Washington Land Title Association

For Land's Sake

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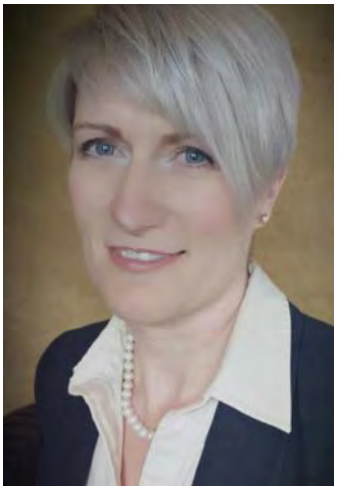

President's Message

Maureen Pfaff

It has been an honor to serve as the President of the WLTA for the last year and I can't say enough how much I appreciate the time and effort put forth by the Board and committee members. These volunteers have dedicated countless hours traveling to meetings in Seattle and Olympia, working on legislative and judicial issues, and keeping on top of issues developing at the federal level through participation in ALTA events and meetings.

Wire fraud and cyber security have been a hot topic with the surge in scams aimed at diverting either the buyers funds to close or the sellers proceeds via fake wire instructions sent through fraudulent emails. Education of industry members has helped reduce the number of successful fraud schemes, however we must continue to be vigilant for changing tactics on the part of the fraudsters.

Predictable recording fees are another hot topic in the industry and over the last year a number of states have enacted legislation providing flat recording fees which helps facilitate fee accuracy and compliance with the TILA-RESPA Integrated Disclosures rule. This is a topic currently being explored in Washington for possible legislative action in 2018.

I attended the ALTA ONE convention in Scottsdale, AZ last October and it was a great opportunity to step back from the day to day minutia of running my agency and focus on education, innovation and thinking creatively about how we do what we do. The ALTA staff bring together leaders from within the industry, creative thinkers from outside the industry and venders who develop tools for the industry and put it all in one place. I always come back from this event with new ideas and fresh perspective.

In May I was part of the delegation from Washington who traveled to Washington DC for the ALTA Advocacy Summit (formerly known as the Federal Conference). We met with many of our state Representatives or their staff members to educate them on issues of importance to our industry and the consumers we serve.

Though the basic premise of our business remains the same as it has always been, changes in regulations, technology and demographics are causing seismic shifts in how the work is done and who will be doing that work going forward. I encourage everyone get involved whether by participating on the board or committees of the WLTA or through the ALTA committees and events. Title Action Network (TAN) membership is free, non-partisan, keeps you informed about current issues and allows you to participate when time-sensitive work needs to be done. We can't afford to sit back and let others dictate what the future of our industry will look like. As one of the past-presidents of ALTA told me many years ago, we either take a seat at the table, or we will be on the menu.

I hope to see you at the 2017 Pacific NW Title Convention August 17-19 at Suncadia Resort in Cle Elum, Washington!

Inside This Issue

CONVENTION

2017 PNW Land Title Convention

The 2017 Pacific Northwest Land Title Convention is August 17-19, 2017 at Suncadia Resort, near Cle Elum, Washington. Members from Washington, Oregon and Idaho gather to re-connect, learn what's new in the industry, and of course to meet with their vendors. We hope to see you there!

SAVE THE DATE!

It's not too early to start planning for next year's convention. Idaho will host it at the Coeur d'Alene Resort.. August 2-4, 2018

More information will be available as the date approaches. Keep an eye on the WLTA web page.

SEMINARS

2017 Fall Seminars Wenatchee & Lynnwood

By John Martin, Chair—Education Committee

It's time to mark our calendars for the popular WLTA Fall Educational Seminars. This year's sessions will be September 16 in Wenatchee and October 14 in Lynnwood. To register, go to http://washingtonlandtitle.com/.

These seminars are a great opportunity to learn from knowledgeable title insurance professionals about the topics that you face every day. They are also a great opportunity to reconnect with old friends.

The seminars are very affordable – only $100 per person for WLTA members – a great benefit of membership in the Association.* As usual, LPOs can expect to get 6 credit hours – usually two of which qualify for liability credit. Of course, while this is a great opportunity for escrow, equal attention is given to title related subjects on the agenda.

The agenda is still being finalized, but a partial list includes broken priority (mechanic's lien underwriting), escrow losses, fraud, the new power of attorney statute, electronic notary developments and judicial foreclosures.

If you have a suggestion for a topic, feel free to email John Martin, WLTA Education Chair (johmartin@firstam.com) and he will try to get it on the agenda. Hope to see you there!

*Note that membership in the WLTA is by company, not individuals. Thus, if you are employed by a member company – either an agent or a direct office of an underwriter – you are a member. Check out our member directory at http://washingtonlandtitle.com.

LEGISLATIVE REPORT

2017 Legislative Report

By Dwight Bickel & Jim Blair

The legislative session this year was by far the most active for the WLTA legislative committee. It was also the longest session for legislative work than ever before. Fortunately, we had more WLTA members working on the legislative issues than ever before.

Rating Organization Authorized [EHB 1450]

Following months of discussions, the WLTA Board voted to support the request of Representative Terry Nealey for a Bill to authorize a rating bureau for title insurance. Rep. Nealey is a lawyer and a title agent owner, who sponsored the WLTA Bill last year to stop the Department of Revenue assessment of excise tax upon inherited property if they did not complete a probate.

