Washington Land Title Association

For Land's Sake

Issue No. 14

August 2021

President's Message

Paul Hofmann

Several years ago, I was chatting with the then Vice President of the WLTA Sean Holland, at an ALTA One convention and I asked him a question, the same question that I have asked many of you who I have known over the years: "What do you foresee happening in the real estate market in the next couple of years or so?" At the time Sean's answer really struck me because, first and foremost, it solidified how cool he really is. And second, it was incredibly succinct and to the point. His answer: "Winter is coming." At the time, we were chatting about what we saw as the inevitable retraction of the real estate market based on years of growth and the natural cycle of things. Unfortunately, he was correct and incorrect all at the same time.

As I end my virtual Presidency, all I can say is that "winter" has been a very long season, for reasons none of us would have likely predicted. I have not seen any of you in person and that for me, an extrovert who loves the interaction and collaboration with people, feels a little strange. As I reflect though, it seems we have all connected in a different and sometimes a more personal way. I have seen hair and beards grow out, including my own, in folks that have been buttoned up shirt and tie people for as long as I have known them. I have virtually met people's cats. I have seen people's personal artwork and style. And I've heard and seen the personal struggles of our colleagues through this "winter" season that has brought us professionally more business than we could oftentimes handle, fighting for staff, not knowing how to do business development/budget planning/forecasting, governmental changes in direction daily, regulatory winds changing, political upheaval, social unrest, personal stress, and, and, and… That "Winter is coming" prediction frankly looks like an understatement in hindsight.

So, with all of that going on around us, what did we accomplish this year? More that I could have imagined!

First, let me thank everyone who participated in our board meetings, especially those who are new and are participating on the board for the first time. I know we were all getting tired of long Zoom events, but the upside of Zoom is that it has allowed people from other parts of the state, who could not have come to Seattle for a meeting, to participate and become more active. This is a huge win for our industry and association, and I am looking forward to more new faces. I believe that this "winter" season and corresponding technological adoptions is going to allow our association to more forward in a hybrid fashion that will make us more inclusive of our rural agents and therefore stronger.

The real work of the Association this year was done by the Legislative Committee. This group worked as a team, outside of their day-to-day duties, to track so many bills, spending countless hours reading proposed legislation and working hand in hand with our new lobbyist to make sure that our interests were well represented. My sincerest thanks to all of you!

This year we also successfully renegotiated all our contracts for venues so that our Association remained financially strong. I cannot thank George enough for spearheading this with the various locations and vendors. The great news is that, barring another unexpected shift in the world, we are going to get to do our education seminars in both Eastern and Western Washington and next summer we will be back to an in-person convention.

As we are entering "spring" and I prepare to hand the baton to Chris Rollins I am honored to have had my virtual Presidency and I must exit in typical Paul fashion with a song: "What a long Strange Trip it's been." Peace.

Inside This Issue	

THE WLTA TODAY

George Peters, Executive Director

The title industry has been through a memorable time, unlike anything before. Faced with challenges that could not have been imagined until they actually arose, our members have risen to more than meet them. The COVID-19 pandemic affected every facet of life, but the hurdles facing those buying, selling and refinancing real property in the end presented opportunities to continue to provide vital services in real estate transactions. The officers, Board members and Committees of the Washington Land Title Association were able to still contribute to the needs of our organization when faced with meeting additional needs of their customers and staff.

The WLTA was again able to postpone planned events, including it annual educational seminars, without incurring additional financial obligations. The next year, particularly the spring and summer of 2022, will be especially busy, as we will finally be able to have seminars in Lynnwood and Spokane. And the tri-state Convention for Washington, Oregon and Idaho will finally happen, at Semiahmoo Resort in Blaine, Washington. These will be opportunities to not only keep up with events and developments on both the title and escrow fronts, but the chance to again meet and mingle with colleagues. The energy and vitality of live events can be difficult to duplicate in the virtual world.

Election of Officers

Without the annual member meeting that usually occurs at the convention, the WLTA again conducted the election its officers for the coming year by emailed ballots, voted on by the agent and underwriter members. The bylaws had previously been amended to allow such voting.

The officers for the 2020-2021 year are:

Chris Rollins
President

Meri Hamre
Vice President

Congratulations to Chris and Meri! A challenging year lies ahead, and the WLTA is lucky to have such leadership. They, along with the Board members and Committee chairs who work throughout the year furthering the cause of the title industry, will be up to the task.

The transition of leadership will take place during a virtual Board meeting in August, and Paul Hofmann will receive a plaque honoring his service this past year.

Normally, WLTA members are able to express gratitude and appreciation in person at the annual convention for the work of all officers, directors, committees and members who contributed to the Association's success over the previous year. Under the circumstances, take a minute to do so – feel free to let them know how you feel.

Paul Hofmann, President
Chris Rollins, Vice President

The WLTA continues to strive to provide support to its members, and the membership can in turn be thankful for the contributions by many. Members are always encouraged to reach out to the WLTA's leadership and let them know how they are doing and discuss issues that face the Association. The current officers, directors and committee chairs are shown on the WLTA website along with contact information.

SEMINARS

WLTA Education Seminars & LPO Information

By Gerry Guerin, Chair

Education Committee

Due to COVID 19 the annual WLTA education seminars have been moved to spring 2022. The current schedule is:

Saturday, April 23,2022 – Lynnwood Convention Center

Saturday, May 21, 2022 – Spokane Convention Center

FOR LPOs: The WSBA has changed the MCLE requirements for attorneys and LPOs – if your reporting year is 2020 (2018-2020 reporting period) you have until December 31, 2021, to earn credits and until February 1, 2022 to report them.

The next reporting period will be shortened to two years (2022-2023).

See https://www.wsba.org/for-legal-professionals/mcle

The WSBA is offering a couple of options for free CLE that are available to all licensees:

WSBA free and Low cost credit options available here or log into your MCLE Credit Account:

https://www.wsba.org/for-legal-professionals/member-support/covid-19

Mark your calendars, and look, for registration information after the first of the year.

The Escrow Association of Washington, Inc. Presents
ESCROWLYMPICS - CHALLENGE YOURSELF!
2021 Educational Conference
September 18, 2021
http://www.e-a-w.org/event/2021-education-conference

WLTA SPOTLIGHT ON NEWEST MEMBERS

Deana Slater — *Membership Committee*

New members joined the Washington Land Title Association in the last year, and more inquiries have been received. You can find all our members in our directories located at http://washingtonlandtitle.com/.

Title Alliance of Puget Sound
Title Alliance Northwest
Washington Title and Escrow

WHO WE ARE

The Washington Land Title Association (WLTA) is a non-profit association composed of trade professionals that promote high quality land title evidencing and title insurance services in the State of Washington. Formed in 1905, membership is composed of national title insurance underwriters, independent agents and professional affiliate members and vendors from related fields of endeavor. The WLTA is governed by an Executive Committee from its membership, including the elected positions of President and Vice President, the Immediate Past President, and Chairs of the Agents and Legislative Committees.

We actively promote sound and ethical business practices; provide educational opportunities for our membership in all areas of title evidencing and insurance and facilitate effective communication within our industry, and with our affiliated real estate professionals such as Realtors®, the escrow industry, attorneys, surveyors and the lending community, and the Office of the Insurance Commissioner.

Of special importance is the work of our Legislative Committee, which continuously monitors the legislative process in order to propose, promote and support legislation that meets the high professional standards of the Association, and to actively oppose legislation that does not. Our political action committee, TITAC, supports legislators who work for these same standards. The WLTA also encourages participation in the American Land Title Association's Title Action Network (TAN, **http://www.titleactionnetwork.com/**).

The WLTA supports its members and other real estate professionals by offering annual title and escrow educational seminars, which provide superior opportunities to learn from the most qualified title, escrow and legal professionals in the industry. These seminars also provide regular and liability credits for Limited Practice Officers. In addition, it maintains an Examiners Manual exclusively for its members.

