, or who perform both on behalf of clients are bound by the traditional negligence standard of reasonable care and skill."). Traditionally, whenever an attorney gives an express opinion regarding the current state of the title to the property in question, that attorney may be liable to a seller/mortgagor as well as a subsequent purchaser of the property. See *id.* (commenting on attorney liability in rendering title opinions); see also Malloy & Klapow, *supra* note 45, at 438-39 (discussing rendering of title opinions as a "fault-based" system ensuring clean title).

55. See Commonwealth *ex rel.* Orris v. Roberts, 141 A.2d 393, 398-402 (Pa. 1958) (holding that government official could not be held liable when negligence of subordinate resulted in misindexing of creditor's note and that duty to ensure proper filing was responsibility of creditor alone).

56. See *id.* (imposing full responsibility on creditor for accurate indexing of creditor's interest).

57. Title insurance provides a strict liability form of ensuring clean title. See Malloy & Klapow, *supra* note 45, at 438-39 (arguing that title insurance is only safe way to insure against undisclosed or undiscoverable risks). Because title insurance is the only mechanism through which the parties to a transaction can be completely protected against later loss resulting from undetectable risks inherent to the recording system, it is the preferred method by which a mortgagee protects its interest in the encumbered property. See *id.* (noting that title insurance is preferred means by which mortgagee's interest is preserved, rather than by reliance upon measures taken by attorney assisting in closing negotiations). In fact, it has been argued that an attorney should be held liable for malpractice when the attorney fails to recommend that the owner acquire title insurance in order to protect the owner from risk of loss in a residential real estate transaction. See *id.* at 443-44 (finding that "the industry standard reflects a duty to obtain . . . title insurance for a client as a routine matter in all residential transactions").

58. See *Antonis v. Liberati*, 821 A.2d 666, 668-70 (Pa. Commw. Ct. 2003) (holding that "*Prouty* imposed an obligation on [the attorney] to ensure that the documents were properly recorded and that expert testimony [to determine the standard of care required of the attorney] was, therefore, not required").

attorney assisting in the transaction's closing stages.⁵⁹ No previous court has construed *Prouty* as creating a duty on the part of the attorney to ensure that a mortgage is indexed correctly.⁶⁰ Rather, courts have interpreted *Prouty* as imposing liability for improper recordation on a mortgagee *only*.⁶¹

B. A Remote Precedent

Even if the remedy fashioned by the *Antonis* court had been consistent with past interpretations of the *Prouty* holding, it is important to note the date of the *Prouty* decision.⁶² Because *Prouty* was decided almost one hundred years ago, courts cannot say that it reflects the current realities of modern residential real estate practice.⁶³ In major metropolitan areas across Pennsylvania, public officers are often faced with managing thousands of new recordings *per week*.⁶⁴ Generally, it is common for those officials to fall months—even up to one year—behind in the filing and indexing of these documents.⁶⁵ Therefore, it is no longer an “easy matter” (as described in the *Prouty* holding) to check whether an instrument has been properly filed and indexed. By failing to take into account the customary practice of real estate filing, the *Antonis* court overlooked the incredible duty its holding imposes upon lawyers involved in conventional real estate closings performed without the benefit of title insurance.⁶⁶

59. *See id.* at 670 (concluding that attorney's failure to check recording system for mortgage constituted a breach of duty that was cause of lender's loss).

60. A review of Pennsylvania case law indicates that Pennsylvania courts have never before interpreted *Prouty* as establishing a duty on the part of an attorney to ensure proper filing or indexing of a mortgage. While courts have read *Prouty* as imposing an obligation upon the mortgagee (or other owner) to see to it that the mortgagee's interests are protected, the phrase “or by a representative” included in the *Prouty* holding has never been interpreted to extend that obligation to the mortgagee's attorney. *See, e.g., Orris*, 141 A.2d at 400 (representing traditional view that consequences of faulty indexing fall upon mortgagee alone).

61. *See id.* (enforcing duty to check recording system against mortgagee only).

62. *Prouty v. Marshall*, 74 A. 550 (Pa. 1909).

