Circuit Court for Worcester County
Case No. 23-C-16-000544

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2758

September Term, 2018

PENNYMAC HOLDINGS, LLC

v.

FIRST AMERICAN TITLE INSURANCE COMPANY

Leahy,
Wells,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: November 30, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, PennyMac Holdings, LLC ("PennyMac") appeals from an order entered in the Circuit Court for Worcester County on October 4, 2018 granting summary judgment in favor of appellee, First American Title Insurance Company ("First American"). The circuit court found, first, that PennyMac's causes of action based upon First American's denial of claims under a title policy issued to PennyMac's predecessor in interest were filed more than three years after denial of the claims. Second, the court determined that the title policy was not a contract under seal; therefore, it did not qualify as a specialty subject to the twelve-year limitation period set forth in Maryland Code (1973, 2013 Repl. Vol., 2019 Supp.), Courts and Judicial Proceedings Article ("CJP"), § 5-102(a).[1] Accordingly, the circuit court entered summary judgment because PennyMac's claims under the title policy were barred by the applicable three-year statute of limitations. The record does not demonstrate, however, that the court addressed Penny Mac's claims that First American breached its obligations under a closing protection letter, issued by First American on November 4, 2006 (the "Closing Protection Letter"), to reimburse PennyMac's predecessor in interest and assigns "for actual loss" incurred in connection with the closing.[2] PennyMac timely noted its appeal and presents two questions for our review:

[1] The current version of CJP § 5-102 took effect on July 1, 2014. The statute was amended by the General Assembly in 2014 to except certain agreements, which are not relevant to this appeal, from the twelve-year limitations period. 2014 Md. Laws, ch. 592 (H.B. 274).

[2] Counsel for First American confirmed at oral argument before this Court that the circuit court did not address PennyMac's claims under the Closing Protection Letter in his oral ruling.

> "1. Did the lower court err in entering summary judgment against PennyMac finding that PennyMac's [] breach of Contract Claims for indemnity are time-barred subject to a three-year statute of limitations?"
>
> "2. Did the lower court err in finding that the title policy was not a contract under seal, subject to a twelve-year statute of limitations?"

For the reasons that follow, we hold that the circuit court correctly determined, as a matter of law, that the title policy was a simple contract and not a contract under seal. After resolving this threshold issue, and respecting our holding in *Stewart Title v. West*, 110 Md. App. 114 (1996), we affirm the grant of summary judgment in favor of First American on the claims brought under the title policy because they accrued more than three years before the underlying action was filed. The circuit court erred, however, in failing to address PennyMac's breach of contract claims under the Closing Protection Letter. Accordingly, we affirm, in part, but reverse the circuit court's grant of summary judgment disposing of the entire case. We remand for further proceedings, consistent with this opinion, for the circuit court to consider whether, and if so, when, PennyMac suffered an actual loss under the Closing Protection Letter.

BACKGROUND

The Refinance Transaction

PennyMac is in the business of purchasing distressed consumer loans. On or about October 26, 2012, PennyMac purchased a portfolio of approximately 1,900 loans from CitiMortgage. The portfolio included a loan for a condominium at 6801 Atlantic Avenue, #1N, Ocean City Maryland 21042 (the "Property") purchased by Jeffrey Burgee in May 2005.

On November 7, 2006, Mr. Burgee refinanced the existing loans on the Property with a new loan ("Loan") from New Century Mortgage Corporation ("New Century"), pursuant to a promissory note ("Note") in the original principal amount of $480,000. Mr. Burgee intended that the Loan would be secured by a deed of trust on the Property in favor of New Century ("Deed of Trust"). However, the Deed of Trust was not recorded. PennyMac currently holds the Note.

In connection with the closing for the Loan, First American issued the Closing Protection Letter on November 4, 2006. The Closing Protection Letter provides that First American will reimburse New Century "for actual loss incurred by [New Century] in connection with such closing when conducted by the Issuing Agent, Approved Attorney, or Approved Closing Services Vendor and when such loss arises out of:"

> 1. Failure of the Issuing Agent, Approved Attorney, or Approved Closing Services Vendor to comply with your written closing instructions to the extent that they relate to: (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien; or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document; or (c) the collection and payment of funds due you; or
> 2. . . .

Although TransContinental Title Company ("TransContinental") is listed as the Approved Closing Services Vendor in the Closing Protection Letter, the closing was handled by Lawyers Title Company. As alleged in the underlying complaint, "Lawyers Title failed to ensure that the Deed of Trust was recorded, and the Deed of Trust remains

unrecorded[.]" According to the record, the original deed of trust was, and remains, missing; consequently, PennyMac could not rectify Lawyers Title's error.

First American also issued a title policy[3] ("Title Policy") in 2006 for the benefit of New Century, and "its successors and/or assigns, as their interest may appear." The Title Policy is a Short Form Residential Loan Policy from the American Land Title Association ("ALTA") and expressly "INSURES THE INSURED IN ACCORDANCE WITH AND SUBJECT TO THE TERMS, EXCLUSIONS AND CONDITIONS SET FORTH IN THE AMERICAN LAND TITLE ASSOCIATION LOAN POLICY (6-17-06), ALL OF WHICH ARE INCORPORATED HEREIN." Policy (6-17-06) states:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, **against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of**:
>
> * * *
>
> 2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from (a) a defect in the Title caused by
>
> * * *
>
> (vi) **a document not properly filed, recorded, or indexed in the Public Records** including failure to perform those acts by electronic means authorized by law; or
>
> * * *

[3] While not relevant for this appeal, First American disputes that the title policy was issued in 2006 when the loan was originated. First American claims, instead, that the title policy was not issued until 2012. When asked, at oral argument before this Court, why the date of the title policy's issuance was not reflected in copies contained in the record of the "Short Form Residential Loan Policy" with a "Date of Policy: November 8, 2006," counsel for First American responded that First American's evidence supporting when the title policy was issued was not a part of the record.

> 9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. **This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage**
>
> * * *
>
> (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
>
> * * *
>
> (f) **a document not properly filed, recorded, or indexed in the Public Records** including failure to perform those acts by electronic means authorized by law; or
>
> * * *
>
> 10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
>
> * * *
>
> The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

(Emphasis added). The Title Policy bears the corporate stamp/seal, which states: "FIRST AMERICAN TITLE INSURANCE COMPANY * CALIFORNIA * INCORPORATED SEPTEMBER 24, 1968." The stamp/seal is opposite the signatures of the president of First American and is attested by its secretary.

Transfers of the Property

On March 15, 2007, Mr. Burgee transferred an undivided one-half interest in the Property to his sister and her husband, Laura and Thomas Loiero, for $150,000. Mr. Burgee subsequently transferred his remaining one-half interest to the Loieros on October 21, 2011, for no consideration. The Loieros then transferred their entire interest in the Property to their wholly-owned company, Premiere Maison, LLC.