Your WLTA Legislative Committee attended 17 meetings with legislators and testified at four public hearings to explain the goal of the Bill to reduce the burdens of rate filing and reduce the overall disorganization in our business that resulted from disparate requirements imposed by the Insurance Commissioner. WLTA thanks Alan Brickley and Cleve Abbe who testified about how OTIRO was formed, how the Oregon Commissioner controls its actions, and how that has benefitted the industry there.

Dwight Bickel and Jim Blair are Co-Chairs of the WLTA Legislative Committee

The essence of the Bill is that the State of Washington authorizes title insurance underwriters to form and join a neutral Rating Organization. The Organization will be allowed to propose the premiums for title insurance products based upon the history of costs to produce and costs to reimburse insureds for losses. The State requires the Insurance Commissioner to approve the Rating Organization and to actively regulate its activities to ensure compliance with the requirements of the statutes and insurance regulations. When the Commissioner approves the proposal of the Organization for title insurance products and the premiums, the title insurance underwriters that chose to be members will be required to adhere to those forms and rates.

The new statutes do not require a Rating Organization to be formed. Each title insurance underwriter may choose whether or not to join.

Even if a particular underwriter does join, that underwriter remains free to file a form or a premium that is different than the proposal of the Rating Organization. At the time of this report there is no organization yet formed.

It is very important for each title company person to understand that these new statutes do not allow competitors to discuss premiums or agree upon trade practices. Federal law continues to prohibit competitors from discussions about prices, forms and trade practices. The only activity that Federal law allows is for under-

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writers to join a rating organization if allowed by state statute and if actively regulated by the State commissioner. Inside that organization, information about costs and claim expenses may be shared.

Modernized Notary Requirements [SB 5085

Washington passed revised notary requirements, mostly following the recommendations of the National Conference of Commissioners on Uniform State Laws. Mostly, the changes are good for real estate transactions. It allows notary certificates in electronic form, dropping the requirement for an impression of the official seal.

But there were changes to the recommended uniform law that the WLTA Board opposed. There were other requests for changes by other stakeholders, such as adding education and testing. This Bill suffered an unusually complicated process caused when changes approved by one house were rejected by the opposite house.

The recommended Uniform Bill required that the person signing must personally appear before the notary public. But the Bill sponsored by Sen. Pederson only required the person to be "in the presence of the notary" and authorized the Department of Licensing to define what would satisfy that requirement. The WLTA Board objected to that provision, at least at this time. Though some states have authorized notary certificates where the person signing is remote, this proposed statute did not define what would be required to ensure identity, sobriety and lack of undue influence.

At the conclusion, the change proposed by WLTA was accepted, preserving personal appearance. The new law will require notaries to maintain a notary journal (a change requested by the company that provides notary supplies). The changes are not effective until July 1 of next year.

Uniform Voidable Transactions Act [SB 5085]

The Washington Legislature passed another uniform law that affects real property transactions. Effective since July 23, 2017, this Act changes some of the definitions, but is not really different in the rules or timing than we already know as a Fraudulent Conveyance.

It has long been the law in Washington that a conveyance made by a person that was insolvent could be set aside at the request of a creditor. The statutes called it a fraudulent conveyance, but no proof of fraud was required. The new uniform act provides the same remedy based upon the same requirements, but calls the deed voidable. The Legislature now defines that the burden of proof is upon the creditor, but the proof required is only a preponderance of the evidence.

The amount of time that must pass before a claim of voidability is barred has not changed. The creditor has four years to challenge the conveyance, or one year after the transfer or obligation was or could reasonably have been discovered by the claimant. The Act preserves the ability of a purchaser to defend if that person took in good faith and for a reasonably equivalent value.

Appreciation to Many

The Co-Chairs want all members to give thanks to the many people who contributed to the WLTA legislative work this year. Many times they had to drive to Olympia to speak with legislators or testify at a hearing. 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.

JUDICIARY REPORT

John Lancaster — Chair, Judiciary Committee

Lis Pendens – When supersedeas bond is accepted by the court it has no authority to cancel lis pendens

In *Guest v. Lange*, 195 Wn. App. 330, 381 P.3d 130 (2016), the Washington Court of Appeals, Division Two, held that the Pierce County Superior Court (the "trial court") lacked authority to cancel a notice of lis pendens when a supersedeas bond had been filed. The Pierce County case concerned a real property dispute between Mr. and Mrs. Guest and Mr. and Mrs. Lange. The Guests recorded a notice of lis pendens in the real estate records. [A notice of lis pendens is filed to provide constructive notice to third parties that there is pending litigation concerning the identified property, that the title to the property may be clouded and that any interest acquired in the property after the filing of the notice will be subject to the outcome of the litigation.]

The trial court entered a final judgment against the Guests and the Guests appealed. The trial court also accepted the Guests supersedeas bond to stay enforcement of the judgment pending appeal. The trial court then, at the request of the Langes who were seeking a refinance loan, cancelled the notice of lis pendens.

The Guests argued to the Appellate Court that the trial court did not have authority to cancel the notice of lis pendens because the Guests had filed a supersedeas bond.

Unlike courts in most other states, Washington courts have long held that filing a notice of appeal from a final judgment does not, by itself, prevent the cancellation of a notice of lis pendens. *Guest v. Lange* however, introduced the element of a supersedeas bond which is posted for the purpose of staying the enforcement of the judgment pending the appeal. In this case of first impression, the Court cited RCW 4.28.320 which empowers a court to order the cancellation of a notice of lis pendens if (1) the action is settled, discontinued or abated, (2) an aggrieved person moves to cancel the notice and (3) the aggrieved person shows good cause and proper notice. The Appellate court held that when a supersedeas bond has been filed which stays the judgment pending appeal, the action has not been "settled, discontinued or abated." Therefore, the trial court lacked authority for its order to cancel the lis pendens. (Note: The Washington Supreme Court declined to review the Appellate Court's decision.)