63. *See First Citizens Nat'l Bank v. Sherwood*, 817 A.2d 501, 503-05 (Pa. Super. Ct. 2003), *appeal granted*, 827 A.2d 1201 (Pa. 2003) (recognizing authority of *Prouty* holding, but acknowledging that modern realities of real estate practice could revise later interpretations of that precedent).

64. *See Ominsky, supra* note 3, at 6 (commenting on current state of recording system).

65. *See* ROBERT G. NATELSON, *MODERN LAW OF DEEDS TO PROPERTY* 499-500 (1992) (“Because there may be a significant delay between the time the document is presented for recording and the time the officer indexes it, reproduces it, and files the reproduction, one considering an investment in property probably should examine the recording officer's pile of recently received documents.”).

66. It was therefore essential that expert testimony be employed in the *Antonis* case in order to establish the duty of care owed by the attorney. Without such testimony, the burden involved in making such a check of the recordings went unappreciated.

C. *The Rule of Negative Inference*

In addition to the extraordinary obligations imposed upon lawyers by the court's holding, the *Antonis* decision is flawed because of the court's incorrect interpretation of the Pennsylvania recording statute. Pennsylvania's statute charges a subsequent purchaser with constructive notice of a competing interest when that interest has been entered in the index.⁶⁷ The court in *Antonis* wrongly applied the negative inference created by this statute, *i.e.*, that an absence of an entry in the index indicates that no recording exists.⁶⁸ Of course, this may well not be the case—an interest may be properly recorded but simply misindexed (as occurred in the case of the *Antonis* mortgage).⁶⁹ Recent Pennsylvania decisions have questioned the appropriateness of the negative inference rule relied on by the Commonwealth Court due to the rule's inflexible approach to the realities of a modern recording and filing system.⁷⁰

One such case questioning the negative inference rationale was decided by the Pennsylvania Superior Court the day after the Commonwealth Court decided *Antonis*.⁷¹ In the case of *First Citizens National Bank v. Sherwood*,⁷² the Superior Court directly confronted the issue underlying the *Antonis* decision: whether a subsequent purchaser of real estate is charged with constructive notice of a mortgage lien where the lien is misindexed but nevertheless properly recorded.⁷³ The court in *Sherwood* concluded that simple reliance on the index was *not* enough to protect a subsequent purchaser of property subject to an otherwise properly re-

67. See PA. STAT. ANN. tit. 16 § 9853 (West 2001) (indicating that indexing of mortgage or deed provides constructive notice to third parties of its existence).

68. See *Antonis v. Liberati*, 821 A.2d 666, 667 (Pa. Commw. Ct. 2003) (excusing subsequent purchasers from conducting independent examination of records based upon misindexing of mortgage).

69. See *id.* at 667 (noting that lender's mortgage was indexed incorrectly during process of otherwise proper recording). A document may be misindexed yet still properly recorded for purposes of complying with the applicable recording statute. See NATELSON, *supra* note 65, at 499 ("Usually, the failure of the recording officer to index or file the document properly does not affect the validity of the recording.").

70. See *In re R.A. Beck Builders, Inc.*, 66 B.R. 666, 670-71 (Bankr. W.D. Pa. 1986) (declining to adopt negative inference as applied by *Antonis* court); *First Citizens Nat'l Bank v. Sherwood*, 817 A.2d 501, 503-05 (Pa. Super. Ct. 2003), *appeal granted*, 827 A.2d 1201 (Pa. 2003) (electing not to apply negative inference rule based upon relative ease of conducting search of record itself given record's electronic format).

71. See *Sherwood*, 817 A.2d at 505 (describing negative inference rule as "mechanical" and choosing to apply reasonableness test to determine whether examination conducted by subsequent purchaser was adequate to put purchaser on constructive notice of recorded interests).

72. 817 A.2d at 501 (noting issue confronted in *Antonis*).