Title Insurance Claims

On December 4, 2012, CitiMortgage, the predecessor to PennyMac, submitted a claim under the Title Policy. In a letter dated December 14, 2012, First American denied the claim.[4]

After PennyMac purchased the Loan (along with other distressed loans on other properties), it submitted its first claim under the Title Policy on April 16, 2013. In its claim, PennyMac stated: "In our review of title for the purpose of foreclosing on the deed of trust, a claim of title of interest which is adverse to the title to the estate, interest, or lien of the insured has been determined by the undersigned as follows: Subject DOT is not on record." First American denied this claim in a letter dated April 18, 2013, explaining that it had previously denied the identical claim on December 14, 2012 and likewise denied the April 16, 2013 claim for the same reason. First American attached a copy of the December 4, 2012 denial.

A little more than a year later, on or about June 16, 2014, PennyMac again requested indemnification coverage from First American but on this occasion, Penny Mac made the demand under the Closing Protection Letter. In conjunction with this claim, PennyMac "informed First American that it was initiating litigation [against Mr. Burgee and others] to enforce its equitable interest on the Property and demanded that First American indemnify its litigation costs per the terms of the Title Policy." First American responded in a letter dated June 24, 2014, refusing to indemnify PennyMac for either litigation costs

[4] The record contains copies of the denials, but not all of the claims submitted.

or loss under the Deed of Trust "since the closing was conducted by [Lawyers Title] and not by [TransContinental], the [Closing Protection Letter] is not applicable to this transaction." First American concluded by requesting:

> If you are aware of additional facts or an interpretation of terms which might alter this determination, please provide that information to me promptly. This Company reserves the right to amend, modify, and/or supplement the position set forth in this letter upon receipt of additional information.

Only a few days before the date of this last correspondence from First American, on June 20, 2014, PennyMac filed a complaint against Mr. Burgee, the Loieros, and Premiere Maison in the Circuit Court for Worcester County (the "Burgee Litigation"). In its complaint, PennyMac requested, among other things, that the circuit court: (1) declare that PennyMac is entitled to a first priority lien against the Property; that a copy of the Deed of Trust be recorded in the land records of Worcester County as an original; and that the land records are reformed *nunc pro tunc* to reflect that the Deed of Trust was recorded on the date of its execution; (2) declare that PennyMac is entitled to an equitable mortgage; (3) impose an implied trust coextensive with the terms of the Deed of Trust; and (4) award PennyMac its fees, costs, and expenses. Ultimately, on March 28, 2018, the circuit court found that PennyMac possessed an equitable lien as to an undivided one-half interest in the Property, effective November 7, 2006, and ordered a photocopy of the executed Deed of Trust, dated November 7, 2006, be recorded among the land records of Worcester County.

Meanwhile, on August 15, 2014, after initiating the Burgee Litigation, PennyMac wrote to First American requesting reconsideration of First American's previous denial letter on the basis that the operative language of the Closing Protection Letter was not cited

in its entirety. Again, First American refused to provide coverage in another denial letter dated August 20, 2014. As in its letter dated June 24, 2014, First American once again reserved "the right to amend, modify, and/or supplement" its position.

The Underlying Complaint

On July 20, 2016, PennyMac filed a complaint in the Circuit Court for Worcester County against First American. The complaint asserted that PennyMac's "security interest in the Property remain[ed] unperfected and [that PennyMac] w[ould] not be able to proceed with the option of foreclosure to protect its security interest." The complaint alleged that the Closing Protection Letter was issued to protect New Century "in the event that [PennyMac]'s predecessor suffered an actual loss as a result of certain actions that occurred during the closing of the Loan. . . ." and that "First American denied [PennyMac]'s subsequent claim for relief under the terms of the Closing Protection Letter on the grounds that the letter's protections did not apply because the closing was conducted by Lawyers Title, not Transcontinental."

The complaint asserted five causes of action and corresponding requests for relief, including; count 3 - specific performance; count 4 - promissory estoppel; count - 5 constructive fraud; and count 6 - negligence. The following excerpts are most relevant to this appeal:

> **Count 1 – Declaratory Judgment**: "Based upon First American's unreasonable denial of [PennyMac] claim, there is a justiciable controversy Policy, and [PennyMac] is entitled therefore entitled to a declaration that First American must reimburse [PennyMac] for the complete loss of the Deed of Trust resulting from this action."
>
> ***

> "[PennyMac] requests. . reimburse[ment]. . . in an amount to be determined, but not less than the full value of the Deed of Trust, $480,000.00[.]"
>
> **Count 2 – Breach of Contract**: "Per the terms of the Policy, First American promised to provide title insurance to New Century in connection with the Loan, insuring that the Deed of Trust had an enforceable first Deed of Trust on the Property."
>
> ***
>
> "Even though First American issued the Policy in favor of New Century and received a premium payment of $1,085.00 from Lawyers Title, it improperly attempted to rescind the policy."
>
> ***
>
> "First American breached its duty to [PennyMac] under the terms of the Closing Instructions or the Closing Protection Letter."
>
> ***
>
> "If, as First American now claims, the Closing Protection Letter . . . did not provide coverage for the services performed by Lawyers Title, then First American was required to issue, and upon information and belief, First American did issue a Closing Protection Letter that protected New Century against actions and omissions by Lawyers Title during the Loan's closing."
>
> ***
>
> "If for some unidentified reason, First American failed to issue such a letter, it breached the terms of the Closing Instructions by closing the Loan without issuing a proper 'Insured Closing Letter.'"
>
> ***
>
> "As a direct result of First American's breach of the Policy, [PennyMac] has been damaged in an amount to be determined, but not less than the full value of the Deed of Trust, $480,000.00, plus legal fees, costs, and interest."
>
> ***
>
> "[PennyMac] respectfully requests that this Honorable Court enter an Order: a. finding First American in breach of contract and declaring that First American must reimburse [PennyMac] in an amount to be determined, but not less than the full value of the Deed of Trust, $480,000[.]"

First American answered the complaint on March 21, 2017, generally denying the allegations of the complaint.

Motion for Summary Judgment

On January 25, 2018, First American filed a motion for summary judgment against PennyMac and asserted that PennyMac's claims were barred by the three-year statute of

limitations. In its motion, First American asserted that PennyMac had actual knowledge of its claims as early as October 2012 because CitiMortgage provided documentation when PennyMac acquired the Loan indicating an issue with the recordation of the Deed of Trust. Regardless, First American contended that PennyMac had actual knowledge of its claims "at the latest, in December 2012 when First American denied Pennymac's [sic] claims." First American asserted, therefore, that PennyMac's claims had accrued more than three years prior to the filing of the complaint and were barred under CJP § 5-101.