Jack Lancaster

Lis Pendens – Sixteen-month delay in releasing a lis pendens does not justify awarding damages under statute dealing with wrongful filing of lis pendens

Tiokasin-Orr v. Estate of Orr, Wash. Ct. of Appeals, Div. II, unpublished opinion (June 20, 2017) - RCW 4.28.328 provides that if a party is found to have filed a lis pendens without "substantial justification," they may be liable for damages and attorney fees to the party whose property was affected by the lis pendens. However, the Court of Appeals held, in an unpublished opinion, that liability for damages and fees cannot be imposed for a 16 month delay in removing the lis pendens.

When Patricia and David Orr divorced in 2003, he was ordered to pay her spousal support. David remarried. He and his new wife, Linda Tiokasin-Orr bought a house together in 2005. David fell behind in his payments to Patricia. In 2011 he quit claimed all interest in the house to Linda.

In 2012, Patricia sued David to collect past due payments and obtained a judgment. Patricia then turned around and filed an action against both David and Linda claiming that David had fraudulently transferred the house to Linda. [Note: Washington's fraudulent transfer statutes, Chapter 19.40 RCW, make it possible for creditors to have their debtors' transfers of real and personal property set aside. The statutes give creditors a means to attack transfers intended to hide or get rid of assets or that favor one creditor over others.] Patricia recorded a lis pendens on Linda's house on October 31, 2012.

Linda claimed that David's deed for his interest in the house was valid, because she had paid $800,000 of David's debts on his behalf. Linda claimed to have produced evidence of her payments to Patricia promptly after the fraudulent transfer action was filed. Nothing happened for 16 months. In early 2014 Patricia filed a motion to dismiss her lawsuit and released the lis pendens. Then she died.

Linda, not being one to let bygones be bygones, then filed a claim in Patricia's probate for damages allegedly caused by the lis pendens. When the estate denied the claim, Linda sued for damages under RCW 4.28.328. The trial court held that Patricia had a good faith basis for filing the lis pendens and entered judgment in favor of her estate. Linda appealed.

On appeal Linda argued that Patricia could be held liable for leaving the lis pendens in place after Linda produced evidence that David's conveyance of the house was not a fraudulent transfer. The court held that because RCW 4.28.328

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Jack Lancaster is the Chair of the Judiciary Committee of the WLTA and the committee members are Sean Holland & Bob Horvat

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provides for damages only if a party lacks "substantial justification for filing the lis pendens," damages could not be awarded for delay in removing a lis pendens. *Sean Holland*

Treble damages for emotional distress under timber trespass statute

In *Pendergrast v. Matichuk*, 186 Wn.2d 556, 379 P.3d 96 (2016), the Washington Supreme Court held that treble damages could be awarded under Washington's timber trespass statute for noneconomic (in this case emotional distress) damages.

Facts: In 2006, Leslie Pendergrast and Robert Matichuk bought adjacent properties. Their properties were separated by a fence that existed prior to either one's purchase. On the Pendergrast side of the fence stood a "venerable cherry tree" that Pendergrast hoped to incorporate into her plans for a bed-and-breakfast. In 2008, Matichuk had the property surveyed. As it turned out, the fence was several feet within the Matichuk property per the deed line description. Matichuk, despite "Pendergrast's strenuous objection," her "tearful pleas," and a letter from her attorney, tore down the fence, put up a new fence on the deeded property line and had the cherry tree cut down.

In the ensuing jury trial, the Whatcom County Superior Court rendered judgment in favor of Pendergrast, quieting title to the land between the new and old fence lines based on "the common grantor doctrine." The jury awarded Pendergrast $5,200 in economic and $75,000 in noneconomic (emotional distress) damages for trespass (removing the fence) as well as $3,310 in economic and $40,000 in noneconomic damages for timber trespass (cutting down the cherry tree).

Washington's timber trespass law at RCW 64.12.030 states, "Whenever any person shall cut down…any tree…on the land of another person…, without lawful authority, in an action by the person against the person committing the trespasses…, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed."

Pursuant to the statute the trial judge trebled the economic damages for timber trespass ($3,310 damages became $9,930) but the judge declined to treble the noneconomic (emotional distress)

damages for timber trespass because "such trebling is not specifically provided in" the statute.

On appeal the Appellate Court upheld the quite title judgment and the damages award but held that the trial court erroneously failed to treble the noneconomic damages for timber trespass. On subsequent appeal to the Washington Supreme Court, the Court upheld the Appellate Court decision. The Court stated that although "it has been well established…that emotional distress damages are available under the timber trespass statute," the Court has not, until now, "been properly asked to decide whether those damages are subject to statutory trebling." Taking a stance somewhat different from the trial court the Supreme Court noted that the statute did not limit the trebling

to economic damages only. It upheld the Appellate Court decision – trebling emotional distress damages for the timber trespass from $40,000 to $120,000. Total damages for removing the fence and tree - $210,130. *Jack Lancaster*

Damages and attorney's fees

Ewing v. Glogowski, 198 Wn. App. 515, 394 P.3d 418 (2017) – Deborah Ewing's home was encumbered by a deed of trust securing a loan serviced by Green Tree Servicing LLC. In June of 2011, even though she was current on her monthly payments, Ewing received a notice of default from the deed of trust trustee. In February of 2012, Ewing, in an attempt to save her home, filed a wrongful foreclosure lawsuit in Skagit County Superior Court (apparently without the assistance of an attorney) against Green Tree and the trustee. Despite the lawsuit, the trustee nonjudicially foreclosed and sold the home.