73. See *id.* at 502 (presenting question for court's consideration).

corded (but misindexed) mortgage.⁷⁴ The court declined to indiscriminately apply the negative inference rule as developed in *Prouty* and later affirmed in *Antonis* because modern recording practices no longer justified this approach.⁷⁵ Given the current state of the recording system, the *Sherwood* court found that a mere check of the index did not constitute a diligent search for the purpose of protecting a subsequent purchaser of the property.⁷⁶

As the *Sherwood* opinion makes clear, the absence of an entry in the index is no longer per se evidence that a record does not exist.⁷⁷ Rather, in order to receive the protection of the recording statute, a subsequent purchaser will be required to conduct a "diligent" search of the recording system, which may require searching outside of the index (and in the actual record) under the appropriate circumstances.⁷⁸ Such circumstances might exist where most, if not all, the records in a particular county have been computerized.⁷⁹ To the extent that the *Antonis* court arbitrarily applied the ninety-four-year-old precedent from *Prouty* without first considering what constituted a diligent search in modern practice, the Commonwealth Court incorrectly decided the case.

74. *See id.* ("While at one time it might be successfully argued that the index should control because to require the purchaser to go beyond the index places an unfair burden on the purchaser, this may no longer be the case.")

75. *See id.* (noting that in most jurisdictions, records are compiled in electronic format making search of records without use of index relatively straightforward task).

76. *See id.* (holding that purchaser must take "all reasonable steps" to discover encumbrances). Several other jurisdictions have found that misindexing is not fatal to the owner and will not always extinguish the owner's interest in the property when it is transferred to a bona fide purchaser. *See In re Harris v. Md. Nat'l Bank*, 183 B.R. 657, 659-60 (D.D.C. 1995) (finding that improper indexing does not automatically imply lack of constructive notice); *Anderson v. Gulf State Bank*, 542 So. 2d 88, 89 (Fla. Dist. Ct. App. 1994) (holding that priority of mortgage liens is not contingent upon proper indexing, but rather upon proper recordation only); *Howard Savings Bank v. Brunson*, 582 A.2d 1305, 1308-10 (N.J. Super. Ct. Ch. Div. 1990) (adopting reasonableness test to determine whether subsequent purchaser will be bound by misindexed conveyance and rejecting per se negative inference rule). The Pennsylvania Supreme Court has also demonstrated a recent interest in hearing arguments on this matter. *See First Citizens Nat'l Bank v. Sherwood*, 827 A.2d 1201 (Pa. 2003) (accepting appeal of Superior Court case).

77. *See Sherwood*, 817 A.2d at 505 (determining that reliance upon index alone is not always sufficient to protect bona fide purchasers from prior adverse interests in property). This is the opposite of the determination by the *Antonis* court. *See Antonis v. Liberati*, 821 A.2d 666, 668-69 (Pa. Commw. Ct. 2003) (relying entirely on *Prouty* opinion and its application of negative inference rule).

78. *See Sherwood*, 817 A.2d at 505 ("If, on the other hand, the records are easily accessible, then a diligent search may require review of [the] records.")

79. *See id.* ("What in the past may have been considered a diligent search may no longer be so considered because of the ease of retrieving computerized information.")

V. CONCLUSION

The court's decision in *Antonis* may have important consequences for lawyers participating in closing negotiations, many of whom must now concern themselves with performing the burdensome task of ensuring the proper indexing and filing of real estate conveyances.⁸⁰ Not only did the court improperly rely on the *Prouty* precedent, but it failed to take into account the fact that modern real estate practices have drastically changed since the time of that decision.⁸¹ Had the case been decided in a manner consistent with the realities of modern practice, the lender's mortgage would have been protected and the lawyer held blameless for the recorder's error.⁸² By failing to consider the practical implications of its holding, the Commonwealth Court creates a dangerous practice environment for lawyers involved in real estate transactions.⁸³

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80. For a complete discussion of the potential effect that *Antonis* will have on the real estate community, see *supra* notes 40-48 and accompanying text.

81. For a complete discussion of court's reasoning, see *supra* notes 5-39 and accompanying text.

82. For a complete discussion of the court's interpretation of the Pennsylvania recording statute and its practical effect on modern day practice, see *supra* notes 49-61 and accompanying text.

83. For a complete discussion of the court's failure to consider the customs of practicing real estate attorneys, see *supra* notes 62-79 and accompanying text.