PennyMac, in its opposition, argued that First American "misconstrue[d] the accrual date and ignore[d] the controlling law applicable to the timeliness of PennyMac's claims." According to PennyMac,

> Because no adverse judgment in related litigation had been rendered against PennyMac at the time it filed this lawsuit (and still has not), it had not suffered an actual loss, and thus its claims had not accrued for that as of yet unknown loss. Thus, the statute of limitations could not possibly have expired at the time PennyMac initiated this litigation. Likewise, PennyMac continues to incur litigation costs in related litigation to correct title defects—which to date First American continues to refuse to indemnify. At the earliest, PennyMac's claim for these costs did not accrue until PennyMac inhabited this lawsuit and First American refused to indemnify it, and thus the statute of limitations for those claims could not have expired at the time PennyMac filed this lawsuit. . . . Under controlling Maryland Law, First American is permitted to cure its prior repudiation of coverage before an indemnifiable "actual loss" and concurrent breach occurs. Indeed, First American has expressly reserved a right to cure in its denial letters to PennyMac.

PennyMac, relying primarily on *Commercial Union Insurance Co. v. Porter Hayden, Co.*, 116 Md. App. 605 (1997) and *Luppino v. Vigilant Insurance Co.*, 110 Md. App. 372 (1996), argued that, for an indemnity contract, breach requires an "actual loss" and a refusal to provide indemnity for that loss. "Thus, First American's prior refusals to provide coverage

are irrelevant to the running of the statute of limitations." PennyMac also argued that its claims relating to the Closing Instruction Protection Letter could only accrue, at the earliest, on August 20, 2014, the "date PennyMac learned that—according to First American—it was denying coverage on the basis that the Closing Protection Letter somehow did not cover the closing of the Burgee Loan."

Finally, PennyMac argued that the Title Policy is a contract under seal and subject to a twelve-year statute of limitations. Relying on *Wellington Co., Inc. Profit Sharing Plan and Trust v. Shakiba*, 180 Md. App. 576 (2008), PennyMac argued that the "seal's presence in the 'usual place' next to the signature 'undoubtedly evince[d] an intention to make' the Title Policy a contract under seal."

In reply, First American, relying on *Stewart Title v. West*, 110 Md. App. 114, 131 (1996), averred that "Maryland courts have clearly stated when a cause of action arises for breach of a title insurance policy. . . . [A] title insurance policy is breached after the title insurance carrier receives notice of an alleged defect and fails to take action under the title policy within a reasonable time." According to First American, because PennyMac filed its complaint more than three years after the denials, its claims are barred.

First American then addressed the additional arguments raised in PennyMac's opposition:

> First, the law on **corporate** seals requires that the alleged contract actually contain specific language in the body of the contract or extrinsic evidence showing that the contract was intended by both parties to be a specialty. In the Opposition, [PennyMac] relies on the law for seals by an individual, not a corporation, to attempt to support its argument. Moreover, [PennyMac] fails to over [sic] any evidence (as required by Maryland law) to support its claim.

> Second, [PennyMac] did not assert a breach of the closing protection letter in the Complaint and it cannot claim one now. Moreover, even if it did, the plain language of the alleged closing protection letter was not breached and any claim under it is also barred by the statute of limitations.
>
> Third, the purported "disputed facts" have absolutely nothing to do with the statute of limitations asserted in First American's Motion. As set forth above, there are no factual disputes with respect to the statute of limitations. The haphazard allegations [PennyMac] has thrown into its Opposition have absolutely nothing to do with the statute of limitations.
>
> Finally, in addition to being legally without merit, [PennyMac's] claims in the Opposition are completely contradicted by what [PennyMac] has already submitted to the Court. In its Complaint, [PennyMac] repeatedly stated that First American breached the Title Policy and/or other tort duties when it denied the claim (*see* Complaint at ¶ 51 ("First American breached its duty to [PennyMac] . . . by rescinding the Policy and failing to honor the terms contained therein."); *id.* at ¶ 58 ("First American has caused [PennyMac] a detriment by failing to honor the terms of the Policy[.]")) and that it was damaged when the Deed of Trust was not recorded (*see id.* at ¶ 38 ("As a result of the aforementioned allegations, [PennyMac's] security interest in the Property remains unperfected and [PennyMac] will not be able to proceed with the option of foreclosure to protect its security interest"); *id.* at ¶ 41 ("First American must reimburse [PennyMac] for the complete loss of the Deed of Trust[.]"); *id.* at ¶ 48, 62 ("[PennyMac] has been damaged in an amount to be determined, but not less than the full value of the Deed 0f Trust, $480,000"); id. at ¶ 71 ("First American's negligence as described above damaged [PennyMac] in that [PennyMac] does not hold a first position lien on the subject property.")). [PennyMac is] not permitted to rewrite [its] prior statements and admissions in the Opposition in order to try to revive their time-barred Complaint.

(Emphasis in original).

A hearing on First American's motion for summary judgment was held before the circuit court on April 19, 2018. Before the court**,** the parties reiterated the arguments presented in their briefs and agreed that the following facts, among others, were not in dispute:

- "The Deed of Trust wasn't recorded more than three years before the suits."

- "The title claim was based on the failure of the [D]eed of [T]rust to be recorded. Because the deed of trust wasn't recorded, there wasn't a properly perfected security interest, and the Plaintiff couldn't move forward with a foreclosure of the condo over in Ocean City."

Counsel for First American argued that any breach would have "accrued when First American denied the title claims." Counsel for PennyMac countered that: "Our breach for loss of a lien d[id] not accrue until our lien is lost. And in this case, our lien was lost last month when we lost half of it" (referring to the March 28 judgment in the Burgee Litigation).

Following argument from counsel, the judge reserved on a final ruling on the motion for summary judgment but noted:

> The Court finds [counsel for First American's] argument that the damage accrued in this case when your client was put on notice that there was – the deed of trust had not been filed[.]
>
> * * *
>
> And, again, the undisputed facts are that there were claims made saying, hey, you know, we don't have the security interest because the mortgage never got filed and that was more than three years ago.
>
> * * *
>
> I am inclined to grant the motion for summary judgment because I do believe—I accept [counsel for First American's] argument that the—there was damage when the mortgage was not filed as it was supposed to have been filed and that a claim was made on numerous occasions within the period of the statute of limitations to have the matter redressed.
>
> On the other hand, I do believe that—you know, you've raised the issue of the 12-year specialty limitation, and I think that, as you say, that because of the lack of discovery in this case, that you haven't—your client hasn't been able to—or you haven't been able to fully pursue that issue on behalf of your client. So the [c]ourt is going to allow the case to continue for that limited purpose only, for you to do discovery regarding the issue of the 12-year specialty.