Ewing hired an attorney in March of 2014 and litigation began in earnest - discovery, motions, claims and counterclaims. The parties agreed to mediation in September of 2015 with Green Tree offering $40,000 and Ewing demanding

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$1,250,000. On September 18, 2015, Green Tree made an offer of judgment "for $50,000 plus reasonable and necessary costs, disbursements, and attorney fees." Ewing accepted the offer of judgment.

In February of 2016 the trial court entered the final judgment of $50,000 plus costs in an amount of $797 and an award of attorney fees in the amount of $246,307. Green Tree appealed regarding the amount of the attorney fees award. The Appellate Court upheld the award as reasonable. [Author's note: There are several lessons to be learned here.] *Jack Lancaster*

Terminating tenancies in common: Partitions by sale and in kind

Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farm, LLC, 196 Wn. App.929, 386 P.3d 1118 (2016) – In court actions terminating tenancies in common, the court is empowered to enter orders for partition by sale - selling the property and splitting the proceeds - or petition in kind, dividing the land between the tenants. In a case involving a former family farm, the Washington Court of Appeals held that a tenancy in common should be terminated by a partition in kind.

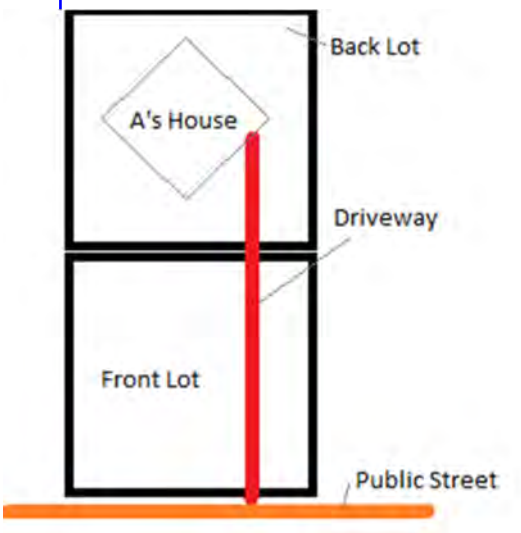
The property was part of a 60-acre tract that had been purchased by a couple in 1947. The couple conveyed a 20-acre portion to one of their two daughters. They also gifted a 25% interest in the remaining 40 acres to each daughter. And when the parents died, they left their retained interest in the 40 acres to the one favored daughter.

By 2011 the two daughters' interests were held by LLCs that were owned by their descendants. The 40-acre parcel's days as a farm were numbered, because it was within the Bellevue city limits and zoned for residential use. Subdividing the land would yield 38 lots. The LLC owned by descendants of the favored daughter filed an action to partition the tenancy, requesting that in return for its 75% interest it should receive land that could be used to create 29 lots. The competing claim from the LLC with a 25% interest was that the property should be sold and the funds

split.

Residential development would require extension of sewer service to the property, at a cost of approximately $1,400,000. A purchaser would factor in the cost of the sewer, spreading it equally over the whole property. But if the land were divided, the first party to develop would pay 100% of the sewer cost. The LLC that would get 75% of the land had no imminent plans for development, so a partition in kind would foist the entire sewer cost on the portion yielding only 9 lots. (The side with 75% was not willing to agree to share the cost. It was a family feud, after all)

RCW 7.52.130 authorizes sale of the property only if a partition in kind would result in "great prejudice to the owners." In this case one owner would be greatly prejudiced by partition in kind, but not both owners. Partition in kind was the required result because would cause great prejudice to only one of the two tenants in common. (Note: The Washington Supreme Court has declined review.) *Sean Holland*



Condo owner can remain in unit rent free during redemption period following judicial foreclosure of Association lien

Viewcrest Condominium Association v. Robertson, 197 Wn. App. 334, 387 P.3d 1147 (2016) - condominium association judicially foreclosed its lien for assessments against a condo owner. The association wound up purchasing the property at the sheriff's sale. It offered to let the owner remain in the unit during the redemption period in return for rent. The owner did not respond. The association then obtained an order evicting the tenant. The Court of Appeals reversed.

Washington's homestead statutes, Chapter 6.13 RCW, allow a homeowner to occupy the homestead during the redemption period without paying rent. However, the Condominium Act, RCW 64.34.364(2), provides that "a lien [for condominium assessments] is not subject to the provisions of chapter 6.13." The association argued that RCW 64.364(2) meant "that a condominium lien is not subject to any right of homestead for any purpose, including the…right to possession during the redemption period."

The court noted that the Horizontal Property Regimes Act provides for the owner to pay "a reasonable rental" following foreclosure. The legislature could have included a similar provision when it enacted the Condominium Act, but did not. The condo owner enjoyed the same homestead protections that applied to other property owners. (***Note***: The Washington Supreme Court declined to review.) *Sean Holland*

"Innocent Third Person Exception" to easement Merger Doctrine

The Washington Court of Appeals, Division One held in *WT Props., LLC v. Leganieds, LLC*, 195 Wn. App. 344, 382 P.3d 31 (2016) that, "Where the dominant and servient estates of an easement vest in the same person, the merger doctrine generally extinguishes the easement. But merger does not apply where the rights of innocent third persons would be prejudiced."