Members also participate in other active committees, including those reporting on judicial cases, following Indian affairs and maintaining liaison with the Office of the Insurance Commissioner.

The exclusive rights given to members include:

- the right to access and use the Examiners Manual
- communication regarding proposed legislation during the legislative session
- the right to be listed in the WLTA directory
- the right to receive the Newsletter ***For Land's Sake***
- the right to attend seminars and the convention at reduced member rates
- an opportunity to network with other industry professionals to discuss industry topics and future changes
- an opportunity for your staff to earn the newest title designation in Washington, as a **Washington Title Professional**.

LEGISLATIVE REPORT

2021 Legislative Session

By Sean Holland and JP Kissling, Legislative Committee Co-Chairs

The past year brought many changes to the Legislative Committee. And then the 2021 legislative session brought a whirlwind of activity. Thanks to the many people who stepped up and contributed, we more than met the challenge.

The WLTA did not sponsor any bills this session. We supported four bills: HB 1335 – racially restrictive covenants, SB 5019 – recording standards commission, SB 5062 – management, oversight and use of data, and HB 1376 – registered land. The first two passed. The other two didn't. We did not oppose any bills. Members of the committee screened and tracked a grand total of 69 bills that had potential to affect the WLTA's members.

HB 1335 – Racially Restrictive Covenants – Passed

This bill pertains to review of recorded documents with unlawful racial restrictions and notification to property owners. As originally drafted, it required counties to review existing recorded covenants and deed restrictions to identify unlawful restrictions based on race or other protected class, and to notify current property owners of the restrictions and provide information on how to remove them. The bill was amended multiple times. The final version will have the University of Washington and Eastern Washington University reviewing auditor records to find illegal covenants, amend the seller's disclosure form required for residential sales, and provide a mechanism for revising the public records if a court judgment is entered striking an illegal covenant. The last aspect caused the greatest concern. One version of the bill would have authorized the removal of an entire record containing an illegal covenant, "if feasible." There was no guidance as whether "if feasible" meant simply "if technically possible." We actively engaged with the county auditors, realtors, and legislators to support the bill in general and to support an amendment that removed the requirement for redaction or removal of a document containing an illegal covenant upon entry of a judgment. The *May v. Spokane County* case may overturn the statutory process. The property owner in that case is seeking redaction of the original record. The Court of Appeals ruled against him during the session, but the Washington Supreme Court accepted his petition for review on June 30.

SB 5019 – Recording Standards Commission – Passed

The bill takes the existing commission set up under the authority of the Secretary of State to deal with electronic recording issues and adds the mission of creating recording standards for all 39 counties. We supported this bill because the consistency it will promote in the recording process and fees should result in fewer rejections by county recording staff. A majority of the commission will consist of county auditors or staff, with representation of other groups whose work involves the land title records. We anticipate that the WLTA will have two representatives on the commission, one for agents and the other for underwriters.

SB 5602 – Management, Oversight, and Use of Data – Did not Pass

For the last three sessions multiple bills have been introduced relating to data privacy. None

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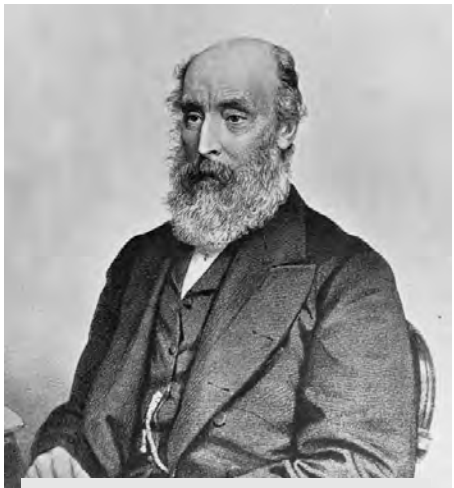
have passed. SB 5062 would have provided for an extensive framework for management of personal data acquired by Washington businesses. We supported SB 5062 because the requirements it established would have avoided imposing new burdens on the land title industry. The bill would not have applied to data obtained during the closing process because that data is already subject to the federal Gramm-Leach-Bliley Act. The bill also excluded "publicly available information," i.e., auditor and court records, from the definition of the "personal data" that would be regulated. Our support for the bill emphasized the importance of maintaining these exemptions. The bill failed because the House has consistently supported more aggressive data protection measures than the Senate has passed. For example, SB 5062 provides for enforcement by the Washington Attorney General and does not allow for private right of action. Privacy advocates have generally been successful in getting the House to favor a private right of action. This issue is not going away. We fully expect to see new bills introduced in the 2022 session.

HB 1376 – Registered Land – Did not Pass

This bill would have terminated use of the Torrens system in Washington. Only a few thousand properties in a handful of Washington counties have their records maintained as registered land. Maintaining competing systems of making a public record of land titles serves no valid interest. After former version of the bill failed to advance out of committee in the 2018 session, we were extremely hopeful when this bill passed the House 83-14 and received a unanimous recommendation for approval by the Senate committee. Unfortunately, it did not obtain a floor vote in the Senate before the session cutoff. We hope to see a similar bill back next year.



Sir Robert Richard Torrens

The four bills already discussed occupied the bulk of the Legislative Committee's efforts during the session. The following five bills passed and are important to the WLTA's members.

HB 1277 – $100 Recording Surcharge to Fund Eviction Prevention and Housing Stability – Passed

Beginning July 26 this bill adds $100 to the recording fee for most documents to fund affordable housing and eviction prevention programs. Certain documents are exempt from the surcharge, including assignments of deeds of previously recorded deeds of trust, death certificates, and "documents otherwise exempted from a recording fee or additional surcharges under state law." The WLTA did not weigh in on this bill. Given the makeup of the legislature and the current level of concern with homelessness, it seemed inevitable the bill would pass. Years ago the county auditors opposed a recording fee surcharge bill that funded programs to alleviate homelessness. That bill passed anyway and the auditors reported lasting damage to their effectiveness as advocates. Finally, in recent years the Legislative Committee has discussed possible ways to advance predictable recording fees with the auditors. An additional fee is not desirable, but a uniform increase will not hinder future efforts to advance an overall fixed fee for recording.

SB 5024 – Reducing Barriers to Condominium Construction – Passed

This bill amended sections of Title 64 RCW, the Real Property and Conveyances statute. It directly affects title insurance industry escrow functions by modifying the law on using escrowed funds for condominium construction. Essentially it provides that escrowed funds could be released if the builder provides a bond in favor of the buyer. It also requires that the purchase and sale agreement include the option for a bond. We requested an amendment while the bill was pending in

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the House that would relieve escrow holders from any obligation to monitor spending of the funds and from liability to a buyer for a release of funds in compliance with the statute. The House adopted the amendment and the Senate concurred.

SB 5096 – Excise Tax on Capital Gains – Passed

This bill imposes an excise tax on capital gains over $250,000. We were concerned that the bill could be read as applying to 1031 exchanges. The WLTA offered a clarifying amendment to subsection 1(4) to incorporate guidance from the Office of Financial Management. The proposed amendment would have clarified that the tax imposed by SB 5096 will not apply to like-kind exchanges that are exempt from federal taxation under Section 1031 of the Internal Revenue Code. The amendment was not adopted, but a different section of the bill was changed to provide that the tax would "not apply to the sale or exchange of…all real estate."

SB 5355 – Wage Earner Liens – Passed

The bill allows employees and former employees to file a lien for disputed or unpaid wages against a business owner's real property. Liens may also be filed against any property on which the employee performed maintenance or landscaping work, regardless of who owns the property. The WLTA was significantly involved in the reworking of this bill in the 2020 session. In 2020 we focused on the lien attachment and priority provisions to make them more consistent with the mechanic's lien statutes. We were also able to get the priority date set as of

the date of recordation, a vast improvement over the mechanic's lien statutes and the original provision for priority over all recorded instruments in the 2020 bill. The changes that we agreed upon with worker advocates in 2020 were retained in the 2021 version.