Accordingly, in its written order on May 23, 2018, the circuit court found that "all causes of action asserted by PennyMac in the Complaint accrued more than three years

before the Complaint was filed" but allowed limited discovery "to ascertain whether or not there is any extrinsic evidence that exists to support a claim that the alleged title policy is a contract under seal subject to the twelve year statute of limitations set forth in [CJP] § 5-102(a)[.]"

Limited Discovery regarding Contract under Seal

In connection with the circuit court's instruction, the parties engaged in discovery focused on whether the Title Policy was a contract under seal pursuant to CJP § 5-102(a). Specifically, the parties exchanged interrogatories and limited document productions, and, on September 10, 2018, took the depositions of the corporate designee of each party.

At his deposition, First American's corporate designee was unaware if ALTA had any requirements regarding the use of a corporate seal but

> My inquiry in the company was – the response I got was, we've always had the corporate stamp on these. And for the purpose to provide verification, it's an authentic First American document.

First American's designee testified that he was unable to identify who in the company actually decided to provide the stamp, rather "[i]t's just there." First American admitted that it utilized the seal present on the Title Policy only on real estate title insurance policies. While First American's designee clarified that First American did not have any specific regulations or procedures that determine when a document is under seal, "when the company enters into an agreement and intends it to be under seal, it will be stated."

PennyMac's corporate designee deposed that PennyMac understood that the Title Policy was an agreement under seal because there was a corporate stamp on the document. Aside from the appearance of the seal on the document, PennyMac's corporate designee

related no other reasons why the Title Policy was an agreement under seal and did not provide any evidence that the original lender intended the document to be under seal. The designee was unaware of any communications with First American, Lawyers Title, or any other entities or persons, besides PennyMac's counsel, regarding the corporate seal on the Title Policy.

PennyMac and First American filed supplemental briefs. PennyMac argued that the Title Policy was intended to be a contract under seal, because First American "chose to add its corporate seal to the policy form" and did so "only on forms for the issuance of real estate title policies." (Emphasis in original). PennyMac argued that it was of particular importance that First American utilized the seal to assure its policy holders that it would honor its obligations. According to PennyMac, "in recognition of the indefinite length of title insurance policies, First American chose to make the Title Policy a contract under seal."

First American responded in its reply on September 17, 2018, that

> At the end of the day, all of the facts confirm that the Short Form [Title Policy] is not a specialty. Indeed, the only evidence that has been actually presented to the Court is the unrefuted evidence by First American in the form of testimony under oath and interrogatory responses stating that the Short Form is not a specialty (and was not intended to be a specialty) and the appearance of the corporate stamp/seal merely signifies corporate authorization/authenticity.

First American argued that despite the limited discovery, "there [wa]s not even a scintilla of extrinsic evidence supporting PennyMac's argument [that the Title Policy was intended to be a contract under seal.]" First American principally relied on the testimony of PennyMac's corporate designee that, based on the designee's knowledge, there were no

reasons why PennyMac could infer that the Title Policy was an agreement under seal besides the presence of the seal itself.

Hearing regarding Contract under Seal

On September 19, 2018, the circuit court held a hearing on whether extrinsic evidence supports that the "policy is, in fact, a contract under seal and, therefore, a specialty for purposes of the Maryland statute of limitations." The parties reiterated the arguments presented in their supplemental briefs. In particular, in response to a question from the circuit court, counsel for PennyMac underscored his argument that the indefinite length of time involved in a title policy tracked in favor of the Title Policy being under seal:

> . . . . So what you have here is an industry, the lenders, who are looking for a very long-term protection, and you have First American who said, yes, we want to make sure that they're getting what they're asking for. We want to make sure they know they're getting what can be relied upon and moving on.

The circuit court then commenced its ruling from the bench by observing that

> [T]he Court is well aware of the language of Rule 2-501. It says that the Court can only grant summary judgment if there is no genuine dispute of material facts. Obviously, there's a dispute of fact[] in this case. Counsel have—for PennyMac have, I think, done, as I said, just an outstanding job of lawyering and raising those disputes of fact.
>
> The question is, are they genuine disputes? And noting the statute that was in effect at the time that these documents were executed, the case law that explains that statute, the Court cannot find other than that there is no genuine dispute as to material fact in terms of the efficacy of the seal in creating a specialty.

The court then determined that the disputes were not material and granted summary judgment:

> I just simply cannot find, based even on the ingenious arguments presented by [PennyMac's counsel], that there's a dispute that a jury would need to

> consider in determining whether or not this was a 12-year specialty. It was not. It was a three-year special—a it was a three-year—the limitations in connection with this transaction were three years. And, therefore, the Court is going to grant summary judgment in favor of First American Title Insurance on all issues in this case.

The circuit court entered a written order on October 4, 2018 granting summary judgment in favor of First American and ordering that final judgment be entered. PennyMac noted its timely appeal to this Court.

STANDARD OF REVIEW

Summary judgment is proper where the trial court determines that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Md. Rule 2-501. Accordingly, we review the trial court's legal determinations that the Title Policy was a contract under seal and that PennyMac's claims were barred by the statute of limitations without deference. *Thomas v. Shear*, 247 Md. App. 430, 447 (2020) (citing *Andrews & Lawrence Prof.'s Servs., LLC v. Mills*, 467 Md. 126, 146 (2020)).

We "independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law." *Kennedy Krieger Inst., Inc.* v. *Partlow*, 460 Md. 607, 632 (2018) (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)). In doing so, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." Id. at 632-33 (quoting *Chateau Foghorn LP*, 455 Md. at 482). Should we ascertain a material fact in dispute concerning whether the Title Policy was a contract under seal or the accrual

of the statute of limitations, summary judgement on that point is improper. *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 313 (2019) (““[O]nly where such dispute is absent will we proceed to review determinations of law[.]”) (quoting *Remsburg v. Montgomery*, 376 Md. 568, 579-80 (2003)). “When analyzing the decision of the circuit court, we consider only the grounds for granting summary judgment relied upon by the court.” *Id.*

DISCUSSION

PennyMac requests that we review two questions: first, whether the circuit court erred in granting summary judgment because PennyMac’s claims for indemnity were time-barred by the applicable statute of limitations and, second, whether the circuit court erred in determining that the Title Policy was not a contract under seal. [5]

Because our determination of PennyMac’s second question is dispositive if we agree that the Title Policy is a specialty to which the twelve-year statute of limitation applies, we analyze that question first.

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[5] In a footnote on page 21 of its initial brief, PennyMac asserts:

> PennyMac’s claims for promissory estoppel, negligence, and constructive fraud all arise from a failure to provide indemnity coverage. Accordingly, in addition to PennyMac’s breach of contract claim and for the same reasons the breach of contract claim is not time barred, these claims are not barred by the statute of limitations.

