Washington Land Title Association

For Land's Sake

Issue No. 9

July 2016

President's Message

Dave Lawson

2016 has been quite a year in our industry. The market has picked up in most of the state. Sales prices have kept rebounding to the point where most of the homes which became over-encumbered simply because of market conditions have regained value. It's great to see the dramatic reduction in the number of residential foreclosures.

Building has been booming in many parts of the state. For a while mechanics' liens seemed to all but disappear because only those with money could afford to build. As the lending community becomes more willing to lend we find builders with less experience entering the market and must remember to keep vigilant. Mechanics' liens are becoming more frequent. Given the cyclical nature of our business we need to keep an eye out for any bubble effect of this rapid market change and increasing construction.

It seems like a long time ago, but having had the opportunity to attend the ALTA Convention in Boston last October was very enlightening. Our industry is lucky to have the ALTA staff, who are very effective in monitoring national legislative and regulatory issues and are excellent advocators for our industry. It is well worth attending if you get the chance.

Gary Kissling and many others pushed strongly over a lot of years to resolve the problem of some counties charging real estate excise for inheritance when title passed upon death without a probate. HB 2539 was initially sponsored this year by House Representative Terry Nealey. As you will see in the Legislative Committee report it was passed unanimously by both the House and Senate, so congratulations! While the HB 2539 contains some provisions which are not what all of us think of as the optimal solution, at least it has created a way to stop the taxation and more easily enable closings to occur. Getting the bill amended and out of committee for a vote was the result of a lot of hard work and special efforts. Thanks to the Legislative Committee and especially Stu Halsan and Dwight Bickel who as usual spent a lot of time and energy contacting legislators and testifying in Olympia.

I am truly lucky to be in the title insurance side of the business, rather than escrow, and not having to deal too directly with the CFPB impacts on closing disclosures and settlement statements. Of course there's no escaping all of the impacts. Change is always difficult and this was made more so by the CFPB decision to approach all closings as having owner's title insurance treated as optional on the part of the purchaser. I must say, I am proud of the way people in our industry were able to adapt to the changes much more quickly than many of our customers. Now we face a new wave of lenders trying to impose more obligations on our industry as a result of CFPB regulations. We have to keep our eyes peeled for issues like indemnity provisions in lender instructions that appear to go way beyond the appropriate realm of our involvement in closings.

I am looking forward to the upcoming 2016 Pacific NW Title Convention September 9-11 in beautiful Bend, OR and hope to see you there!

cfpb Consumer Financial Protection Bureau

Inside This Issue	

SAVE THESE DATES!

SEMINARS

2016 Seminars Coming Up!

By John Martin

Chair - Education Committee

It's that time again to save the date for the WLTA's Fall education seminars. The sessions this year are scheduled for September 24 in Spokane and October 15 in Lynnwood. These are fantastic opportunities catch up with old friends while hearing from title experts on a range of title and escrow topics. The agenda is not set yet, but last year featured discussions on the Homeowner's Policy, earnest money dispute resolutions, commercial endorsements, CFPB updates and much more. This year's agenda will similarly be packed with practical topics to assist in your career as a title or escrow professional. There will also be Continuing Education credits for the LPOs. What a great deal, so do not miss out.

"NO YOU CAN'T ASK A QUESTION."

Well — of course you can —
But you have to be there!

Registration will open very soon on the WLTA website. Also, if there are topics you would like to be covered contact John Martin at jomartin@stewart.com.
He will do his best to get them into this year's agenda. Hope to see you all at one of the seminars this Fall.

Click here to Register for the Spokane Seminar (Sept 24, 2016)

Click here to Register for the Lynnwood Seminar (Oct 15, 2016)

SAVE THE DATE!

CONVENTION AT SUN RIVER

The 2016 PNW Land Title Convention, hosted this year by the Oregon Land Title Association, is just around the corner.

Register now – space is limited!

Register Here

Room block expires on August 18, 2016

15% off best available rate in homes and condos will also be offered.
Groups rates will be honored for extended stays from September 6 through September 14.
For resort reservations, go to: Reserve your room today

GOLF

Enjoy an afternoon of golf on Sunriver's beautiful Woodlands Golf Course.