SB 5408 – Homestead Exemption – Passed

The main effect of this bill was to provide for a major increase in the homestead exemption in many parts of the state. The prior law had a uniform exemption of $125,000. This bill changes that to the greater of $125,000 or the median sale price of a single-family home in a particular county in the prior calendar year. In King County the new homestead exemption is in excess of $700,000. The WLTA was concerned with the provisions in the bill as introduced that included a "dependent" as a party who benefits from the homestead statute. "Dependent" was not defined in the original bill. We were also concerned with how the bill might affect the requirement in existing law that non-titled spouses join in conveyance documents affecting homestead property. We did not know if a court might impose a requirement that dependents also join in executing conveyances. We suggested amendments clarifying that the protections for dependents did not impose new execution requirements which were incorporated into the final bill.

Your Legislative Committee in Action

A major challenge for the Legislative Committee is simply identifying bills that might affect the WLTA's members and then analyzing those bills to see which ones require action. Megan Powell deserves a huge amount of the credit for this year's success. She organized a formal process to screen new bill filings, assign bills for review, and to track them throughout the session. The following members of the committee participated in screening and reviewing bills: Jim Blair, Dwight Bickel, Lindsy Doucette, James Gailbraith, Gerry Guerin, Lauren Humphreys, Gary Kissling, Dan MacMillan, Scott Meyer, George Peters, Mauren Pfaff, Erin Scheckler, Erin Stines,

(Continued on page 8)

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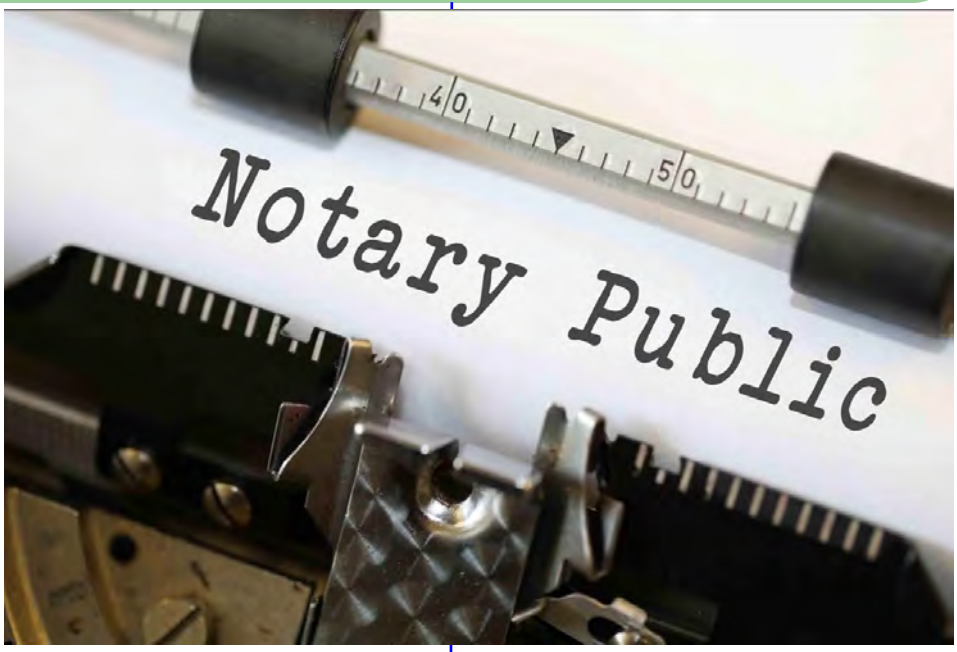
Michelle Taylor, Shawn Toor, and Craig Trummel. This level of contribution was unprecedented. Without the formal process that Megan set up and the work of so many reviewers, it's hard to see how we could have identified the 69 bills out of the hundreds that were introduced and taken effective action. Thank you to everyone who was involved.

This session was the WLTA's first with Carrie Tellefson as our lobbyist. Her knowledge and experience proved invaluable. Events happened rapidly with many of the bills we were tracking. Carrie was always on top of developments and ready to assist committee members and engage with legislators. The amendments we obtained to SB 5024 and SB 5408 were the direct result of Carrie contacting individual key legislators and making the case or setting up phone calls for members of the Legislative Committee to make the case. The WLTA is extremely fortunate to have Carrie on our side. We look forward to working with her on the many challenges we will be facing in the future.

The Legislative Committee was also actively involved on the development of regulations for remote online notarization by the Washington Department of Licensing. The WAC provisions adopted on an emergency basis in March 2020 included excellent sections on identity proofing, communication technology, and retention of audio-visual records. The DOL initially proposed making the provisional rules permanent. But in response to some comments the DOL received, it gutted these provisions. Had the interim version of the rules been finalized, the security of Washington's RON process would have been undermined. The potential for identity theft and financial abuse of the elderly would have increased. The Legislative Committee raised concerns over the proposed rules. To its great credit, the DOL was willing to listen and reconsider. It ultimately restored the provisions it had removed and they were included in the new regulations formally adopted in March.



This report would not be complete without thanking the former Agent co-chair, Bill Ronhaar. Bill served as co-chair for the past three plus years until stepping down in December. The WLTA owes Bill a great debt for his service on the Legislative Committee. The extent of his dedication can be summed up by two numbers: 105 and 254. Those are the mile markers for the I-5 on-ramps and exits between Olympia and Bellingham. Every trip to Olympia was hundreds of miles and many hours, but Bill was always ready to go to testify, meet with a legislator, or talk to the folks at DOL. When the legislature was in session, he was the first set of eyes on every single bill that dropped. Thanks, Bill. You have truly made a difference for the WLTA.

JUDICIARY REPORT

Ashley Callahan, Judiciary Committee Chair

RAILS TO TRAILS EASEMENT WIDTH

***Neighbors, et al. v. King County*, 15 Wash.App.2d 271 (2020)**

King County purchased a 100-foot-wide railroad corridor along Lake Sammamish from BNSF Railway in 1998 and converted it to a public trail. Abutting landowners (plaintiffs) filed suit asserting that the corridor was only as wide as the railroad tracks, ties, and ballasts (about 12 feet) and, even if the corridor was 100 feet wide, the plaintiffs owned a portion of the land based on adverse possession. The trial court granted King County's motion for summary judgment and the appellate court affirmed.

The appellate court held that the government surveys from 1917, 1930, 1940, and 1998, which showed that the corridor was 100-feet, constituted presumptive evidence of the width of the corridor. The court further held that King County was immune to plaintiffs' adverse possession claims under RCW 7.28.090. For claims that would have ripened before 1998 (when BNSF Railway owned the land), the court held that they were preempted by the Interstate Commerce Commission Termination Act. Finally, for plaintiffs' claims that were not barred as set forth above, the adverse possession claim(s) would still fail. King County had maintained the corridor since 1998 and therefore adversely possessed any such land back.

Summary by Ashley Callahan

EASEMENT MAINTENANCE

Hurlbut v. Crines, et al., 14 Wash.App.2d 660 (2020)

In 2002, Hurlbut granted an easement to upland owners for access to Lake Whatcom. The Hurlbuts did not collect assessments for easement maintenance the first 10 years but then decided to start collecting. In 2015, the Hurlbuts sought to terminate the easement based on the grantees' actions. The trial court allowed termination based on failure to pay assessments and made the defendants responsible for unassessed maintenance fees. The appellate court reversed stating that the plain language of the easement did not provide for termination if the grantee fails to pay an assessment or for payment if the maintenance fees were not assessed.