This argument was not set forth in PennyMac’s “Question Presented” section. Accordingly, we decline to address it. *Green v. N. Arundel Hosp. Ass’n, Inc.*, 126 Md. App. 394, 426 (2001) (citing Md. Rule 8-504(a)(3)). As we stated in *Green*, “Appellants can waive issues for appellate review by failing to mention them in their ‘Questions Presented’ section of their brief.” *Id.* We reasoned that “[c]onfining litigants to the issues set forth in the ‘Questions Presented’ segment of their brief ensures that the issues are presented and obvious to all parties and the Court.” *Id.* (citing *DiPino v. Davis*, 354 Md. 18, 56 (1999)). We see no compelling reason to stray from that rule in this case.

I.

Contract Under Seal in Accordance with CJP § 5-102

Parties' Contentions

PennyMac argues that the circuit court should have found that the Title Policy is a contract under seal and, therefore, subject to the twelve-year limitations period for specialties in CJP § 5-102. PennyMac urges that the extrinsic evidence sufficiently demonstrates that the Title Policy document has a "general seal," rendering a dispute of material fact that precluded summary judgment. More specifically, PennyMac relies on the following evidence:

(1) Location of the seal, opposite the execution of the Title Policy by the president of the company and a witness;

(2) First American's election to utilize "this seal only on forms for the issuance of real estate related title policies;"

(3) The lack of any particular practice at First American to require the use of a corporate seal to certify corporate authorization;

(4) First American's decision to vary the generic ALTA form to include a seal;

(5) The seal's use to "help assure [First American's] policy holders that it would stand behind its policies and honor its obligations;" and

(6) The indefinite duration of a term residential loan policy.

First American counters that the "mere presence of a corporate seal does not transform a document into a contract under seal." Rather, citing *Mayor & Council of Federalsburg v. Allied Contractors, Inc.*, 275 Md. 151, 155 (1975), either the contract itself must indicate the intent to establish an agreement under seal or extrinsic evidence must

establish the parties intended to create a specialty. First American avers that PennyMac failed to satisfy either exception. First American also contends that the only evidence "actually in the record proves that the parties did *not* intend to enter into a specialty contract under seal." First American refers to the deposition testimony of its corporate designee, that "First American has 'always had the corporate stamp' on its short form policies 'for the purposes to provide verification, [that] it's an authentic First American document.'"

In its reply brief, PennyMac claims that the testimony of First American's designee actually supports its argument:

> [T]he Title Policy was intended to be a contract under seal, since: (a) he testified that First American always used the seal during the relevant time period on real estate title insurance policies but no other types of title policies; (b) he admitted that the seal was not necessary to establish that the policy was an authentic and enforceable First American Title Policy; and (c) Appellee could not locate any other types of contracts issued or entered into by First American on which it used a seal.

(Citations to the record omitted).

Governing Law

The statute that controls here, CJP § 5-102(a), establishes a twelve-year period of limitations for certain "specialties," which includes, among other instruments, contracts under seal. In Maryland, the creation of a contract under seal "requires more than the mere affixing of the corporate seal to transform a would-be simple contract into one under seal." *Federalsburg*, 275 Md. at 155. We recognize the historic role that sealed instruments have occupied in corporate transactions. As the Court of Appeals explained in *Gildenhorn v. Columbia Real Estate Title Insurance Co.*:

> In the early law it was held that a corporation could not contract except under its corporate seal. This rule persisted, but was increasingly relaxed during the 19th century. Today, in the absence of a charter or statute to the contrary, a corporation may bind itself by a writing under seal to the same extent as an individual.

271 Md. 387, 398 (1974). As a result, when a corporate seal appears on a contract, Maryland courts do not conclude that the contract is a sealed instrument; rather, we may assume that the "seal was affixed to the agreement as proof of the signer's authority to bind the corporation because 'the main purpose of the corporate seal now is as a prima facie authentication that the document is the act of the corporation and that the officers who have executed it have been thereunto duly authorized."' *Rouse-Teachers Prop., Inc. v. Maryland Cas. Co.*, 358 Md. 575, 585-86 (2000).

Even when "a corporate seal is impressed on an agreement, it will remain a simple contract unless either the body of the contract itself indicates that the parties intended to establish an agreement under seal, or sufficient extrinsic evidence, in the nature of 'how and when and under what circumstances the corporate seal was affixed,' establishes that the parties desired to create a specialty." *Federalsburg*, 275 Md. at 155-56. *See also Gildenhorn*, 271 Md. at 403 (recitations such as "signed and sealed" and "witness my hand and seal" indicate the instrument is sealed for the statute of limitations).

In *Federalsburg*, a construction contractor filed suit against a local government for moneys due on a construction contract. 275 Md. at 152. The local government defended on the grounds that the suit was barred by the statute of limitations. *Id.* at 154. The trial court ruled that the suit was not barred by the statute of limitations, and the local government appealed. *Id.* Eventually the case reached the Court of Appeals, where the

"principal contention of [the local government] . . .[wa]s that the trial judge erred when he ruled that each of the unpaid claims for additional compensation was not barred by limitations." *Id.* at 154. This required the Court to consider whether the "contract was under seal so as to create a specialty and thus make the applicable period of limitations twelve years." *Id.* The Court observed that "only evidence, [the contractor] concedes, to support its assertion . . . is that the document was signed on behalf of [the contractor] by its vice-president, he also impressed the corporate seal on the instrument." *Id.* "[N]o reference to a seal is made in the body of the instrument; and no extrinsic evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty." *Id.* at 157. The Court of Appeals, thus, held that the contract was a simple contract, rather than a contract under seal. *Id.*

In *Rouse-Teachers Properties*, the Court of Appeals considered two issues: first, whether a contract's signature page containing the directional phrase "Affix Corporate Seal" creates a presumption that a contract is a specialty and; second, whether the contract was under seal. 358 Md. at 577-78. The appeal arose from the defendant's "unsuccessful efforts to convince the Circuit Court for Baltimore City and the Court of Special Appeals that [the plaintiff's] suit [wa]s barred by the relevant statute of limitation[.]" *Id.* at 577.

The parties entered into an agreement in which the "corporate seals of both parties were affixed on the Agreement on the left of the attestation lines" above an entry on the page directing "(Affix Corporate Seal)." *Id.* at 579. The Agreement concluded:

> IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

Id. The circuit court held that "when a contract contains the above clause and the corporate seal, it is presumed to be a specialty contract." *Id.* at 583. The circuit court then held an evidentiary hearing and found that the defendant failed to rebut the presumption that the agreement was a contract under seal by a preponderance of the evidence. *Id.* at 583-84. On appeal before this Court, we held that, while the defendant "produced strong evidence that the parties did not intend to make a contract under seal," the defendant failed to rebut the presumption as a matter of law. *Id.* at 584.