Facts: Predecessors in ownership to WT Properties held title to a parcel of land together with an easement for access over adjacent property. The prede-

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cessors granted a deed of trust to Viking Bank encumbering the parcel "together with…all the easements." Subsequently, the predecessors gained title to the easement area by way of a lot line adjustment, thereby owning the dominant and servient estates of the easement at the same time. They then defaulted on their loan and Viking Bank foreclosed. WT Properties bought the property as described on the deed of trust at the trustee's sale. The predecessors then sold the property that they acquired by the lot line adjustment (the easement area) to Leganieds, LLC.

Leganieds argued that because the predecessors had held title to both the WT Properties parcel and the easement area at the same time, that the easement was then extinguished by the merger doctrine and that WT Properties did not have access easement rights over the Leganieds property.

The Appellate Court upheld the decision of the trial court granting judgment to WT Properties and ruling that it held an access easement interest. The Court emphasized the "innocent third-person exception" to the merger doctrine. The court held that extinguishment of the easement by merger would have prejudiced the interest of Viking Bank, the innocent third party. The bank would have lost part of its collateral and it would have lost access. *Jack Lancaster*

Deeds of Trust, Notes and the 6 year Statute of Limitations

Two Appellate Court cases, one in Division One (Seattle) and one in Division Three (Spokane) concerned the statute of limitations and the enforcement of promissory notes and deeds of trust. Washington's six year statute of limitations applies to written agreements such as promissory notes. That time limit begins to run when the lender is entitled to enforce the obligations of the note.

In *4518 S. 256th, LLC v. Karen L. Gibbon, PS*, 195 Wn. App. 423, 382 P.3d 1 (2016), a 2006 promissory note provided that the borrowers would make monthly installment payments and would pay the debt in full by 2036. A deed of trust securing the note was recorded.

A notice of default was sent to the borrowers in 2008. In addition to warning that the failure to cure defaults could lead to a trustee's sale, the notice informed the borrowers of the amount of the arrearages, the amount required to cure all defaults before the recording of a notice of a sale, and the amount of the unpaid principle balance at the time of the notice. Nothing in the notice stated that the lender chose to declare the unpaid balance due and payable. Later in 2008, a notice of trustee's sale was recorded. Arrearages were then over $15,000. Again nothing in the notice of trustee's sale stated that the lender chose to declare the unpaid balance of the loan due and payable.

The foreclosure sale did not occur. Over six years later, in 2014, a second notice of default was sent to the borrowers and a new notice of sale was recorded in early 2015. Arrearages by that time were over $166,000. Two weeks later the borrowers quitclaimed the property to 4518 S. 256th, LLC. The LLC filed an action seeking a judgment to quite title and a declaratory judgment that the lender's rights were barred by the statute of limitations. The trial court entered summary judgment in favor of the lender and the property was sold at a trustee's sale. The LLC appealed.

The Court of Appeals Division One noted that "the six-year statute of limitations on a written agreement" begins to accrue on a demand note at the time it is executed, but that regarding an installment note "the statute of limitations runs against each installment from the time it becomes due [which could mean up to 2036 in this case]….But if an obligation that is to be paid in installments is accelerated, the entire remaining balance becomes due and the statute of limitations is triggered for all installments that had not previously become due."

The Court found that there was nothing in the 2008 notice of default or notice of sale that accelerated the maturity date of the loan. The Court held that to accelerate the maturity date "some affirmative action is required, some action by which the holder of the note makes known" that the whole debt is due. "Acceleration of the maturity date must be made in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised [its] right to accelerate the payment date." The Court found that the 2008 notices did not do so and acceleration did not occur.

The Court also noted that acceleration of the debt was not a prerequisite to non-judicial foreclosure. There is no such requirement in the statute. Acceleration is an option not a requirement and it "must be exercised by clear and unequivocal notice to the borrowers. It is not self-executing." [Note: The Washington Supreme Court declined to review.]

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In the second case, *Wash. Fed. Nat'l Ass'n v. Azure Chelan LLC*, 195 Wn. App. 644, 382 P.3d 20 (2016), the dispute concerned two deed of trust beneficiaries - Azure Chelan LLC (Azure) which held a February, 2007, first lien deed of trust and Washington Federal which held a May, 2007, second lien deed of trust.

The Azure note went into default almost immediately in 2007. Several notices of default were sent to the borrower containing statements regarding the "Accelerated balance" and the "Total Amount Due." Despite the notices, Azure took no action to foreclose its deed of trust.

The borrower also defaulted on the Washington Federal loan and Washington Federal foreclosed and acquired the property in 2011. In 2014, Washington Federal brought a quite title action against Azure claiming that the statute of limitations had run on Azure's note. Azure raised counterclaims. The trial court found for Washington Federal. Azure appealed.

The Court of Appeals, Division Three, again noted that the trigger for the accrual of time under the statute of limitations "can occur either immediately for a demand note, when the note naturally matures, or when the party accelerates the note through breach or some other clause in the note." The Court upheld the decision of the trial court and found that Azure had accelerated the note through its 2007 notices of default and that the statute of limitations for taking action for enforcement had run by the time that Washington Federal filed its quite title action. Title was quieted in Washington Federal.