Summary by Ashley Callahan

LEASE RENEWAL

Borton & Sons, Inc. v. Burbank Properties, 196 Wash.2d 199 (2020)

The Supreme Court affirmed the appellate court's ruling denying Burbank Properties an equitable grace period to renew its lease. Loss of its annual hay crop was not considered loss of a "valuable improvement" resulting in an inequitable forfeiture. *See*, 2020 Annual Report by Judiciary Committee for further case review.

Summary by Ashley Callahan

Members of the Judiciary Committee are Ashley Callahan, Chair, and Erin Stines, Craig Trummel, Shawn Elpel & Sean Holland

LIS PENDENS

***Guardado v. Taylor*, 2021 WL 1985442 (May 18, 2021), Unpublished Opinion**

Otto and Diana Guardado divorced and the property with the house was awarded to Otto. Otto failed to remove Diana from the mortgage and, because it was damaging her credit, Diana took Otto to court. The trial court modified the dissolution decree and ordered Otto to sell the property. Otto disputed the order. He recorded a lis pendens on Oct. 10th

but did not post a supersedeas bond to stay the sale.

Meanwhile, Mark and Michelle Taylor were interested in purchasing the property. The title report noted the pending action and the lis pendens. Diana responded to Otto's lis pendens by filing a motion for contempt. Believing that he could go to jail, Otto signed a release of lis pendens on Nov. 16th. On Nov. 17th, the court-appointed administrator signed the statutory warranty deed and on November 18th it was recorded. The release of lis pendens recorded immediately thereafter.

The appellate court reversed and vacated the trial court's order modifying the dissolution decree to compel the sale of the property. Otto filed a separate complaint against the Taylors for restitution and unjust enrichment. The Taylors asserted that they were bona fide purchasers, that there was no lis pendens on the property at the time of purchase, and that Otto failed to post a bond to stay the sale. The trial court certified the question of whether the Taylors were bona fide purchasers to the appellate

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(Continued from page 9)
court.

Actual knowledge of Otto's appeal does not defeat BFP status. The appellate court held that the trial court was entitled to enforce its order requiring the sale of the property while Otto's appeal was pending because Otto failed to post a supersedeas bond to stay the order. Unless the Taylors knew that the order to sell property was obtained by fraud (no evidence of this) the fact that they had actual knowledge of Otto's appeal prior to purchase did not prevent them from being bona fide purchasers. The Taylors were entitled to rely on a court order that had not been stayed.

Lis Pendens defeats BFP status. Otto did not post a bond to stay the sale, but he did record a lis pendens on Oct.10th in an attempt to affect the outcome after the sale. The appellate court noted the lis pendens is effective as of the time of recording until the time the release or cancellation is recorded. In other words, the release of a lis pendens is evidenced by its recording, not execution. Therefore, when the Taylors purchased the property and the deed was executed on Nov. 17th, the lis pendens, while executed on Nov. 16th, had not been released because it was not recorded until Nov. 18th. Because the lis pendens was effective at the time the sale was executed on Nov. 17th, the Taylors were not bona fide purchasers and would be subject to the trial court's authority regarding efforts "…to restore to [Otto] any property taken from [him], the value of property, or… provide restitution."

This case is a good reminder about the risks of insuring property when a lis pendens is recorded.

Summary by Ashley Callahan

CONDO ASSESSMENT PRIORITY

***Diaz v. Bank of America*, 16 Wash.App.2d 341 481 P.3d 557 (2021)**

Diaz appeals an adverse summary judgment in a quiet title action. Diaz bought the subject property at a Sheriff Sale for unpaid homeowner association dues. Diaz believed the record lender had been foreclosed out by the sale. Lender issued a Notice of Default to Diaz and Diaz filed the action. Lender prevailed on summary judgment at trial, showing it preserved the priority of its lien over the association lien by compliance with RCW 64.34.364(3). Diaz appealed the dismissal to Division 1 challenging whether the payment met the statutory requirements along with other errors.

The foreclosed condo owner purchased the property in 2007 and lender herein provided the purchase money mortgage in the 2007 transaction. The association initiated judicial foreclosure proceedings to recover the unpaid dues in 2012, naming lender as an additional defendant. Initially, lender suffered a default judgment for failing to appear, but in January 2013, Lender paid 6 months of overdue dues and obtained, with the association's consent, an order declaring lender's lien superior to the association lien being foreclosed. Lender was dismissed from the association lien foreclosure action believing its lien priority preserved. Notably, the court did not vacate the initial default order against lender. Subsequently, the trial court issued a default judgment and decree of foreclosure against property owner in January of 2013. The association attempted to collect its judgment, but was unable. In November of 2015, an order of sale was obtained and a Sheriff Sale was scheduled for January 15, 2016, three years after lender paid 6 months of dues.

Diaz was the successful bidder at the 2016 sheriff sale for the association lien, bidding $17,571 for the property. In 2017, lender-initiated foreclosure proceedings against Diaz, asserting first lien priority. Diaz initiated the subject quiet title action.

On appeal, Diaz argued lender cannot maintain a senior lien interest under 64.34.364(3) unless (1) assessments are owed for the six months immediately preceding the foreclosure sale, *and* (2) the lender pays those assessments AFTER they become due. Diaz pointed out the lender's payment in 2013 was well before the 2016 sale and the actual sale date had not been scheduled when lender paid the equivalent of six months of assessments.

The applicable section states: "(3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments …which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association …." [*emphasis added*].

Diaz argues a lender must pay the six months of assessments after the assessments became due and immediately before the sheriff's sale, relying on "immediately preceding the date of sheriff's sale" to support his argument of when lender payment must be made. The court, after summarizing statutory interpretation rules, held the phrase in question is *which* six month period is covered by the super priority lien created by the Act; not *when* the sum must be paid. The court singled out "which would have become due" as a "conditional or subjective mood of the future tense verb phrase 'will become due'", stating the legislature meant a lender could preserve its lien position by prepaying six months of assessments that would become due, or would have been owed to the association.

Diaz argued a sheriff sale must be scheduled prior to the lender making the priority saving payment. The court disagreed. Citing Washington Supreme Court ruling in *BAC Home Loans Servicing LP v Fulbright* (328 P.3d 895(2014), the association lawsuit to foreclose established the super priority of the association lien, stems from the recording of the condo declaration, not a sheriff sale. Once delinquent, the association has priority over subsequent liens, unless a creditor complies with RCW 64.34 to subordinate the association lien.

Diaz argues he was without notice of the subordination of the association lien, claiming he was entitled to bona fide purchaser ("BFP") status, claiming no document was recorded indicating the lender's preserved priority. The court stated "[T]he bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in purchased real property has superior interest in that property." "In considering whether a person is a bona fide purchaser, we ask (1) whether the surrounding events created a duty of inquiry, and if so, (2) whether the purchaser satisfied that duty. *Albice*, 174 Wn.2d at 573. In answering the second question, the court considers the purchaser's knowledge and experience with real estate. *Id*." The court held Diaz was a sophisticated investor who had inquiry notice to investigate whether the property was encumbered by a superior mortgage lien. Addi-

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tionally, the court confirmed court records associated with the judicial foreclosure are public records that can impart notice; recording an instrument to show preserved priority in the county record was not necessary, citing:

> "Under RCW 64.34.364(2) and (3), the Association has a single lien against a condominium for unpaid assessments, six months of which is prior to any mortgage, and the remaining portion of which has no priority over any mortgage recorded before the date on which the assessments became delinquent. … By paying the six month "super priority" portion of this lien, [lender] was not seeking a "release" of the Association's lien or seeking to have the Association subordinate its lien to that of the bank. By prepaying assessments the owner would otherwise be responsible for, [lender] merely reduced the total monetary value of the Association's lien and retained its priority status. Thus, the payment was not a "conveyance" within the meaning of RCW 65.08.060(3) and it was not required to be recorded."