The Court of Appeals granted certiorari and held that "the directional phrase 'Affix Corporate Seal'" adjacent to the signature execution lines on the face of an agreement, combined with the attachment of corporate seals, does not create a presumption." *Id.* 587. Rather, the "presence of the seals and the directional phrase create an equally strong inference that the seals were added to establish the authority of the parties signing the agreement." *Id.* The Court held the presumption applied by this Court and the circuit court was an error of law. *Id.*

Turning to whether the contract was under seal, the Court analyzed the two exceptions set out in *Federalsburg*, referenced above. *Id.* First, the Court found "nothing in the body of the Agreement that establishes it was made under seal." *Id.* at 588. The Court expounded:

> The absence of the word "seal" from the testimonium clause of the Agreement is a significant fact that distinguishes the present case from the cases relied upon by [the plaintiff]. The directional phrase "Affix Corporate Seal" is not a recital within the body of the Agreement, therefore the phrase

> is insufficient to elevate the Agreement to the status of a contract under seal under our holding in *Federalsburg*.

Id. at 589. Because the parties to the transaction were "sophisticated business entities acting with the benefit of counsel," "these parties surely would have selected a more direct articulation than the directional phrase 'Affix Corporate Seal'" to execute the agreement under seal. *Id.* at 590.

Second, the Court explained that "[t]he absence of evidence establishing that the parties intended to, or even spoke about, creating a document under seal leaves us unconvinced that a contract under seal was effected." *Id.* The plaintiff, Maryland Casualty Company, presented only one witness, a staff attorney with "primary responsibility for the negotiation of the Agreement." *Id.* at 591. The witness "consistently and unequivocally responded that he had no recollection of an intent to create a sealed contract." *Id.* The staff attorney witness did "acknowledge, however, his general understanding that corporate seals were customarily used to demonstrate that the execution of a contract was an authorized act of a corporation." *Id.* The Court then summarized:

> The testimony fails to provide any evidence of an affirmative intention to execute the Agreement under seal. Rather, it suggests that the parties never discussed the issue. "A sealed instrument is not created by accident." Under the circumstances, the parties to this contract would not likely have created a contract under seal without any discussions to that effect and we will not allow [the plaintiff] unilaterally to create one by implication.

Id. The Court of Appeals held, as a matter of law, that the agreement was an ordinary contract, as opposed to a contract under seal. *Id.* at 592.

Analysis

Applying the precepts established in the foregoing decisional law to the Title Policy before us, we hold that the circuit court correctly determined, as a matter of law, that it was a simple contract and not a contract under seal.

We begin with the first exception to the presumption that an agreement remains a simple contract even when impressed with a corporate seal. As enunciated in *Federalsburg*, we examine whether "the body of the contract itself indicates that the parties intended to establish an agreement under seal" and conclude that there is nothing in the body of the Title Policy that indicates such intention. *See Federalsburg*, 275 Md. at 155. The Title Policy does not mention a seal or utilize any recitations of the sort referenced in *Gildenhorn*, e.g. "signed and sealed" and "witness my hand and seal," which would indicate that the Title Policy is a contract under seal. 271 Md. at 403. Moreover, as in *Rouse-Teachers Properties*, First American is a sophisticated business entity and certainly could have drafted a testimonium clause to indicate its intent to execute the Title Policy as a contract under seal. 358 Md. at 590. It did not do so. As First American's corporate designee indicated: "when the company enters into an agreement and tends it to be under seal, it will be stated."

Even following the additional discovery permitted by the circuit court, PennyMac has not produced "sufficient extrinsic evidence, in the nature of 'how and when and under what circumstances the corporate seal was affixed,' [to] establish[] that the parties desired to create a specialty." *Federalsburg*, 275 Md. at 155-56. At her deposition, PennyMac's corporate designee could not articulate any reason, aside from the appearance of a seal on

the document, to support the proposition that the parties desired to execute a contract under seal. Similar to the plaintiff's witness in *Rouse-Teachers*, PennyMac's corporate designee was unaware of any communications with First American, Lawyers Title, or any other entities or persons, besides PennyMac's counsel, regarding the corporate seal on the Title Policy. *Rouse-Teachers*, 358 Md. at 591. The testimony of PennyMac's corporate designee and the other evidence submitted does not support an affirmative intention by First American that the Title Policy would be under seal. Instead, the deposition testimony of the corporate designees "suggests that the parties never discussed the issue." *Id.*

First American's corporate designee testified that the purpose of the stamp was to provide verification that the document was a valid First American policy. PennyMac asserts that there is sufficient extrinsic evidence to establish, or at least generate a dispute of material fact, that the Title Policy was a specialty because (1) the seal is on the Title Policy; (2) the seal is only utilized on real estate related title policy forms; (3) First American did not have a practice requiring corporate seals to certify corporate authorization; (4) First American chose to add its corporate seal to the Title Policy; and (5) First American utilized the seal to assure policy holders it would stand behind its policies and honor its obligations. None of these assertions, however, is inconsistent with the Court of Appeals' holding in *Rouse-Teachers* "that the seals were added to establish the authority of the parties signing the agreement," 358 Md. at 587. More significantly, none of these assertions, and nothing in the body of the Title Policy, demonstrate that the parties intended to establish an agreement under seal. Having resolved that the Title Policy is not a contract

under seal subject to the twelve-year limitations period of CJP § 5-102(a), we consider when PennyMac's claims accrued and limitations began to run under CJP § 5-101.

II.

Statute of Limitations under CJP § 5-101

Generally, "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." CJP § 5-101. "Because the legislature did not define the term 'accrue' under CJP § 5-101, 'the question of accrual is left to judicial determination.'" *Fitzgerald v. Bell*, 246 Md. App. 69, 88 (quoting *Hecht v. Resolution Tr. Corp.,* 333 Md. 324, 333 (1994)), *cert. denied sub nom. Fitzgerald & JJF Mgmt. Servs. v. Bell*, 470 Md. 212 (2020). "It is settled that a cause of action for breach of contract accrues, and the limitations period begins to run, when a plaintiff knows or should have known of the breach." *Id.* (quoting *Samuels v. Tschechtelin*, 135 Md. App. 483, 541 (2000)).

Because PennyMac asserts an action for breach of contract pursuant to both the Title Policy and the Closing Protection Letter, we address each in turn.

A. Title Policy

Parties Contentions

PennyMac argues that the language of the Title Policy requires an "actual loss before a claim arises[.]" According to PennyMac, its "claims under the Title Policy did not accrue until PennyMac suffered an *actual monetary loss,* and First American refused to indemnify PennyMac for that loss." (Emphasis in original). Because "PennyMac did not incur litigation costs until less than three years prior to the filing of this litigation with

the lower court below and did not sustain actual loss of any portion of its mortgage interest until after the action below was filed," its claims are not time-barred.