Shotgun start at 1:00 pm on Saturday - September 10th

Golf registration fee of $185.00 includes cart, range balls, boxed lunch **AND** a $10.00 pro shop credit.

Email your handicap and preferred team members to:

info@oregonlandtitle.com

LEGISLATIVE REPORT

2016 Legislative Report

By Dwight Bickel, Co-Chair—Legislative Committee

There was so much publicity about the budget debate that you may be surprised the Legislature accomplished anything this session. Like most years, most of the Bills that the Legislative Committee monitored and worked on failed to get out of committee hearings and were never voted upon. At the end of this report, all those Bills are listed. This year was the second year of our two-year session, so all Bills that did not survive do not continue to the next session.

There are several new laws that title companies should be familiar with before their effective dates (June 9, 2016, unless stated otherwise). We did finally get a partial remedy to the few counties that were charging excise tax for intestate transfers if they did not complete probate proceedings.

Deferral of Impact Fees Will be Mandatory Beginning in 2016

First a reminder of the deferred impact fee statutes passed last year that become effective September 1, 2016. The cities and school districts required the delayed effective date, stating it would be "too late for permits for building that year."

All cities must allow deferral of impact fees for up to 20 residential houses per builder, but not longer than 18 months. There are two methods they may choose. One alternative allows a system where payment is at the time of closing. The other alternative allows a system where the payment is at the final inspection or CO. It is quite apparent cities will only choose the latter. They would prefer a builder's check where they remain in control while holding the CO hostage until that check clears.

A notice of the deferred lien must be recorded, regardless which alternative is chosen. The lien is only binding upon successors after recording.

Upon payment, the City must execute a release, but is not responsible for its recording. The City representatives would not accept a requirement that the release would be prompt, or that it would be recorded.

Dwight Bickel (left) and Rep. Terry Nealey (4th from left) with Gov. Jay Inslee as he signs SHB 2539.

The bankers and title companies negotiated a provision ensuring that builders could get construction loans secured by mortgages that were in first lien position over the deferred impact fees.

3(c)(iv) provides: "The deferred impact fee lien, which must include the legal description, tax account number, and address of the property, must also be:

(iv) Junior and subordinate to one mortgage for the purpose of construction upon the same real property granted by the person who applied for the deferral of impact fees."

Property Transferred by Operation of Law is Exempt from Real Estate Sales Tax Again

The Real Estate Excise Tax (REET) only applies to sales or real property. Transfers by operation of law have always been defined not to be sale, therefore exempt from REET.

Transfers of owner-

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ship that are accomplished pursuant to court orders, such as partition, divorce, condemnation and quiet title, are not taxable. Changes in ownership to real property that occur by changes in the owner entity that are not due to sales are not taxable. Transfers that occur pursuant to devise made by a Will are not taxable. Transfers that occur due to the death of an owner pursuant to the legal effect of intestate succession, community property, joint tenancy, life estates and transfer on death deeds are not taxable. These changes in ownership are not required to pay REET, even if there is no probate or court proceeding.

However, since a statutory change in 2008, certain Treasurers have required excise tax if the heirs did not complete a probate. The purpose of RCW 82.45.197 since 2008 has been to allow recording of documents to show exempt transfers by operation of law. It specified the documentation to be provided to the excise tax desk to prove that the transfer was exempt.

About four years ago a couple County Treasurers began interpreting RCW 82.45.197 as authority to require heirs who receive title by inheritance to pay REET if they did not have proper documentation. The position taken was that a probate was required to avoid REET. This affected only a few people because most intestate and non-probate heirs were not recording documents and not filing excise tax affidavits.

Since February 28, 2014, a change was made to WAC 458-61A-303 [the regulation that explains when a real estate excise affidavit is required]. Now all transfers by operation of law are required to file an excise tax affidavit. Previously, the Regulations required an excise tax affidavit and specified the documentation that was required to claim exemption from REET for transfers by operation of law *only when conveyance documents were recorded*.