[Also of note is one of Azure's counterclaims. The Azure deed of trust contained a "no-further-encumbrances" clause in which the grantor agreed not to further encumber the property without written consent of Azure. Azure argued that the Washington Federal deed of trust was void because the "no-further-encumbrances" clause in the Azure deed of trust is a "disabling clause" rendering any subsequent encumbrance void. The Court held that instead of a "disabling clause" it found the clause to be a "promissory restraint" that could be breached by the borrower but did not render the subsequent deed of trust void.]

Note: Both of the above cases concern the six year statute of limitations and the enforcement of the note underlying a deed of trust. Keep in mind however that, if the time limit has run, the statute only bars the enforcement of the note in a court of law. It does not, by itself, render the debt, note, or lien of the deed of trust void or no longer in existence. This has been clarified by earlier court decisions such as *Jordan v. Bergsma*, 63 Wn. App. 825, 822 P.2d 319 (1992) and others. [In *Bergsma* the borrower paid the loan in order to clear the title for a sale and then unsuccessfully sued to get the money back arguing that the note and deed of trust had "expired" due to the statute of limitations.] When an action for foreclosure on a deed of trust or mortgage is barred by the statute of limitations, the owner's recourse is an action for quiet title to omit the lien as authorized by RCW 7.28.300. *Jack Lancaster*

Mechanic's Liens: Laborers Can File Liens, Too

Guillen v. Pearson, 195 Wn. App. 464, 381 P.3d 149 (2016) - The Washington Court of Appeals reversed a trial court judgment in favor of a property owner and held that individual laborers were entitled to assert a lien against a property.

The owner was constructing an apartment complex. A subcontractor hired laborers to perform framing work. Five laborers filed a joint mechanic's lien claiming that they were owed $9,914 in unpaid wages. One week later they filed a lawsuit to foreclose the lien.

After the laborer's lien foreclosure suit began, the owner conveyed title to another entity with a nearly identical name and owned by the same individuals. The new owner granted a deed of trust to a credit union. The laborers joined the new owner and lender in the action.

The issue in the case was whether the laborers were entitled to claim a mechanic's lien. RCW 60.04.021 provides:

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

Note that it is not sufficient to be a person who performs labor. The labor must be "furnished at the instance of the owner, or the agent or construction agent of the owner."

The owner tried to claim that "only licensed contractors who contract to perform work on real property" are persons who can claim a lien under the statute. But the owner had no authority for its claim and the court rejected it out of hand.

The laborers claimed lien rights because the subcontractor for whom they had worked was the "construction agent" of the owner. RCW 60.04.011(1) defines "construction agent" as "any registered or licensed contractor, registered or licensed subcontractor, architect, engineer,

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or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter." The owner argued if a subcontractor did not have "charge of any improvement," then it could not be a "construction agent." The court rejected that argument, holding that any "registered or licensed subcontractor is a construction agent without an additional requirement of having charge of any improvement to real property." (Note: the Washington Supreme Court has denied review.) *Sean Holland*

Mechanic's lien claimant's suit on lien bond can be brought solely against bonding company (caveat: now under review – see Note below)

Inland Empire Drywall Supply Company v. Western Surety Co., 197 Wn. App. 510, 389 P.3d 717 (2017) - In January the Washington Court of Appeals held that a lien claimant can sue the bonding company alone, reversing a trial court summary judgment ruling that the party posting the bond is also a necessary party.

Inland Empire Drywall Supply Company ("Inland Empire") provided drywall materials to a subcontractor working on a construction project. The subcontractor ran up a tab of $124,653.05 with Inland Empire. The general contractor on the project provided the subcontractor the funds to pay Inland Empire. However, the subcontractor never paid Inland Empire and eventually ceased working on the project.

Inland Empire filed a pre-claim lien notice with the owner of the property, and then recorded its lien. The general contractor obtained a release of lien bond in the amount of $186,979.57 (one and a half times the lien claimed, per RCW 60.04.161) from Western Surety Company ("Western"). The bond named the general contractor as the principal and Western as the surety.

After the lien release bond was recorded, Inland Empire sued Western, without joining the general contractor as a defendant. Western raised several defenses, including that Inland Empire had failed to name and serve the general contractor.

Both Inland Empire and Western filed motions for summary judgment. In a 2014 decision, the same division of the Court of Appeals had held that when a lien claimant sued on a lien release bond, it was "sufficient" to join the principal and surety and there was no need to name the property owner as a defendant. The trial court assumed that when the 2014 decision said it was "sufficient" to join the principal and surety, it meant that both were required. The trial court entered summary judgment for the bonding company, solely on the necessary party issue. But in January's decision, the Court of Appeals noted that while the lien claimant had rights against both the principal/general contractor and the surety/bonding company, it does not have to pursue them in the same action. The court sent the case back to the trial court for further proceedings on the underlying issue of whether Inland Empire was owed the $124,653.05 that it claimed.

Note: In May, 2017, the Washington Supreme Court granted review, so the case is not yet over. *Sean Holland*

Seattle's Just Cause Eviction Ordinance: Landlord must terminate tenancy before sale

R. Thoreson Homes, LLC v. Prudhon, 197 Wn. App. 38, 386 P.3d 1139 (2016). Seattle's Just Cause Eviction Ordinance allows eviction of tenants only for "just cause." A landlord who "elects to sell" a rental property has just cause to evict. But a landlord cannot invoke the "elects to sell" provision once the property is already under contract for sale.