Diaz was also unable to prevail on a Consumer Protection Act. An entity providing non-judicial foreclosure services for a lender, is exempt from registering as a collection action under the Washington Collection Agency Act (RCW Chapter 19.16). The court clarified the term "Trust Companies" in RCW 19.16.100(5)(c) included entities providing non-judicial trustee services.

Summary by Craig Trummel

HOA DUES—STATUTE OF LIMITATIONS

***Kiona Park Estates v. Dehls, et al.*– 2021 WL 2817583 (July 7, 2021)**

Homeowner Dehls appealed a trial court judgment finding him liable for unpaid homeowners association dues from 2003 – 2018. The appellate court held that in the absence of a statement in RCW 64.38 governing homeowners' associations, the applicable limitations period for lien enforcement is six years. The governing documents, often called Declarations, are written contracts which govern homeowner association dues, collection, and the right to lien. Because a lawsuit over the failure to pay dues and the right to collect is a lawsuit to enforce the Declarations (a written contract), the six-year statute of limitation period applies. The trial court's judgment obligating Dehls to pay for 2002-2012 dues was reversed.

Summary by Ashley Callahan

ADVERSE POSSESSION

***Pokorny v Osborn*, 15 Wash.App.2d 1045 (2020), Unpublished Opinion**

This is a Division 2 case from December 2020. It is of interest because it contains a thorough discussion of adverse possession. This was an appeal from a trial court's order granting a motion for summary judgment on a number of claims – the primary claim centering on adverse possession. Appellate court affirmed the trial court decision. This case offers a common scenario – new buyer obtains a survey and disputes the boundary line. New buyer spends five years litigating and is charged with attorney fees, in the end highlighting the risks of attempting to move historic boundaries through litigation.

In 2011 the Porkorneys purchased a vacation residence at a foreclosure. The Porkorneys and their neighbors, the Osborns, believed the boundary line ran down the length of an old fence, through the vegetation, and toward the street. The Osborns, cut down trees and shrubbery that formed a hedge along a shared boundary line. After the trees and shrubs forming the "privacy barrier" were cut, the Pokornys got a survey which revealed that the Porkorney's lot extended several feet westerly of the fence line, and trees and shrubs cut by the Osborns.

In 2016 the Pokornys filed a quiet title action seeking to establish ownership of the disputed strip. Osborns filed counterclaims seeking a declaratory judgment and to quiet title to the disputed strip in themselves. Litigation entailed an extensive review of historical use of the lots. Ultimately, the court ruled on summary judgment in favor of the Osborns, free and clear of any claim to the same by the Pokornys.

The Pokornys appealed and lost. First, the Porkornys argued that the superior court did not have jurisdiction to rule in favor of the Osborns on their adverse possession claim because in so doing, the superior court altered the boundary lines in their subdivision contrary to RCW 58.17.215, which requires an individual seeking to alter a subdivision to first submit an application to a legislative authority. ***The court disagreed and ruled RCW 58.17.215 does not apply to this case and, therefore, does not divest the superior court of authority to decide the adverse possession claim because the adverse possession claim involved a boundary line adjustment between two platted lots and did not result in the creation of additional lots.***

Second, the Pokornys claim that the trial court erred in granting SJ in favor of the Osborns because genuine issues of material fact exist as to several of the elements of adverse possession. Pokornys argue Osborns' use and their predecessors' use was not hostile, actual and uninterrupted, or notorious for the statutory period. ***The court disagreed and provides a lengthy analysis and list of detailed facts centering on historical use supporting the Osborn's adverse possession claim.***

Third, to the extent the Porkornys disliked how the court resolved the boundary line, ***the court responded by citing to WA case law that entitles the court to delineate a boundary as is reasonably necessary to settle boundary disputes.*** Citing *Lloyd v. Montecucco*, 83 Wn. App. 846, *853–54, 924 P.2d 927 (1996)*.

Summary by Erin Stines

WORK COVERED BY LIEN CLAIM

***Brashear Electric V. Norcal Properties, LLC*, 16 Wash.App.2d 741 (2021)**

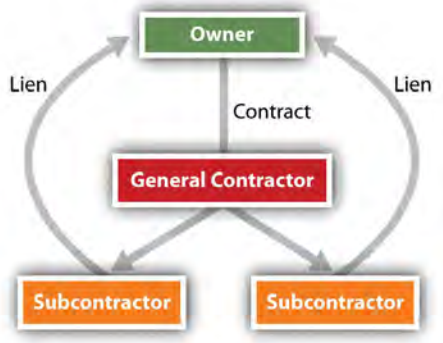
On March 11, 2021, the Washington Court of Appeals held the definition of Repairing to exclude a contractor's correction of its own work and performing warranty work does not extend the 90 days to record a claim of lien. The ruling upheld the Summary Judgment ruling by the trial court in favor of the property owner.

The controversy arose from a com-

(Continued on page 12)

(Continued from page 11)
mon commercial construction arrangement. Landowner contracts with, Vandervert, a General Contractor to construct two commercial buildings on adjacent properties. General Contractor, hires multiple subcontractors to construct the buildings. Landowner secured warranty from Vandervert for one year after construction and Vandervert apparently secured a one year warranty from Brashear Electric, a subcontractor on both building projects.

The facts set forth state Brashear completed building A on June 28, 2017 and building B on September 29, 2017. Brashear sent its final invoice for building A on August 17, 2017 and for building B on October 26, 2017. Landowner fully paid Verdervert, but the opinion does not indicate when.



On January 8, 2018, Vandervert directed Brashear to address an air conditioning unit issue on building A and a light fixture issue at building B. On January 30, 2018 and on January 31, 2018, Brashear filed Notices of Claim of Lien against the properties, claiming over $49,000 was due Brashear. On February 2, 2018, Vandervert filed for Receivership.

Brashear argued both Claims of Lien were filed within the 90 day lien period set by statute, because RCW 60.04.091 is ambiguous and warranty work falls within meaning of Labor and sets the clock to January 8, 2018 rather than the previous completion dates, 216 and 124 days prior to the recording of the claim of liens.

The court first addressed whether strict or liberal construction of the Statute applied. The court, citing *Lumberman's of Washington* (949 P.2d 382 (1997)), acknowledged that while RCW 60.04.900 states the lien statutes are to be liberally construed, because mechanic's liens are creatures of statute, the statute must be strictly construed to determine whether a lien attaches. The 2011 *Williams v Athletic Field* case (261 P.3d 109) added that strict construction should be applied to (and limited to) whether persons or services came within the statute's protection. Once the door is open, then liberal construction analysis would apply.

The court framed the question before the court as, "Does Warranty work come within the protection of the ML statute?" "We therefore strictly construe the pertinent statutes to decide this question." Statute says "every person claiming a lien . . . shall file … not later than ninety (90) days after the person has ceased to furnish labor, professional services, materials or equipment…." While the court acknowledged the actions of Brashear on the property as "labor" looking at the dictionary definition of "repair" and invoking Noscitur a Sociis ("it is known from its associates") to analyze "constructing, altering, repairing, remodeling …" it found warranty work was not protected by the statute. "They are not hired and paid to correct their own non-conforming work. Rather, their own work is warrantied and they are contractually obligated to correct it at no cost to the owner." Lastly, the court invoked the rule that a statute is construed to effect its legislative purpose and avoid absurd or strained consequences. "A lien is intended to secure payment for money owed. A contractor is not paid to correct its own nonconforming work. Warranty work, therefore, is not lienable."

Summary by Craig Trummel

RESPA & ATTORNEY'S FEEES

***Brooks v. Nord*, 480 P.3d 1167 (2021)**

The court here took the opportunity to crystalize the rule that when a party prevails on a tort action, which is based on a REPSA containing an attorney fee provision, the prevailing party is entitled to attorney fees.