WAC 458-61A-303 (2) Affidavit required. In general, an affidavit must be filed when ownership or title to real property transfers as evidenced by conveyance, deed, grant, assignment, quitclaim, or any other document effectuating the transfer including, but not limited to, the following:

(b) ((~~Conveyance~~)) Transfer resulting from a court order;

(g) ((~~Conveyance~~)) Transfer to an heir in the settlement of an estate;

The amendments passed this year expand the documentation that may satisfy the excise tax person and should promote having the real property records show evidence of such off-record changes in ownership. A new provision allows heirs to record a short "Lack of Probate Affidavit" to evidence the change of ownership. That Affidavit also is allowed where a Will exists, though has not been probated.

When title companies train examiners and title officers, it will be most important to emphasize that these changes and that recorded affidavit are completely unrelated to underwriting whether to insure against claims of heirs without a probate. The Department of Revenue has drafted its own suggested affidavit form. None of those forms will include the information that title companies have traditionally requested for underwriting.

Cities Have a Right to Lien to Recover Nuisance Abatement Costs

Prior statutes have allowed various governments to have a secret lien for recovery of costs to abate nuisances upon real property. HB 2519 extends to cities

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JUDICIARY REPORT

2016 Judiciary Report

By John Lancaster, Chair — Judiciary Committee
Members: Sean Holland and Bob Horvath

Centurion Properties III, LLC, et al. v. Chicago Title Insurance Company, - Wn.2d – (2016) – No Liability to Third Parties for Recording

In July a unanimous Washington Supreme Court struck a blow for good sense when it held that title companies do not owe a duty of care to third parties when recording documents. A borrower had tried to hold a title insurer liable for recording four documents, all signed by the borrower, that put the borrower in breach of a deed of trust recorded and insured by the title company long before. The US District Court for the Eastern District of Washington had found in favor of the title company, resulting in an appeal. The 9th Circuit Court of Appeals, noting that there was no Washington authority directly on point, certified the question to the Washington Supreme Court.

The case involved a commercial property in Richland. Plaintiff Centurion Properties III, LLC (CP III), was formed to purchase the property. Ninety percent of CP III was owned by persons and entities controlled by Thomas Hazelrigg. An unrelated LLC owned the remaining 10%. CP III obtained a $70.8 million loan from General Electric Capital Corporation (GECC), which was secured by a deed of trust on the property. Three separate documents prohibited the placement of any junior liens or encumbrances on the property without GECC's prior approval: the GECC deed of trust, the loan agreement between GECC and CP III, and CP III's operating agreement.

Chicago Title provided escrow and title insurance services for the GECC deed of trust. It received and reviewed the deed of trust, the loan agreement, and the operating agreement in the course of closing and insuring the GECC loan. GECC's deed of trust was recorded in November 2006.

Shortly after the GECC loan closed, Thomas Hazelrigg began siphoning money out of CP III, an activity facilitated by the owner of the LLC that owned a 10% interest in CP III. The minority owner acquiesced in turning money over to Mr. Hazelrigg and signing a backdated consent by members, even though the minority owner knew that in doing so he was violating both the GECC loan agreement and the CP III operating agreement.

In July 2007 CP III granted a deed of trust to secure a $10 million loan by Centrum Financial Services, Inc. (Centrum Financial). Chicago Title insured the

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Centrum Financial deed of trust and recorded it. No escrow was opened with Chicago Title. There was no evidence that anyone at Chicago Title who worked on the Centrum Financial order was aware of the "no unauthorized junior lien" language in the GECC deed of trust, loan agreement, and CP III operating agreement that had been reviewed eight months before. Centrum was Chicago Title's sole customer in handling the July 2007 transaction.

In 2008 Chicago Title handled a total of three accommodation recordings affecting the property: two more deeds of trust and one memorandum of agreement. Chicago Title did not issue a commitment nor perform escrow functions with respect to any of these three documents.

In September 2009 GECC notified CP III that is was in default under the loan agreement for at least four different reasons, only one of which involved the recordation of junior liens against the property. The GECC loan came due in November 2009.

GECC commenced foreclosure in January 2010. Its notice of default did not mention unauthorized liens. In February 2010, CP III, which had been taken over by the

10% minority owner, filed suit against Thomas Hazelrigg and the parties associated with him, alleging misappropriation of funds. The lawsuit also sought to enjoin foreclosure of the junior liens that had been recorded against the property. Finally, in April 2011, CP III brought Chicago Title into the action, claiming that its negligence in recording the junior liens had caused $7.5 million in damages, including $3 million in default interest. The district court entered summary judgment in favor of Chicago Title in July 2013. The 9th Circuit certified the question to Washington in July 2015.

The gist of CP III's claim was that Chicago Title knew that all four of the junior liens were prohibited under the GECC deed of trust, loan agreement, and the CP III operating agreement. CP III argued that Chicago Title knew that in recording each of the four junior liens it would cause CP III to be in breach of the GECC deed of trust and should therefore be held liable for the resulting damages.

To determine if a third party could hold a title company liable for recording documents, the Supreme Court reviewed the 2002 case in which it had dealt with a title insurer's liability to its insured: *Barstad v. Stewart Title Guaranty Co.* In *Barstad* the court had determined that a title insurer had no duty to its customer to search for or disclose title defects when preparing a preliminary commitment of title insurance. Relying on *Barstad*, earlier cases, and the statutory distinction between an abstract and a preliminary commitment as stated in RCW 48.29.010(3), the Supreme Court held that because a title insurer has no duty to identify and disclose title defects to its own customers, there is no basis for "extending this duty of care to nonclient third parties when recording a legal instrument[.]"

The Supreme Court also considered whether it should apply general tort law principles imposing a duty of care to third parties on certain professionals. The court looked to its 2013 decision in *Stewart Title Guaranty Co. v. Sterling Savings Bank* which involved the question of an attorney's duty of care to third parties. The *Sterling Savings Bank* case sets out six factors to be considered, including the extent

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to which the transaction is intended to benefit the third party and the foreseeability of harm to the third party. CP III tried to argue Chicago Title owed it a duty because of the foreseeability of harm from recording the junior liens. The court rejected that that argument, noting that whether a benefit is intended to the third party is the "primary inquiry," and CP III had made no effort to show that it was the intended beneficiary of the transaction involving Centrum Financial's $10 million deed of trust nor of the three accommodation recordings that followed.

Chicago Title had more than the legal authorities on its side:

> As a matter of logic and common sense, CP III is not entitled to something for nothing; not having entered into a contract with Chicago Title relating to future recordings, CP III is not entitled to the benefit of Centrum Financial's bargain with Chicago Title. Nor are they entitled to have Chicago Title review operating agreements and presumably lengthy loan agreements without a contract for – and paying for – that benefit. These factors reinforce our conclusion that title insurance companies do not owe third parties a duty of care when recording instruments.

While the court refused to impose a duty based on the facts before it, the decision does not provide a blanket exemption for accommodation recordings. The Supreme Court noted multiple times that the four junior documents were all facially valid: "the manager of CP III had signed the documents filed by Chicago Title." That distinction suggests that the court may in the future impose liability when there is an obvious problem with a document that was the subject of an accommodation recording.

***Shelcon Construction Group LLC v. Haymond*, 187 Wn. App. 878 (2015) – Lien priority**

Among other matters, the Shelcon case, decided by the Court of Appeals, Division 2, dealt with the question of priority between a deed of trust, held by Anchor Mutual Savings Bank (Anchor Bank) and a mechanic's lien filed by Shelcon Construction Group.

Facts: The property owner, Haymond, contracted with Shelcon to build improvements on Haymond's property. Haymond also obtained a construction loan for approximately $1.5 million from Washington First International Bank. Just hours before the deed of trust securing the loan was recorded, the owner of Shelcon went to the property, made some measurements and marked boundaries with florescent ribbons.

Nearly 2 years later while construction was proceeding, Shelcon filed a lien against the property for unpaid work in the amount of $303,000. Haymond then contacted Anchor Bank seeking a new loan in the amount of $3.9 million which would, in part, refinance the previous loan. Anchor Bank, aware of the filed construction lien, refused to provide the new loan unless the lien was released. Based on a promise by Haymond that Shelcon would be paid from the new loan, Shelcon recorded a release of lien. The release contained no conditions or limitations. Relying on the release, Anchor Bank loaned the requested funds, some of which were used to pay off the previous deed of trust, and secured the new loan with a new deed of trust.

Less than a year later, Shelcon filed a second lien which included claims for amounts that were previously claimed under the first lien as well as amounts for later work. Shortly afterward, Shelcon filed a suit for contract damages and foreclosure against Haymond and Anchor Bank arguing, among other things, that its lien was superior to Anchor Bank's deed of trust. The Court held in favor of Shelcon.

Two issues raised in the suit are of special interest to title insurers.

(1) The trial court found, and the Court of Appeals affirmed, that Shelcon's release of its first lien did not preclude Shelcon from filing a second lien for amounts shown in the first lien that remain unpaid. The Court held that "a lien release where the underlying work is not fully paid does not prevent the lien claimant from later recording a second lien." The Court further not-

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INDIAN AFFAIRS COMMITTEE

Native American Update

By Megan Powell, Chair, Indian Affairs Committee

25 CFR Part 169 – Right of Way Regulations: Final Rule Published 12/21/2015

The final rule for the new federal regulations governing the process for obtaining rights of way grants over Indian land and BIA Land was published on November 19, 2015. The original effective date of December 21, 2015 has been pushed to March 21, 2016 to allow the tribes and industry time to prepare for implementation of the new rule. Additionally, the date by which documentation of past assignments must be submitted (as further discussed below) has been extended from April 18, 2016 to July 17, 2016.

The new regulations revise the current regulations issued in 1968. The new regulations streamline and consolidate the processing and administration under one set of rules for all types of rights-of-way.

Highlights of the final rule are summarized below.

What type of land is affected by these regulations?

The ROW Regulations only apply to "BIA Land" and "Indian Land" as defined in the rule.

- BIA Land – Land owned and administered by the BIA
- Indian Land – Individually owned Indian land and/or tribal land.
- Individually owned Indian land – Any tract in which the surface estate, or an undivided interest of the surface estate, is owned by one or more individual Indians *in trust or restricted status*.
- Tribal land – Any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more *tribes in trust or restricted status*.
- Trust status – When the USA holds title for the ben-

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IMPORTANT
Additional Regulatory Changes – 25 CFR Part 151 Fee to Trust Acquisitions

These links provide information and access to the newly revised Fee to Trust Handbook.

The handbook was in need of revision due to a final rule published May 16, 2016 which deletes the requirement that applicants for fee to trust transfers furnish evidence of title that satisfies DOJ standards and replaces those standards with requirements that BIA believes are more appropriate for fee to trust acquisitions. The revised rule eliminates the need for the applicant to purchase a title insurance policy, either for the US or the tribe. BIA believes that this amendment will reduce the cost of fee to trust transfers

The new standard requires an applicant to furnish a deed evidencing its ownership of the land, or a written contract for sale or statement from the current owner that the applicant will have ownership. Additionally, applicants must submit either (i) a current title commitment or (ii) the title policy issued when the applicant or current owner acquired the land and an abstract of title from the date on which the interest was acquired by the current owner or applicant.

http://www.bia.gov/cs/groups/public/documents/text/idc1-034365.pdf

http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-024504.pdf

https://www.gpo.gov/fdsys/pkg/FR-2016-05-16/pdf/2016-11489.pdf

Native American Update

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efit of a tribe or an individual Indian.

- Restricted status – When a tribe or individual Indian holds title but can only alienate or encumber with the approval of the USA.

This is a very complicated way of saying that 25 CFR Part 169 only applies to BIA Land and land that is held in trust or restricted status.

If an individual Native American or a Native American tribe owns land inside the reservation, that does not automatically mean 25 CFR Part 169 applies. If an individual Native American or a Native American Tribe owns land in unrestricted fee on the reservation they are not subject to 25 CFR 169.

BIA Deadlines

Prior regulations did not contain any deadline for the BIA to take action on a right of way request submitted under 25 CFR Part 169. The new regulations establish a 60 day deadline for BIA to act on a request for a new right of way (169.123) and a 30 day deadline to act on a request for an amendment (169.205), assignment (169.208) or mortgage (169.211) of a right of way. Lack of response by the BIA in these established timeframes is not a deemed approval.

Jurisdiction

The new regulations affirm that rights of way on trust or restricted land are not subject to state law. The grant of a right of way does not diminish the jurisdiction of a tribe over tribal land (169.10). The grant document will actually state that the tribe maintains existing jurisdiction over the land (169.125).

Applicability

The new regulations apply to rights-of-way granted before the effective date of these regulations, but only as to those portions of the current regulations that address issues that were not addressed in the prior regulations (169.7).

Assignments

Landowner consent and BIA approval are required for all assignments of an existing right of way (169.207). Prior assignments of rights of way must be reported to the BIA within 120 days of the effective date of the new regulations (169.7(d)). This date has been extended to July 17, 2016.

Piggybacking

The new regulations state that piggybacking is expressly not allowed unless the new use is within the same scope of use specified in the original right-of-way grant. Any new use, or use not within the scope of the original grant, will require the grantee to obtain consent for any assignment or amendment authorizing the new use (169.127). A new right-of way may be required.

Mortgaging

The new regulations allow for mortgages of rights-of-way, but only if the original grant expressly allows for it. If allowed, the grantee must obtain majority consent of the landowner and BIA approval for the mortgage (169.210).

New ROW vs. Renewed ROW

The new regulations provided clarity as to when the BIA will require a new right-of-way instead of a mere renewal (169.202).

Consent

The new regulations clarify what consent is needed for approval of the right of way (169.107).

Click here for a full copy of the final rule: ***CFR 25 Part 169***.

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a right to lien for recovery of expenses "to abate a nuisance which threatens health or safety."

The requirements of the city for notification to owners and lenders do not include a recording. Due to the lobbying of WLTA and the testimony of Stu Halsan, this statute limits the lien priority against successors before a recording gives notice. However, with the consent of the mortgage lenders, the statute gives super priority for $2000:

> (3) The special assessment authorized by this section constitutes a lien against the property, and is binding upon successors in title only from the date the lien is recorded in the county where the affected real property is located. Up to two thousand dollars of the recorded lien is of equal rank with state, county, and municipal taxes.

Other Changes Indirectly Related to Real Property Transfers

SHB 2876 will become effective July 1, 2016, to add a new $250 fee to all non-judicial foreclosures of a Deed of Trust. It is imposed upon the recordation of each Notice of Trustee Sale, regardless if the foreclosure is terminated or completed.

SSB 5597 changes licensing of real estate appraisers to recognize licensing from another state if WA determines the other state requirements meet or exceed WA requirements.

SB 5635 will be effective as of January 1, 2017, repeals all of Chapter 11.94 replacing all power of attorney statutes with the new Uniform Power of Attorney Act.

Appreciation to Many

I close the report for this session with my thanks to the many people who contributed as Legislative Committee members to review all the Bills filed to find those that needed to be monitored. That is a tedious task that is so essential for our success.

During this session, and between sessions, I was invited to contribute and given a significant voice during the negotiations hosted by Rep. Terry Nealey with the Treasurers leading to the REET amendment. WLTA has a friend at the Legislature and gives thanks to him.

Our successes this year would not have occurred without the respect and influence that WLTA enjoys at the Legislature due to the skills and patience of Stu Halsan. The Legislative Committee and WLTA members thank him again.

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ed that mechanic's lien statutes are "silent regarding the effect of a lien release." The statutes only provide "that when the amount due has been paid and upon demand, the lien holder shall release the lien." They do "not address the effects of a release upon the rights of any party if a release is granted without full payment."

(2) Anchor Bank claimed that, regardless of the above, its lien was superior because it was equitably subrogated to the lien priority of the first Deed of Trust that it refinanced. The Court held that regardless of the subrogation argument the results would be the same. It found that the owner's work in measuring and marking boundaries prior to the recording of the first deed of trust was sufficient to establish Shelcon's priority. By statute, a construction lien's priority is established if the "commencement of labor or professional services or first delivery of materials or equipment by the lien claimant" precedes the recording of the deed of trust. The court held that the actions taken by Shelcon's owner prior to the recording of the first deed of trust consisted of professional services in preparation for construction.

The Court's decision is not surprising. It is consistent with previous decisions concerning lien releases and waivers. The courts have indicated several times that well drafted lien priority agreements are the preferable protection for lenders. ***Jack Lancaster***

Bel Air & Briney v. City of Kent, 190 Wn.App. 166 (2015) – Equitable Subrogation

The Washington Court of Appeals affirmed the trial court's award of equitable subrogation, then negat-

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ed the effect by precluding foreclosure of the resulting equitable lien.

In January 2008 the City of Kent paid $392,500 for a property, paying off one lender to the tune of $196,894.17. The sellers pocketed $193,499.50. The sellers failed to inform the city that there

was a junior deed of trust on the property, securing a debt of $143,305.42. The junior deed of trust was recorded in June 2007, three months after the city obtained a preliminary commitment, and seven months prior to closing. The junior deed of trust was not shown as an exception on the title policy.

The sellers continued to pay the loan secured by the junior deed of trust for approximately nine months after they sold the property to the city. By 2012 the sellers and the junior lender were in negotiations to reconvey the deed of trust, when the lender finally learned that the property had been sold. The lender then contacted the city. By this time, four and a half years after the sale, the property's value had declined to $110,000.

The city tendered a claim to its title insurer. An action was commenced seeking equitable subrogation declaring that the junior lender's deed of trust was junior to the city's interest in the property in the amount of the $196,894.17 that the city had paid to satisfy the first mortgage. The city also sought to foreclose an equitable lien against the junior lender's deed of trust.

The trial court entered summary judgment for the city, declaring the junior deed of trust to be junior to the city's equitable lien and ordering foreclosure of the city's lien. The resulting foreclosure would presumably have wiped out the junior lender, unless it was willing to meet the city's credit bid of $196,894.17 (on a property now worth only a little over half that).

Division One of the Court of Appeals affirmed the application of equitable subrogation in favor of the city, giving the city an equitable lien with priority over the junior deed of trust in the amount the city had paid to satisfy the senior loan. However, the court reversed the trial court's judgment allowing the city to foreclose its equitable lien. The court indicated that the "equitable purpose of subrogation is fully served by permitting the City to succeed to first position with priority to right of proceeds, in the amount of its equitable lien, from any sale." In other words, the city was stuck with the junior lender retaining an interest in the property. The opinion suggests that other factors may have been in play: the court observed that to the extent the junior lender's lien adversely affected the city's interest in the property, it "neither addressed nor foreclosed any claims the City may have against its title insurer."

The Court of Appeals decision significantly undermines the usefulness of equitable subrogation to deal with missed or unresolved junior interests. The city sought review by the Washington Supreme Court, but that court declined to take the case in March of 2016. ***Sean Holland OneWest Bank v. Erickson*, 185 Wn.2d 43 (2016) – Court Orders from Other States, Round II**

The previous issue of this Newsletter (*August 2015, page 5*) reported on the Court of Appeals case of *OneWest Bank v. Erickson*. The losing bank appealed. In February 2016 the Washington Supreme Court reversed the Court of Appeals.

The Court of Appeals had invalidated a deed of trust on a Spokane residence executed by a conservator appointed by an Idaho court. The conservator was for an elderly gentleman who resided at the Spokane property with his daughter. Pursuant to

the order of the Idaho court, the conservator granted a deed of trust in October 2007. The elderly gentleman died in 2011, after which his daughter recorded a deed to the property that he had executed in June 2007, four months before the deed of trust was recorded. In 2012 the bank commenced a judicial foreclosure of the deed of trust. The bank obtained a summary judgment in the trial court, but the

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Court of Appeals reversed. It reasoned that an Idaho court order could not provide authority to the conservator to execute a deed of trust on Washington property.

The Washington Supreme Court held that pursuant to the full faith and credit clause of the U.S. Constitution, Washington courts had to give effect to the two Idaho court orders that first (a) appointed the conservator and then (b) directed the conservator to execute the deed of trust.

The Court of Appeals had considered and rejected the bank's full faith and credit argument. Citing a 1909 decision of the U.S. Supreme Court, the Court of Appeals noted that "decrees of one state affecting interests in land of another state are not accorded full faith and credit under the United States Constitution."

The Washington Supreme Court agreed with the Court of Appeals that the courts of another state cannot directly transfer title to Washington property. However, the Supreme Court distinguished a direct transfer of title from situations where an out-of-state court indirectly affects personal interests in Washington property. The court held that because "the Idaho court orders merely determined personal interests in the Washington property and did not directly transfer title, … they are entitled to full faith and credit."

For the full faith and credit clause to apply, the court entering judgment must have jurisdiction over the parties and subject matter of the case. The daughter claimed that her father was not subject to the jurisdiction of the Idaho court. She argued that he ceased being an Idaho resident when he moved in with her in Spokane. The Court of Appeals had agreed with her that her father was not an Idaho resident when the conservatorship proceedings began. But the Supreme Court noted that the daughter had raised the jurisdictional issue in the Idaho proceedings, and that the Idaho court had decided against her. The Supreme Court held that she was bound by the result in Idaho and could not reopen the same issue in the Washington courts. The court's decision allowed the bank to proceed with the foreclosure of its deed of trust. ***Sean Holland***

Dept. of Revenue v. FDIC, 190 Wn.App. 150 (2015) – Receiver Sales & REET

The Washington Court of Appeals held that sales by a receiver are exempt from real estate excise tax only in the specific situations defined by statute.

Cowlitz Bank made loans of approximately $13 million that was secured by deeds of trust on multiple properties. The borrowers defaulted. The bank filed suit. The resulting judgment for $14.5 million included an agreement to delay foreclosure.

When the bank failed, the FDIC acquired its assets. Rather than foreclose on the deeds of trust, the FDIC requested court approval to appoint a receiver "to *give effect* to the judgment and control, sell, and manage [the debtor's] assets." The court's order appointing the receiver stated that sales of real property would be exempt from excise tax. The order was based on former RCW 82.45.010(3)(i) (now sub-section (3)(j)), which exempted sales in several situations, including "*upon execution* of a judgment [.]"

The FDIC requested court approval to sell one of the properties, without paying excise tax, and the Washington Department of Revenue filed an objection. The FDIC argued in response that "*giving effect* to a judgment is synonymous with *execution* of a judgment." The court did not see it the same way. It agreed with the DOR that the exemption for sales "upon execution of a judgment" applied to the statutory schemes for execution of judgments and sales upon execution as provided in Chapters 6.17 and 6.21 of the RCW. The court noted that if the receiver had obtained a writ of execution pursuant to Chapter 6.17 RCW, then its sale would have been "upon execution of a judgment," and therefore exempt. But because the FDIC's sale was not in fact the result of execution upon a judgment, the court rejected the receiver's attempt to avoid paying excise tax.The decision means that one cannot rely upon a trial court order saying a receiver's sale is exempt from real estate excise tax. Instead, unless the case fits squarely within a statutory exemption, excise tax will be due. ***Sean Holland***

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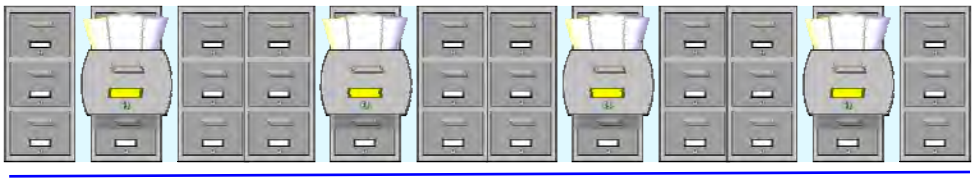

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