Owners of a single-family home in Seattle entered a purchase and sale agreement on April 2, 2015. Their agreement with the buyer required that they notify the tenant that they were terminating the tenancy. The sellers gave written notice to the tenant that they were terminating the tenancy because "owner elects to sell" the property. Their sale to the buyer closed on April 11, 2015.

The tenant filed a complaint with the city. On April 16, 2015, the city issued a notice of violation to the sellers and ordered them to rescind the notice. The buyer contested the notice of violation, and then in July 2015 filed an unlawful detainer action against the tenant. In December 2015 the trial court entered judgment evicting the tenant and awarding the buyer nearly $18,000 in attorney fees and costs.

The Court of Appeals reversed. The court agreed with the buyer that "elects to sell" applies only to owners who intend to sell the property, not those who have already sold it. [Note: It's not like the incoming buyer had no way to get rid of the tenant. The buyer planned on tearing down the house and doing a rebuild. That purpose would justify eviction under Seattle's ordinance, but would require payment of tenant relocation assistance, which was not required under the "elects to sell" provision.]

The case was sent back to the trial court, with an order to award attorney fees to the tenant. *Sean Holland*

For information regarding *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 389 P.3d 569 (2017) see the Native American Affairs Report in this issue

NATIVE AMERICAN AFFAIRS

Update

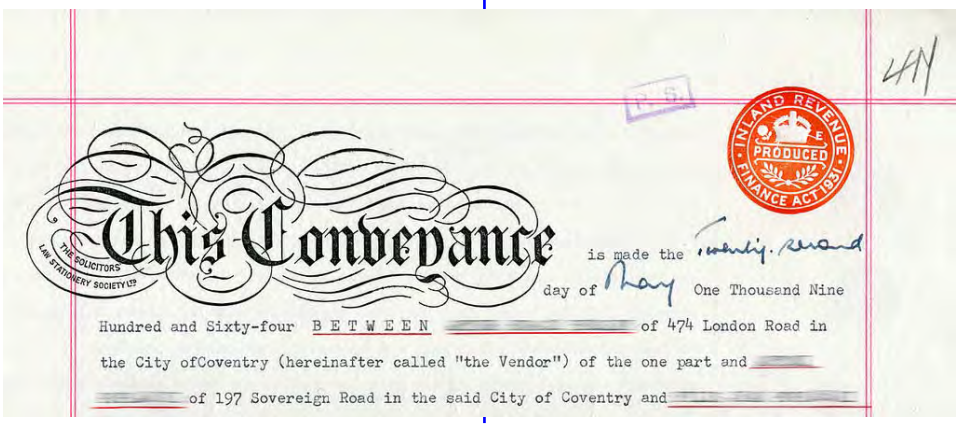
Megan Powell, Chair

Fee to Trust Acquisitions

In May of 2016 the federal regulations governing fee to trust acquisitions (25 CFR Part 151) were amended by deleting the requirement that tribes who apply for fee to trust transfers furnish evidence of title that satisfies DOJ standards and replaces those standards with less stringent requirements. The applicant may now instead 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. The applicant must additionally 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 (in other words, a date down of the title). This change was also memorialized in the BIA Fee to Trust Handbook by revision on June 28, 2016. These amendments are intended to make the application process less expensive and burdensome for Native American tribes. The amended requirements effectively eliminated the need for the applicant to purchase title insurance, either for the US or the tribe.

Potential Challenges to Fee to Trust Transfers

On February 15, 2017 US Congressman Rob Bishop, Chairman of the Committee on Natural Resources, sent a letter to James Cason, acting Deputy Secretary at the US Department of the Interior. The purpose of the letter was to express concern regarding decisions made by the Department of the Interior in the final days of the Obama Administration, as well as the early days of the Trump Administration. He requested that Cason "suspend the effectiveness" of some of these decisions until they have been carefully re-examined. Bishop cited last-minute approvals of Indian casinos located outside of existing reservations as an example of questionable decision making. He is encouraging a second look by the Department at those decisions. He is asserting that there was a lack of transparency in the decision making process and that the Committee on Natural Resources received no notification of the decisions. Many of the members of that committee are on record expressing concerns over off-reservation gambling. Bishop is encouraging reversal of any decision that was influenced by political or personal considerations, or made without fair consideration of affected interests. He also states there is precedent for the reversal of last minute decisions made by personnel of the outgoing administration following an investigation, then in a footnote refers to reversals after the exit of the Clinton Administration.


This Conveyance

is made the Twenty-Second day of May One Thousand Nine Hundred and Sixty-four BETWEEN [redacted] of 474 London Road in the City ofCoventry (hereinafter called "the Vendor") of the one part and [redacted] of 197 Sovereign Road in the said City of Coventry and [redacted]

Following this letter was a memo issued on April 6, 2017 by Ryan Zinke, who was confirmed as the Secretary of the Interior in March. The memo is directed to the Regional Directors within the BIA. The memo states that effective immediately, the delegated authority for off-reservation land into trust acquisitions will lie with the Acting Assistant Secretary of Indian Affairs. Additionally, delegated authority for off-reservation land into trust acquisitions for gaming will lie with the Acting Deputy Secretary of the Department of the Interior. Regional Directions are required to provide immediate notice to the AS-IA of applications for off-reservation acquisitions. The Regional Director will be responsible for completion of some of the steps outlined in the BIA's Fee to Trust Handbook, then they will transfer the application and their work completed to the Department for further review and final decision making.

While the regulations governing fee to trust acquisitions were modified such that a title insurance policy is no longer a requirement, there may be scenarios such as described above which could prompt a request for a policy by the impacted tribe or the federal government.