Buyer here filed a lawsuit alleging that the seller misrepresented the property's condition in the Form 17. There was some dry rot the buyer was unhappy about. The seller ultimately prevailed, proving the buyer was aware of the problem before he purchased, and seller requested the court award him attorney's fees. That request was denied. The trial court denied the request and held that the REPSA's attorney fee provision did not apply because the form that contained alleged misrepresentations was not actually part of parties' agreement.

On appeal, the Court of Appeals, Division Two disagreed and held that the seller was entitled to recover attorney fees pursuant to the RESPA's attorney fee provision. The court, in reaching its decision noted the general rule in Washington - attorney fees will not be awarded unless authorized by contract, statute, or recognized ground of equity. See *Clausen v. Icicle Seafoods, Inc.*, 174 Wash.2d 70, 79, n.2, 272 P.3d 827 (2012). The court then proceeds to analyze a variety of Washington contract cases which open the window to awarding fees when claims center on information disclosed on the Form 17.

The court was ultimately persuaded by *Brown v. Johnson*, 109 Wash. App. 56, 58, 34 P.3d 1233 (2001). Under *Brown*, a prevailing party "is entitled to attorney fees when the action is based on a contract containing an attorney fee provision." The test in Washington for deciding if an action is based on a contract is whether "a) the action arose out of the contract; and b) if the contract is central to the dispute."

The court, citing *Brown and Douglas v. Visser*, 173 Wash. App. 823, 826, 295 P.3d 800 (2013), further explained that when an action in tort (like this action for misrepresentation on the Form 17) is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.

Relying on well established Washington cases, the court brought the rule into focus and makes clear that in Washington when a party prevails on a tort action which is based on a REPSA containing an attorney fee provision, the prevailing party is entitled to attorney fees, even when the tort arises out of representations on a Form 17 disclosure.

Summary by Erin Stines

(Continued on page 13)

(Continued from page 12)

BANKRUPTCY & UNJUST ENRICHMENT

***In re Carolyn L. Burke*, 2019 WL 6332370, United States Bankruptcy Appellate Panel of the Ninth Circuit**

On appeal from the US Bankruptcy Court for the for the Northern District of California, the US Bankruptcy Appellate Panel of the Ninth Circuit decided in an unpublished opinion that a discharge in bankruptcy does not bar a post-petition unjust enrichment claim against a debtor.

In 2009, Carolyn L. Burke received a chapter 7 discharge. She left bankruptcy unencumbered by personal liability under a guaranty payable to Umpqua Bank. But Umpqua's guaranty-claim was secured by a lien against her home which survived discharge, and Umpqua had the right to recover payment on the guaranty from the post- petition sale of its collateral.

Eight years passed and in 2017 Ms. Burke sold her home. In error, Umpqua submitted a demand to escrow that was approximately $250,000 too low. Thus, when the sale closed, Umpqua was paid less than it was owed, and Ms. Burke is alleged to have received a windfall. Because the demand bound Umpqua as a matter of California law, Umpqua's deed of trust was reconveyed and because of Ms. Burkes' bankruptcy discharge, Umpqua could not sue Ms. Burke on the guaranty.

Umpqua was left with a singular remedy: an unjust enrichment claim. The court did not answer the ultimate question of whether unjust enrichment exists under these facts. Rather, the only question the court answered was ***whether Ms. Burke's 2009 bankruptcy discharge barred Umpqua from bringing an unjust enrichment action***. The bankruptcy court concluded that the discharge creates such a bar; on de novo review the US Bankruptcy Appellate Panel of the Ninth Circuit decided that it does not create a bar to recovery.

The court reasoned that Ms. Burke was in a financial relationship with Umpqua – by virtue of a guaranty and deed of trust. After discharge, this relationship was modified such that Ms. Burke's liability was limited to the equity available from the proceeds of her home. After the payoff error, the obligation that Umpqua sought to vindicate was one arising from common law: liability wherein a party unjustly recovers an economic benefit to the detriment of another.

In vindicating Umpqua's right to recover full payment, the court surmised that the guaranty and deed of trust are relevant only to the damage calculation and held that because California law expressly provides for an unjust enrichment cause of action for mistaken distribution of proceeds, the claim was untethered from any related contract and not barred by the discharge.

Although unpublished, this Ninth Circuit case may be cited for persuasive value. Potentially this case may be relevant in a wide variety of scenarios and specifically to cases involving insurance company loss payments wherein an unforeseen claim for unjust enrichment arises.

Summary by Erin Stines

SUCCESSION & VESTING OF HEIRS

***JP Morgan Chase Bank v. Madrona Lisa LLC*, No. 80775-7-1, Div 1.**

The Division 1 Court of Appeals for Washington reversed trial court decision and allowed exercise of redemption rights by a successor to decedent borrower who died intestate and without administration. The court provided an excellent discussion of succession and vesting of interest by heirs.

Borrower passed on April 30, 2017, survived only by parents and a brother. Borrower died intestate and no probate or administration of his estate occurred. The sole asset of the estate was a home in Everett, encumbered by a deed of trust. Lender initiated judicial foreclosure in January of 2018 and personally served borrower's brother. Service by Publication provided notice to unknown heirs and the parents.

The Sheriff sale occurred on February 15, 2019 and Vera Semenyuk purchased the property for $218,531.00, and the sale confirmed in April of 2019. In May of 2019, borrower's parents executed a QCD to Madrona Lisa, LLC, conveying redemption rights. Madrona Lisa informed the Sheriff's office of its intent

to redeem in August of 2019.

Semenyuk objected to Madrona's intent, indicating the lack of probate as fatal and, in the alternative, stating $283,472.85 was the redemption amount. Madrona Lisa submitted $222,355.29 to the Sheriff's office. The Sheriff declined to act without a court order. The trial court denied Madrona Lisa's motion to direct sheriff to issue certificate of redemption. Madrona Lisa appealed.

Semenyuk asserted the lack of probate for borrower precluded the effect of the deed from borrower's parents because without probate, the property did not pass to the parents. Engaging in a significant discussion of inheritance and probate, the court disagreed.

Starting with the statute, RCW 11.04.250, upon death, the property of the deceased immediately vests in the heirs. One might ask, then why probate? The court extensively explained the process and purpose of probate. The purpose of probate is the orderly disposition of creditor's claims to the estate and to determine the devisees; devisees being the named recipients of the deceased's estate as stated in the Will. "Administration of the estate serves to resolve any competing claims, which the heirs take their title to…" The court held the parent's affidavits, stating the deceased had no will, no wife or children, no known creditor claims were outstanding, and only the property as an asset, was sufficient to vest title in the parents, which, due to the foreclosure, was the redemption rights.

The court also addressed the purchaser's demanded redemption amount, about $60K more than was paid by Semenyuk, being fees for legal costs, a higher 8% interest and improvements. The court disagreed. The 8% applies only to successive redemptioners (RCW 6.23.040). Legal fees and improvements are not to be included, citing State ex rel. Bryant v Starwich, 229

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P. 12 (1924). Public policy prohibits a purchaser from indirectly thwarting redemption by adding costs to push the redemption price up.

In summary, for title insurers, the courts discussion of probate affirms the practice of insuring without a probate, but reminds of the risks to address.

Summary by Craig Trummel

DUTY TO DEFEND

***Safeco Insurance Co. of America v. Fidelity National Title Insurance Co.*, 2021 WL 252236 (W.D. WA Jan. 26, 2021)**

In this case, the United States District Court for the Western District of Washington held that a title insurer had no duty to defend its insured who was named in a third-party complaint alleging claims of trespass and related to a private road that was excepted in Schedule B of the title insurance policy.