First American, relying on *Stewart Title v. West*, 110 Md. App. 114 (1996), counters that Maryland law "is clear" that "when an insurer denies a claim for an alleged title defect . . ., the title policy is breached." Because First American denied PennyMac's claims more than three years prior to PennyMac's filing suit, according to First American, PennyMac's claims are barred. In response to PennyMac's argument that the statute of limitations reset each time PennyMac incurred additional litigation costs or sent an additional claim submission, First American retorts that it "denied PennyMac's claims in their entirety and clearly stated that the Alleged Title Policy was not in effect and that First American had no obligations to PennyMac."

PennyMac, in its reply brief, asserts *Stewart Title* "is the opposite of what [First American] argues it stands for." PennyMac argues:

> Rather than limiting the time in which an insured may bring an action, as Appellee argues, the *Stewart* Court actually extended that time period by determining that the breach does not occur when the policy is issued but only after notice and opportunity to cure.
>
> * * *
>
> Here, this is particularly relevant because (a) actual harm did not occur until the Burgee Court issued its decision in March 2018, because *Stewart* makes it clear that, as an indemnity contract, a title policy is not breached (and therefore the applicable statute of limitations does not apply) until actual harm has occurred; (b) tellingly, in each of its claim denial letters, First American repeatedly "reserves the right to amend, modify, and/or supplement the position set forth in this letter upon receipt of additional information,"—thus indicating that it wanted the opportunity to cure a potential breach in the future.

Governing Law

This Court's decision in *Stewart Title v. West*, 110 Md. App. 114 (1996), controls our analysis concerning when a cause of action accrues for breach of a title insurance policy. In *Stewart Title*, we held that "a title insurance policy is breached only *after* notice of an alleged defect in title is tendered to the insurer and the insurer fails to cure the defect or obtain title within a reasonable time thereafter." *Id. at* 132 (citing *First Fed. Savings & Loan Ass'n of Fargo*, 19 F.3d 528, 531 (10th Cir. 1994) (emphasis in original)).

Although *Stewart Title* "involves a long and complex factual and procedural history," we recount the salient facts to provide context for the holdings that guide our analysis. Buyers purchased a property and relied on a plat attached to the sales agreement indicating that the property was accessible through strips of land. *Id.* at 120. Unbeknownst to the buyers at settlement, however, the deed did not convey the strips of land, and consequently, they were landlocked because the property did not have access to any public roads. *Id.* at 122-23. The buyers advised their settlement agent concerning their problems with their title. *Id.* at 121-23. The buyers wanted to refinance, but "their application was denied because of the unmarketable status of their Property." *Id.* at 123.

The buyers filed a complaint against, among others, the title company alleging that the title company breached the title policy because it "failed to provide good and marketable title and access to and from the land." *Id.* The buyers then moved for summary judgment against the title company, among others. *Id.* at 124. The circuit court granted summary judgment in favor of the buyers and concluded that the property was "unmarketable." *Id.* at 125-26. The title company appealed. *Id.* at 127.

On appeal, the title company argued "vigorously that summary judgment against it was premature because the [buyers'] litigation against all defendants had not been finally resolved." *Id.* at 134. The title company specifically relied on a provision in the title policy that only allowed claims under that policy after a final determination "adverse to the title." *Id.* We determined that the provision did not apply:

> In this case, in which the title defects are conceded, we conclude that the [buyers] do not have to procure a "final determination . . . adverse to the title" in order to recover from [the title company].

Id. at 136.

In reviewing "the fundamental principles of title insurance," *id.* at 128, we noted that the purpose of a title insurance policy is "to safeguard a transferee of real estate through defects that may cloud the title." *Id.* at 129. Title insurance ordinarily accomplishes this purpose through three components:

> First, it is an indemnity agreement to reimburse the insured for loss or damage resulting from title problems. Second, it is litigation insurance, by which the insurer is required to defend the insured in the event the insured's title is attacked by a third party. Finally, and perhaps above all, it involves the hiring of experts in title matters.

Id. (quotations and citations omitted). A title insurance policy's status as an indemnity agreement requires the insurer to "reimburse the insured for loss or damage sustained," provided the incurred damages are not excluded from the policy. *Id.* at 129. Therefore, once an insured notifies the insurer of a problem with title, as we explained, the "insurer ordinarily has three choices:"

> It may either (1) pay the insured for the loss up to the amount of the coverage limits of the policy; (2) clear the title defect within a reasonable time; or (3)

> show that the alleged unmarketability or other title problems do not really exist, and thus there is no way in which the insured could sustain any loss.

Id. (citations omitted). Accordingly, we concluded that an insurer is not in breach merely because the title is defective. *Id.* 130-31. Rather, breach occurs after notice of the defect is tendered to the insurer and the insurer fails to cure the defect within a reasonable time. *Id.* at 132.

Analysis

Applying our holding in *Stewart Title* to the case before us, we conclude that the circuit court correctly granted summary judgment in favor of First American on the accrual of the claims under the Title Policy. As *Stewart Title* directs, we consider first when notice of the alleged defect was tendered to First American. *Id.* at 132. Notice of the alleged defect first was tendered to First American on December 4, 2012, when PennyMac's predecessor in interest submitted a claim under the Title Policy. Next, *Stewart Title* directs us to consider whether the insurer failed "to cure the defect or obtain title within a reasonable time thereafter." *Id.* First American denied PennyMac's predecessors claim by letter dated December 14, 2012. Accordingly, PennyMac's claims accrued on December 14, 2012. Even First American's second denial letter dated April 18, 2013, sent directly to PennyMac, explained that it had previously denied the identical claim on December 14, 2012. Because PennyMac filed this action against First American on July 20, 2017, outside of the three-year statute of limitations, its claims are barred.

PennyMac's arguments to the contrary are misplaced on several counts. First, according to PennyMac, Stewart Title recognizes that an insurer's duty to the insured may

not be triggered when "the insured (or the insurer on his behalf) claims that title is good and pursues an action to establish that fact." *Id.* at 136-37. While this is a correct recitation of *Stewart Title*, it is inapposite because, instead of claiming its title was good, PennyMac sought to create an equitable title, specifically because its title was not good.

Second, PennyMac's assertion that it did not sustain actual loss of any portion of its mortgage interest is belied by its own prior statements. Even in the case below, PennyMac consistently asserted that it was "damaged . . . not less than the full value of the Deed of Trust." PennyMac also asserted throughout the litigation that it "has sustained demonstrable damages and costs" as a result of Lawyers Title's failure to record the Deed of Trust.

Third, given the clear application of *Stewart Title* to the case at bar, PennyMac's reliance on cases analyzing commercial liability insurance, *e.g. Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605 (1997), when the operative insurance is the Title Policy, is misdirected.