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NATIVE AMERICAN AFFAIRS

Update — continued

Megan Powell, Chair

(Continued from page 11)

Lundgren v. Upper Skagit Indian Tribe, 187 Wn.2d 857, (February 16, 2017)

In February of 2017 the Washington Supreme Court ruled in favor of individual landowners who claimed to have adversely possessed a portion of land now owned by a Native American tribe. The court rejected the tribe's claim that its sovereign immunity prevented the lawsuit from deciding who owned land included in a recent deed to the tribe.

The plaintiffs and the tribe own adjoining properties, with a common boundary running east-west and extending for a quarter mile. The plaintiffs own the southerly property. Since the plaintiffs' relatives first acquired the southerly property in 1947, there has been a barbed wire fence running the entire length of the common boundary. The fence is north of the boundary, inside the land now owned by the tribe. Starting in 1947, the plaintiffs' relatives and then the plaintiffs have been in continual adverse possession of the land lying between the common boundary and the fence. They have harvested timber and cleared brush all the way to the fence.

When the tribe bought the northerly property in 2013, it was unaware of the fence. Shortly afterward the tribe had a survey done that revealed the encroachment. In 2015 the plaintiffs sued to quiet title to the land lying between the boundary and the fence.

The tribe asserted sovereign immunity as a defense and argued that the trial court could not hear the case. Sovereign immunity is a legal doctrine originating in the English principle that the monarch can do no wrong. As applied today, the doctrine means that the government cannot be sued without its consent. Depending on the context, sovereign immunity protects other nations, the federal government, state and local governments, and federally recognized Indian tribes.

The trial court recognized that the tribe could not be made a party to the lawsuit without its consent. However, the trial decided that the tribe's participation in the lawsuit was not necessary, because a quiet title action is an in rem proceeding. The trial court reasoned, and the supreme court agreed, that because the adverse possessors had met all elements of adverse possession long before the tribe purchased its property, the tribe never had an interest in the land between the fence and boundary. Despite the tribe's sovereign immunity, the trial court had jurisdiction over the property itself and could award title to the adverse possessors.

The case is an example of how the usual assumptions about title can be trumped by exceptions. In Washington, an adverse possession claim not based solely on possession normally ripens into title after 10 years. But the exception is that the clock doesn't run when the record title to the disputed property is held by certain protected parties, such as absent military service members, minors, or Native American tribes with sovereign immunity. Even when the current owner enjoys sovereign immunity and is shielded from personal liability, a court can still rule on title, if the adverse possession claim met all the statutory requirements before the party with sovereign immunity acquired the land.

Case reported by Sean Holland, member of the WLTA Judiciary Committee

ALTA

YES! Your Opinion Matters to Elected Officials

By Elizabeth Blosser

During the two decades I have spent working in the political arena, I have learned the combined voices of voters have the power to create change. Without a doubt, when many people start talking about the same thing, politicians listen.

People often ask me if their opinion really matters. The answer is a resounding YES. Making a difference is easier than you might think. The keys to success are conversations and connections.

Grassroots activity is simply people talking with decision makers about things that matter to them. These conversations can happen through letters, phone calls or meetings. The likelihood of positive outcomes is multiplied when co-workers, colleagues and competitors join their voices with yours.

Ultimately conversations lead to connections. At first, you will be the one initiating contact with legislators, but as time goes by you will build relationships that generate two-way communication. That means lawmakers or their staff will start reaching out to you when issues related to the title industry arise.

So – what can you do to get started? First, join the Title Action Network (TAN). A few important things to know about TAN:

- ►TAN is FREE and any title professional can join!
- ►TAN is the official grassroots network of the title industry.
- ►TAN allows you to quickly and easily contact your legislators about issues that impact your company and customers.

If you have questions about TAN or want additional information on building relationships with your federal legislators, please contact me or set aside time to meet with me during the Pacific Northwest Land Title Convention in August. See you in Suncadia!

Elizabeth Blosser recently joined the American Land Title Association as Director of Grassroots and State Government Affairs. She is a resident of Washington State and excited to work closely with the members of WLTA. Elizabeth can be reached at 202-261-0310 or eblosser@alta.org.

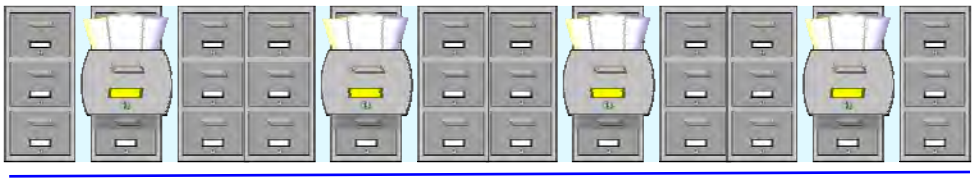
TITLE ACTION NETWORK

TAN Pizza/Donuts

Win a pizza party or donuts when you sign up your whole office for TAN (www.titleactionnetwork.com). Contact Elizabeth Blosser at eblosser@alta.org for more details.

Joining TAN takes two minutes. Visit www.titleactionnetwork.com to sign up today.

Washington Land Title Association
http://washingtonlandtitle.com
PO Box 328, Lynnwood, WA 98046 (mail)
6817 208th St SW, #328, Lynnwood, WA 98036 (deliveries)
Contact: George Peters
206-437-5869 (Mobile)
206-260-4731 (Fax)
execdirector@washingtonlandtitle.com



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