Safeco provided the homeowner's insurance and Fidelity provided the title insurance for Scott and Debra Dalgleish, the insureds. Safeco filed this action against Fidelity seeking a declaratory judgment that Fidelity had a duty to defend an underlying property dispute and contribute to defense costs. The underlying property dispute involved a 20-acre parcel of land split into 4 parcels. The insureds owned the northwest parcel, the neighbors at issue owned the northeast parcel (Kenneth and Brenda Erickson), and two other neighbors (Nelsons and Jensens) owned the southwest and southeast parcels, respectively. A private road ran north-south down the middle of the 20-acre parcel.

Following a dispute over the private road, the Nelsons and Jensens sued the Ericksons. The insureds tendered the lawsuit to Fidelity claiming that the Ericksons were "hostilely taking over" their property. The Ericksons soon added the insureds to the lawsuit by way of a third-party complaint alleging claims of trespass (filling a ditch, cutting trees and removing a stake) and related to the private road.

Fidelity denied the Dalgleishes coverage based in part on the "no loss" exclusion which excludes "[d]efects, liens, encumbrances, adverse claims or other matters….resulting in no loss or damage to the insured claimant." Fidelity reasoned that if the insureds trespassed on the Ericksons' property, they would not have suffered a covered loss

or damage because the insureds did not own that property (land outside Schedule A). Alternatively, if the insureds did not trespass, no loss or damage would result from the insureds' activity on its own land. In response to Safeco's assertion that Fidelity's argument results in illusory coverage for trespass claims, the Court stated that the purpose of title insurance is to insure against defects, liens, encumbrances, or adverse claims against title, not to provide coverage for the insured's alleged intentional acts. See, *Campbell v. Ticor Title Ins. Co.*, 166 Wn. 2d 466 (2009). Fidelity also denied the Dalgleishes coverage for the private road claims because the private road was excepted in Schedule B of the policy.

Because Fidelity had no obligation to indemnify the Dalgleishes for the claims asserted against them in the Ericksons' third-party complaint, there was no duty to defend the claims, either.

Summary by Ashley Callahan

REDACTION OF RACIAL RESTRICTIONS

***May v. Spokane County*, 16 Wash.App.505, 481 P.3d 1098, (2021), review granted, 06/30/2021**

In this case the Division III of the Court of Appeals ruled that a court order striking a racially restrictive covenant from the chain of title did not require physically removing the original record or redacting it.

A homeowner in Spokane County had filed an action to strike a racially restrictive covenant from the chain of title to his property. The covenant had been recorded in the 1950s. In the 1960s Washington declared such covenants void and illegal in RCW 49.60.224. In the 1980s the legislature enacted RCW 49.60.227. That statute authorizes the court to "strike" the illegal language.

The trial court entered an order striking the illegal language. But it also denied the homeowner's request that the Spokane County Auditor be ordered to physically alter the recorded covenants. The court ruled that RCW 49.60.227 does not require the physical removal or redaction of records. The homeowner appealed.

The Court of Appeals had to decide what it means under RCW 49.60.227 to "strike" the illegal language. The court framed the issue as follows:

> Must the offending language be physically and permanently removed from existing records? Or is it sufficient that a court order declares the language stricken, thereby removing the language as a matter of law?

The court held that the statute does not require the physical alteration of land title records. It found support for its decision in the provisions that had been added to RCW 49.60.227 in 2018 that allowed for the recording of a covenant modification document. The WLTA had worked closely with the sponsor of the 2018 bill to develop the covenant modification process. The 2018 bill (the relevant portion of which is now codified as RCW 49.60.227(2) authorized the recording of a modification document that stated in part that it "strikes from the referenced original document all provisions that are void and unenforceable under law." The court noted that in the 2018 bill "the legislature intend a legal document to do the act of 'striking" discriminatory language" and as a result "there is no need for a third party to take action to

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alter public records."

The decision was released while this year's bill relating to restrictive covenants, HB 1335 was in hearings in the House. The bill was amended multiple times during the session. Just days before the decision was released, the bill had been amended, in part at the request of the Spokane homeowner's attorneys, to require physical alteration of the public records. The version that finally passed does not have that requirement.

The homeowner's petition for review was granted by the Washington Supreme Court on June 30. What remains to be seen is how the Supreme Court reconciles the homeowner's demands with the changes to the statute enacted this year. Two out of three Court of Appeals judges found that when legislature enacted RCW 49.60.227 it did not intend to require physical alteration of records. In enacting HB 1335 legislature overwhelmingly (97-1 in the House, 49-0 in Senate) opted to clarify that physical redaction or removal is not required.

Summary by Sean Holland

FORECLOSURE NOTICE

***U.S. Bank Nat'l Ass'n v. Roosild* – Ct. of Appeals, Div. II, No. 537772-9-II, 487 P.3d 212 (May 18, 2021)**

Appellant-Borrowers borrowed $227,000 from Bank of America which was secured by a Deed of Trust on property owned by the borrower located in Poulsbo, Washington. Borrower stopped making payments sometime in 2015. The promissory note was transferred to the Christiana Trust sometime in 2015. The loan servicer, BSI, provided a notice of default letter to the borrowers, which stated "BSI was acting on behalf lender, referenced the loan number and stated that the loan was in default" because the borrower "had missed 40 monthly payments and owed $475,420.69."

The note and Deed of trust was thereafter assigned to U.S. Bank who commenced an action in Kitsap County Superior Court to judicially foreclose the Deed of Trust. Borrower contested and argued that default notice was defective because "there was no evidence that Christiana Trust had an interest in the loan in May of 2015 when notice was sent, so the notice was not sent by the lender a required by the preforeclosure requirements in Section 22 of the deed of trust.

In ruling for U.S. Bank the appellate court held that:

(1) that preforeclosure notice requirements contained in a Deed of Trust applied to judicial foreclosures, not just nonjudicial foreclosure; and

(2) Substantial compliance, not strict compliance, was sufficient with the preforeclosure notice requirements contained in the Deed of Trust.

Here, the court concluded that "regardless of whether the Christiana Trust was the lender in May 2015, BSI"s demand letter substantially complied with the deed of trust's conditions precedent regarding preforeclosure notice. All of the material notice requirements were met, and U.S. bank was authorized to pursue judicial foreclosures in 2018.

Summary by Shawn Elpel

TAX FORECLOSURE

Okanogan County v. Various Parcels of Real Property, 13 Wn.App.2d 341 (2020)

This Division 3 case decided in April of 2020 centers on the issue of priority in the context of a tax foreclosure.

In 1997, Washington Mutual (WaMu) originated a loan secured by a mobile home and real property. Twenty years later, the county initiated a tax foreclosure against the property. The county published notice of the proceeding and sent notice to WaMu, but the notice was returned. The tax sale went forward despite the returned notice and occurred on December 8, 2017.

After the sale, the county was contacted by WaMu's successor in interest asserting the notice to WaMu was sent to the wrong address and so the tax foreclosure was invalid The purchaser at the tax sale contested the right to seek vacation of the sale. Litigation centered on the successor in interest's ownership of the original note and it's standing to challenge the sale. The trial court held that an affidavit filed in support of the assignment was found to be insufficient to establish standing and failed to establish the current holder of the note.

The Court of Appeals disagreed and found that the trial court had, in essence, decided the factual issues on a summary basis without compelling the county or the purchasers to make a showing that the successor in interest was not, in fact, the holder of the note. Ultimately the Court of Appeals held the trial court erred in summarily determining WaMu's successor in interest was not the holder of note and an evidentiary hearing on the matter was necessary.

The Court of Appeals further concluded that the county failed to undertake all the steps necessary to provide notice to the holder of the WaMu note. Had the notice been sent to WaMu's address of record, its successor in interest would have received notice of the tax sale. Because the notice did not satisfy statutory or constitutional requirements, the trial court was reversed.