Finally, PennyMac cannot reset the statute of limitations each time it resubmitted a claim or incurred additional litigation costs. *See, e.g., Muffoletto v. Towers*, 244 Md. App. 510, 527 (reviewing earlier cases and noting that "continuing harm doctrine" required "new affirmative act" rather than "continuing ill effect" of earlier breach), *cert. denied,* 469 Md. 276 (2020). PennyMac has not cited any authority to support its pronouncement to the contrary.

B. The Closing Protection Letter

Parties Contentions

In addition to asserting that its claims under the Title Policy were not time-barred, PennyMac also asserts that its claims for breach of contract under the Closing Protection Letter were not barred by the statute of limitations. PennyMac asserts that "those claims arose (at the earliest) on the date PennyMac learned that—according to First American—it was denying coverage on the basis that the Closing Protection Letter somehow did not cover the closing of the Burgee Loan." Because First American denied coverage under the Closing Protection Letter in August of 2014 and the lawsuit was filed on July 20, 2016, PennyMac contends that its breach of contract claims arising from the Closing Protection Letter were timely.

First American counters with three arguments. First, PennyMac did not bring a claim for breach of the Closing Protection Letter in the complaint. Second, First American contends that "PennyMac knew of any losses in connection with the Closing Protection Letter as October 2012 and certainly no later than the denial letters in December 2012 and April 2013 pursuant to which First American rejected all liability under any theory." Third, First American contends that the claim should be denied as a matter of law, because the "Closing Protection Letter does not indemnify PennyMac for loss arising from any action or inaction on the part of Lawyers Title," because Lawyers Title was not the Approved Closing Services Vendor.

Analysis

Maryland appellate courts have not addressed, in a published opinion, whether a closing protection letter is a policy of title insurance or when a claim pursuant to a closing protection letter accrues. Most states that have addressed the issue have held that a closing protection letter, such as the one at issue, is an indemnification agreement that provides protection for risks other than that provided under a title insurance policy. *JPMorgan Chase Bank, NA v. First Am. Title Ins. Co.*, 750 F.3d 573, 579 (6th Cir. 2014). The United States Court of Appeals for the Sixth Circuit has observed that a closing protection letter "may support a breach of contract claim independent of any related title insurance policy . . ., especially considering the parties agree that a [closing protection letter] is an indemnity agreement and not an insurance policy:"

> In a [closing protection letter], "the underwriter agrees to indemnify the lender for any problems that arise from the closing agent's failure to properly apply the funds, as set forth in the closing instructions, and the title insurance commitment." Conversely, a title insurance policy "insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value."

Id. at 579 (citations omitted).

In Maryland, title insurance is defined "as insurance of owners of property or other persons that have an interest in the property against loss by encumbrance, defective title, invalidity of title, or adverse claim to title." Maryland Code (1995, 1996, 1997, 2017 Repl. Vol., 2019 Supp.), Insurance Article, § 1-101(qq). The Closing Protection Letter in the case at bar provides that First American "agrees to reimburse [New Century] for actual loss incurred by [New Century] in connection with such closing when conducted by the Issuing

Agent, Approved Attorney, or Approved Closing Services Vendor and when such loss arises out of:"

> 1. Failure of the Issuing Agent, Approved Attorney, or Approved Closing Services Vendor to comply with your written closing instructions to the extent that they relate to: (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien; or
> 2. Fraud or dishonesty of the Issuing Agent, Approved Attorney, or Approved Closing Vendor in handling your funds or documents in connection with such closing.

The Closing Protection Letter does not fall under the definition of title insurance under Maryland law because it indemnifies New Century for losses—such as those caused by a closing agent's fraud or dishonesty in handling New Century's funds—which may be unrelated to the title itself. *See also* Joyce Palomar, 2 Title Ins. Law § 20:19 (2019 ed.) ("Several courts and state insurance departments concluded that title insurers' original closing protection letters were not themselves insurance policies."). Accordingly, we must interpret the terms of the contract—the Closing Protection Letter—to determine when a claim accrues.

"An express indemnity agreement, being a written contract, must be construed in accordance with the traditional rules of contract interpretation." *Ulico Cas. Co. v. Atl. Contracting & Material Co.*, 150 Md. App. 676, 692 (2003), *aff'd*, 380 Md. 285 (2004). The Court of Appeals has summarized these rules of contract interpretation on multiple occasions:

> In determining the meaning of contractual language, Maryland courts apply the principle of the objective interpretation of contracts. Applying objective

> interpretation principles, the clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or was intended to mean. Our primary consideration, when interpreting a contract's terms, is the "customary, ordinary, and accepted meaning" of the language used. The terms of the contract must be interpreted in context, and given their ordinary and usual meaning.

Atl. Contracting & Material Co. v. Ulico Cas. Co., 380 Md. 285, 301 (2004) (citations omitted).

"The commencement and scope of the obligation depend on the terms of the contract." *Pulte Home Corp. v. Parex, Inc.*, 403 Md. 367, 381 (2008). As the Court of Appeals pointed out:

> indemnity agreements may provide (1) indemnity against loss or damage, under which the indemnitee may not recover until it **has made payment or otherwise suffered an actual loss or damage within the scope of the indemnity**; (2) indemnity against liability, under which an action may be brought as soon as the liability is legally imposed, as when judgment is entered, even though no actual loss has yet been sustained (the judgment has not been paid); or (3) a promise by the indemnitor "to perform a certain act or make specified payments for the benefit of the indemnitee," under which an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether any actual damage has been sustained. The nature of the indemnity will determine not only when a right of action accrues but also the measure of damages that may be recovered.

Id. at 381-82 (2008) (citations omitted) (emphasis added).

Consistent with our sister states that have found that a closing protection letter, such as the one at issue, is an indemnification agreement that provides protection for risks other than that provided under a title insurance policy, we hold that the circuit court erred in failing to address PennyMac's breach of contract claims under the Closing Protection Letter separately. We remand with instruction for the circuit court to determine whether

First American breached its obligations to PennyMac under the Closing Protection Letter and, if so, whether PennyMac has suffered any compensable losses.

To guide the proceedings on remand, we note that one key provision in the Closing Protection Letter provides that First American "hereby agrees to reimburse you for actual loss incurred by you[.]" Central to the determinations on remand will be *when* PennyMac, or its predecessor in interest New Century, incurred an *actual loss* under the Closing Protection Letter which would require reimbursement. As with any contract clause, the language of this provision should be construed in accordance with its customary, ordinary, and accepted meaning. *See Atl. Contracting & Material*, 380 Md. at 301.

JUDGMENTS OF THE CIRCUIT COURT FOR WORCHESTER COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID 50% BY APPELLANT AND 50% BY APPELLEE.