Summary by Erin Stines

Calendar Events

Don't forget to mark your calendar for next year:
The WLTA will have two seminars in the spring of 2022 with MCLE and WTP credit hours.
April 23—Lynnwood
May 21—Spokane

Then the WLTA will host the Pacific Northwest Land Title Convention, at the Semiahmoo Resort in Blaine, Washington. Title and escrow professionals from Washington, Oregon and Idaho, as well as vendors serving the industry, will meet after a three year hiatus.
July 14-16, 2022

We want to see you there!

Native American Affairs Report

Megan Powell, Native American Affairs Committee Chair

This article provides an update to the article that appeared in the 2020 WLTA newsletter entitled The Impact of McGirt v. State of Oklahoma.

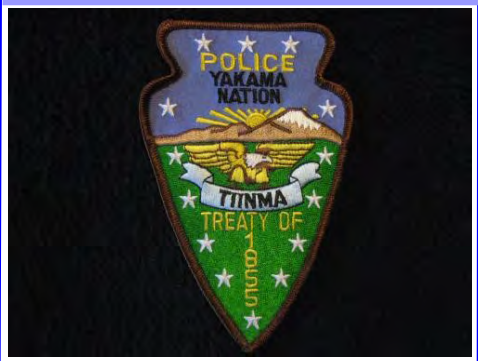
McGirt v. State of Oklahoma Latest Developments

On July 9, 2020 the Supreme Court of the United States ("SCOTUS") issued a decision in *McGirt v. State of Oklahoma* confirming that the Muscogee Reservation has never been disestablished by Congress, and therefore the reservation remains intact. Consequently, the reservation lands of the Cherokee, Chickasaw, Choctaw and Seminole Nations have also been affirmed, resulting in literal overnight awareness that the eastern half of the state of Oklahoma is Native American reservation land.

Acknowledgement of the reservations does not modify the vesting of the property, but it does give the associated tribes the opportunity to assert legislative and judicial jurisdiction over the reservation lands. This has prompted significant discussion within the title insurance industry. A change in jurisdiction requires a change in underwriting approach when issuing policies and endorsements. The *McGirt* decision motivated the ALTA Forms Committee to draft the ALTA 47 Operative Law series of endorsements and policy addendums. These documents were promulgated by ALTA in 2021 for use with 2006 policy forms when insuring inside the boundaries of a Native American reservation.

To date, *McGirt* has been cited in reservation disestablishment or diminishment cases in Washington, Wisconsin, Michigan and Minnesota.

The first Washington tribe to formally address the case is the Confederated Tribes and Bands of the Yakama Nation. In 2018 the tribe commenced litigation with Klickitat County over a 121,000-acre parcel



of land known as "Tract D". The tribe asserted that Tract D was part of their reservation, but the County disagreed. The tribe prevailed in U.S. District Court, which was affirmed by the U.S. Court of Appeals for the Ninth Circuit in June of 2021. The tribe called the appellate court's attention to the *McGirt* decision, claiming it provided a clear legal framework for determining whether Congress intended to shrink its boundaries. The County must now decide whether to appeal the decision to SCOTUS.

The *McGirt* decision and its impact continues to resonate in Oklahoma, with a flurry of recent activity summarized as follows:

- On July 16, 2021 the State of Oklahoma filed suit against the Department of the Interior ("DOI") claiming that the DOI wrongly has stripped the state of regulatory jurisdiction over surface mining on land within the boundaries of tribal reservations. This case was filed in response to a ruling from the Office of Surface Mining in May of 2021.
- On August 6, 2021 the Attorney General for the State of Oklahoma filed a petition asking the U.S. Supreme Court to overturn the *McGirt* decision, citing evidence of egregious safety consequences related to a lack of criminal jurisdiction by the state.
- On August 12, 2021 the Oklahoma Court of Criminal Appeals stated in the opinion filed in *State v. Wallace* that the *McGirt* ruling is not retroactive. Like *McGirt*, this is a criminal case, however, there are thousands of pending criminal cases seeking dismissal under *McGirt*. This case will undoubtedly go up to SCOTUS. If it is affirmed that McGirt is not retroactive in a criminal context, it may provide some comfort as to the application of *McGirt* on jurisdiction over Oklahoma reservation lands.

The title insurance industry, along with many other stakeholders, will continue to monitor the impact of McGirt on jurisdiction of land in Oklahoma, as well as its ripple effect on other reservation diminishment cases throughout the United States.

TITAC of WASHINGTON

A Political Action Committee of the Land Title Insurance Industry

WLTA Members and Title Industry Associates:

TITAC of Washington needs your help! We are the only political action committee in Washington State developed to support and ensure the priorities of local Title Industry and companies. We support individuals and efforts that are beneficial to the health and longevity of our industry, with the guidance of a new lobbyist, Carrie Tellefson, and the Legislative Committee of the Washington Land Title Association.

The chaos of 2020 impacted TITAC just as it did everyone else. We were unable to conduct any of our traditional fundraising activities that enable us to continue our efforts in the coming years. Further, with the uncertainty looming around any in person events and functions we need your support now more than ever. Our fundraising relies on your support and participation. TITAC is asking for donations to support the industry that has provided so much for us all.

TITAC is a non-profit organization that exists only through volunteers who have the same goals as you. If you are interested in supporting our cause, please reach out to myself or send funds to the address below. Any amount is appreciated and truly put to great use. Contributions can come from your company or yourself.

Sincerely,
Chairperson
Kris Weidenbach,
253-312-3606
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TITAC of Washington,
5723 NE 57th St
Seattle, WA 98105
Attn: Kris Weidenbach

TITLE ACTION NETWORK

Maureen Pfaff, Chair TAN

Title Action Network 2021

Our state has joined many others in making Remote Online Notary legal, but use of RON is still largely limited to cash transactions. Lenders are faced with a patchwork of varying state rules and no guarantee of reciprocity among states so there is limited adoption of the technology for use in transactions involving loans at this time. The best avenue for moving this technology forward will be passing the SECURE Notarization Act which will make RON legal in all 50 states with national minimum standards for its use and provide certainty for the interstate recognition of RON. This is where the power of TAN comes in.

Members of TAN have been sending messages to their members of Congress and the Senate encouraging them to sign on and support the SECURE Notarization Act. If you are a member of TAN, please be on the lookout for calls to action and take a couple of minutes to respond. If you aren't a member of TAN or haven't seen any of these calls to action please read on to learn how to join or renew your membership.

TAN membership is FREE and it only takes two minutes to sign up at www.alta.org/TAN. If you don't remember your ALTA login or don't have one, you can use the following link to sign up for TAN without signing in to the ALTA website:
https://www.alta.org/tan/join-tan-form.cfm
If you joined TAN in the past, but haven't been an active member please be aware that TAN membership expires. TAN members can stay connected by opening TAN emails and taking actions. Each time a TAN member responds to a TAN alert, their membership auto-renews for another year! TAN members can also manually renew their membership by going to www.alta.org/tan and entering their ALTA login information.

TAN is not just for national issues…the Washington Land Title Association also uses TAN to alert our members to state legislation or events and activities we want everyone to be aware of.

Washington Land Title Association
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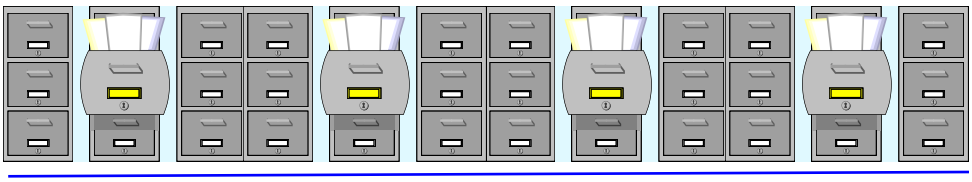

Inside This Issue: