Washington Land Title Association

For Land's Sake

Issue No. 16

August 2023

President's Message

Meri Hamre

I have been blessed to be a part of this amazing industry for going on 40 years and I'm asked repeatedly why? Why do I continue to do the same thing day after day and not get bored? Because boring is definitely never the word I would use to describe what we do in the title industry. The processes and the steps may be consistent from one transaction to the next, but it's what I refer to as the 3 PPS – the people, the properties and the personalities – that keep us coming back for more. Those components are consistently never the same. It's probably why so many of us in the industry become what is affectionately known as "lifers" – a title I'm proud to hold.

Another title I have been proud to hold is as president of the Washington Land Title Association for this past year. It's been a year where we are seeing life returning to what is affectionately now called the post-covid "new normal". Our industry and our professionals have proven to be as resilient as ever. The past few years have been jam-packed with change – it's wonderful to see how we have adapted to those changes and are thriving once again.

I would like to thank everyone involved with the Washington Land Title Association for their help, advice and guidance throughout my tenure as president. I've learned so much from you all and it has allowed me to grow tremendously. It would surprise a lot of people to know that I normally have a very introverted personality, but through my day-to-day job and this position, I'm forced to explore the extrovert in me. It's not always easy or pretty, but somehow, I swallow the nerves and can pull it off with a little bit of grace and dignity. Not always, but most of the time.

As I pass the gavel off to Craig Trummel, I know that we could not be in better hands. Maya Angelou stated it well – "we delight in the beauty of the butterfly, but rarely admit the changes it has gone through to achieve that beauty". In closing, I would like to say that change is beautiful – for both butterflies and our industry.

Blessings to you all.

Inside This Issue	

SEMINARS

Washington Title Professional

By Maureen Pfaff—WTP Chair

The WLTA encourages all members to look at the Washington Title Professional program launched in 2018. The objectives of the program are to recognize those individuals who continue to educate themselves and others on current title and escrow matters; promote and maintain high standards in the title insurance profession; promote pride in the title insurance profession and establish education standards for the title insurance profession.

The roster of WTP designees as of July 2023 includes the following individuals: *Kathy Backstrom*, *Dwight Bickel*, *Lori Bullard*, *J.P. Kissling*, *Sean Holland*, *Kevin Howes*, *Maureen Pfaff*, *Bill Ronhaar*, *Marian Scott*, *Michelle Taylor*, *Craig Trummel* and *Brenda Weaver*.

Earning the WTP designation is a requirement for those interested in earning the National Title Professional designation from the American Land Title Association. Lori Bullard, Maureen Pfaff and Bill Ronhaar have all earned the NTP designation in addition to the WTP.

The Washington Land Title Association recognizes these land title professionals who have demonstrated the knowledge, experience and dedication essential to the safe and efficient transfer of real property. Congratulations to the Washington Title Professionals!

I've had the pleasure of heading up the WTP committee since the idea was brought to the board in 2014. The committee members have put in untold hours to develop the program, write the exam questions, and set up the testing platform. George Peters has been invaluable in providing the administrative work needed to track the applications and CLE requirements for those who have applied to take the exam as well as for the members of the WTP group to maintain their designation. It is time for me to step aside and pass the Chair position to Paul Hofmann, that crazy owner guy from Aegis Land Title and WLTA Past-President, who has graciously agreed to provide leadership to the committee going forward. Thank you for allowing me to be a part of launching this terrific program!

If you are interested in learning more about the WTP program, please go to the WLTA website, www.washingtonlandtitle.com, where you will find information and the application.

Stand out from the Competition

Invest in Your Career with ALTA

Are you the smartest person in your office? Prove it with the American Land Title Association's (ALTA's) National Title Professional (NTP) designation. A measure of personal achievement, ALTA's professional acknowledgement affirms these experts are powerhouses of knowledge, experience and dedication essential to the title industry.

The NTP designation provides evidence of your industry proficiency as well as your commitment to professional development. It represents your achievement of excellence and enhances your status in the industry and among your colleagues! Other tangible benefits include:

- Individual recognition in ALTA publications and website
- Discounts on ALTA meetings
- Special benefits and recognition at ALTA meetings and select State Land Title Association events
- Right to use the NTP designation and logo in your business publications, website and correspondence, including marketing efforts, resume and networking activities

To apply for the NTP designation, you must meet several individual, licensing and training prerequisites. You must be an ALTA member and, if your State Land Title Association offers a similar designation, you also must earn your local credential before applying. Once all prerequisites are met, you must earn a minimum of 100 NTP points to qualify for consideration. Points can be earned in many areas, including industry experience, education and training as well as involvement with ALTA, your State Land Title Association and other professional organizations. All applications are reviewed by the NTP Council, a group of up to nine designees appointed by ALTA's Board of Governors.

Stand out from the crowd and start earning your NTP designation this year! For more information on the program, email ntp@alta.org or visit www.alta.org/ntp.

LEGISLATIVE REPORT

2023 Legislative Session

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

Washington had a 105-day legislative session in 2023. The Legislative Committee identified and tracked 100 bills. A sedate spacing out, one bill per day of the session would have been great. If only. The session began on January 9. JP Kissling had already screened seven pages of pre-filed bills by late December. Come January, the floodgates opened. The nature of the legislative calendar means the Legislative Committee's work is heavily front loaded. Bills must move, or they die. January and the first part of February are dominated by initial committee hearings. February 17 was the deadline this year for bills to be voted out of their original committee. The second great winnowing occurred on March 8, the last day for a bill to be voted out of its house of origin. From that point until the end of the session on April 23 we could focus our efforts on the bills that still had potential to pass.

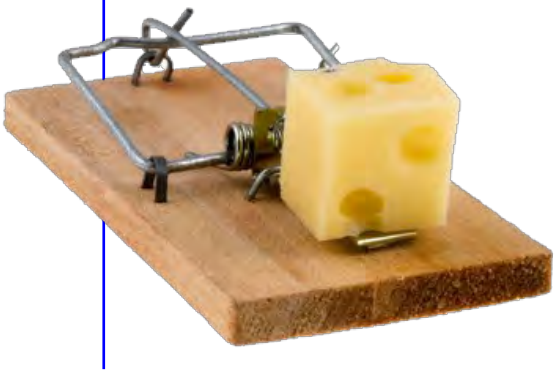
The work of the Legislative Committee depends upon the folks who volunteer their time. Maureen Pfaff deserves special thanks for her service as vice chair. Her tracking of bills reviews is critical, especially in the early days of the session. Thanks to all those who reviewed one or more bills this year, including Ben Case, Craig Trummel, Dwight Bickel, Erin Stines, George Peters, Lindsy Doucette, Megan Powell, Michelle Taylor, and Scott Meyer. When we put all the work together and seek to engage with the legislature, we benefit tremendously from the assistance of the WLTA's lobbyist, Carrie Tellefson. We have been so fortunate to have her on our side the last couple of sessions.

There are three types of bills covered in this report. First, the ***national issues***, the topics very much on the American Land Title Association's radar. Second, the ***uniquely Washington*** bills. Finally, the ***disappearing acts***.

National Issues

NTRAPS —and— Foreign Ownership

MV Realty is a real estate company based in Florida that has pioneered what it calls "homeowner benefit agreements." ALTA calls these documents Non-Title Recorded Agreements for Personal Services, or NTRAPS. MV Realty pays a homeowner a pittance up front, and in return records a document that purports to bind the homeowner's property for the next 40 years. If the homeowner, or the homeowner's heirs, wish to sell the property, they have to list with MV Realty. If MV Realty does not get the listing, it still demands payment of the commission, and in some cases attempts to collect from the buyers. Before the legislative session began three state attorneys general had sued MV Realty, alleging unfair and deceptive consumer practices. The number is now up to six. This year over a dozen states enacted laws dealing with NTRAPS, in some cases banning them entirely. Washington's law provides essential protections, but still manages to disappoint.



Foreign ownership of agricultural land, or land near military installations, became a hot legislative topic nationwide this year. About a dozen states adopted laws banning or limiting foreign ownership. In the case of agricultural land, the laws

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tended to restrict any foreign ownership. In the case of military installations, the laws tended to focus on land within a certain radius of installations. Washington's bill never made it out of committee.

Senate Bill 5399 NTRAPS or "Future Listing Right Purchase Contracts" Passed

Senate Bill 5399, as originally proposed, was a bad bill. It purported to provide some protection for homeowners by imposing a maximum duration for NTRAPS. But the time it would have set was too long, five years. Worse, it provided that NTRAPS "may act as a lien on the property."

On the day the bill had its first hearing, both co-chairs of the Legislative Committee were sick, so Dwight Bickel, longtime co-chair of the committee, stepped up to present testimony. Following the hearing the Legislative Committee pushed for improvements. We were heard. The bill was amended to limit duration to two years and to provide that NTRAPS "shall not run with title to real property" and would not be binding on any subsequent owner or lender. The amended bill passed the Senate unanimously.

The House changed the duration back to five years and that's the way the bill was signed into law. WLTA achieved its primary goals, that NTRAPS should not affect title and should not be binding on successors. But it is nonetheless disappointing that the legislature did not impose a shorter duration.

SB 5399 did not affect the hundreds of NTRAPS that MV Realty and others recorded prior to the law's effective date of May 9, 2023. Any NTRAPS recorded before then should be regarded as affecting title and needing to be cleared by escrow. NTRAPS recorded after that date do not affect title, but may nonetheless represent a potential claim against a seller. If such liability is not addressed by escrow, sellers may make claims after closing if they receive payment demands under NTRAPS.

House Bill 1412 Prohibition on Foreign Entity Acquisition of Agricultural Land Did Not Pass

House Bill 1412 would have prohibited the acquisition of any agricultural land in Washington by a foreign government or entity. The ban extended to entities formed under Washington law, or the laws of other states, if they were foreign-controlled. Leases would also have been banned, plus the holding of "any interest" in agricultural land, or being the beneficiary of a trust that owns or controls such land. The bill had an exception for the acquisition or holding of interests "expressly authorized by a treaty between the United States and another country."

HB 1412 had an effective date of August 1, 2023. Beginning January 1, 2024, the Washington Department of Agriculture was to "review all agricultural land in this state prior to the closing of the transaction." Say goodbye to 1031 exchanges involving ag

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land. The consequences of non-compliance were drastic: "a transfer of an interest in agricultural land in violation of this section is void."

That the bill was going nowhere was obvious from the first hearing. The sponsor introduced the bill and was followed by . . . zero speakers in support. There were multiple speakers in opposition.

The WLTA spoke, neither for nor against the ban, but rather to advance suggestions to protect persons dealing with agricultural land. First, that a violation should make a transfer voidable, as opposed to void. Second, that the Department of Agriculture's approval be recorded.

The bill never received a committee vote. The sponsor was interested in amending it to address concerns, so it may be back in 2024.

Washington Issues
Recording Fees
Mortgage Priority
and
Easement Relocation

This year's session saw recording fee increases on the agenda (yet again), a mortgage priority bill driven by a recent case, and the adoption of a uniform law for easement relocation.

Senate Bill 5386 Recording Fee Rework – No Net Increase Passed

Senate Bill 5386 is a rework of how recording fees are calculated. The basic statutory fee to record a single page document is $5. Over the years the legislature has added a host surcharges. SB 5386 got rid of four surcharges, for $100, $13, $62, and $8, and replaced them with a single surcharge of $183. Surcharges beside those four were not affected. The bill caused concern because of the way it was organized. The new $183 surcharge was right up front in section 1. You had to read all the way through to section 13 to realize that a like amount of surcharges was going away. The law went into effect July 23, 2023.

House Bill 1474 $100 Increase to Recording Fees Homeowner Covenant Account Program Passed

House Bill 1474 established a homeowner covenant account program to provide down payment and closing cost assistance to persons who experienced housing discrimination in Washington, or the descendants of such persons. The parties benefiting from the program are people who would have been adversely affected by the types of racially restrictive covenants made illegal by the federal Fair Housing Act. To claim benefits, a person must have been a Washington resident on or before April 11, 1968, the Fair Housing Act enactment date, or the descendant of such a person. Funds for the program will come from a $100 recording surcharge going into effect on January 1, 2024.

The WLTA's position on the bill was that if the legislature wanted to fund the program, there were better and fairer ways of doing so than a recording fee increase. In testimony to the House committee considering the bill, the WLTA pointed out that the cost to record both a deed and mortgage would increase to over $600. The surcharge would be a regressive burden, imposing the identical recording cost for deeds for a $300,000 house, a $30,000,000 mansion, or a $100,000,000 office tower. The legislature seems to operate under the misunderstanding that money is involved whenever documents are recorded, overlooking the huge number of documents where no consideration is involved: deeds between former spouses following divorce, transfer on death deeds, powers of attorney, etc. The WLTA suggested that the surcharge should either be imposed only on recordings where real estate excise tax was due, or even be assessed by means of a change to REET. An increase of only 2/100 of 1% would raise least $100 on the median priced home in most parts of the state. The bottom line: in seeking to reduce barriers to homeownership, the legislature should not impose new barriers to homeownership.

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Following the hearing the WLTA submitted a letter to committee members, further outlining its concerns. The letter included figures for certain types of documents, other than deeds, recorded in King County during 2022 that would be hit with the surcharge despite no consideration being involved. The most frequently recorded document was orders changing names, with 3,861 for the year. The WLTA also noted that a significant percentage of deeds were not subject to REET because there was no monetary consideration. Something like 25,000 documents recorded in a single year in King County alone would have been subject to the $100 surcharge, despite no money changing hands. The committee made one adjustment based on the WLTA's letter. Orders changing names were exempted from the surcharge.

House Bill 1420 Mortgage Priority for Future Advances Passed

Do advances made under a deed of trust enjoy the same priority as the date the deed of trust was recorded? Washington courts had traditionally decided priority based on whether the advances were obligatory or optional. A borrower can sue a lender that fails to make obligatory advances. Washington had given priority to obligatory advances only. This position was confirmed in a 2022 Washington Supreme Court case.

In response, the Washington banking community sought a bill that would change the traditional rule. House Bill 1420 provides that any mortgage or deed of trust shall be prior to all subsequently recorded mortgages, deeds of trust, and other encumbrances. This priority extends to all sums secured by the mortgage or deed of trust. Timing of advancement and whether obligatory or optional are no longer relevant.

The law went into effect for all litigation commenced on or after July 23, 2023. The effective date is not based on recording date. If a lawsuit were to be filed next month where the relative priority of a deed of trust recorded in 1998 versus one recorded in 1999 is disputed, the law would apply.

Senate Bill 5005 Uniform Relocation of Easements Act Passed

Washington regularly adopts model laws proposed by the Uniform Law Commission. Washington's remote online notary bill passed in 2019, Senate Bill 5641, was based on the ULC's Revised Uniform Law on Notarial Acts. Senate Bill 5005 brought two new ULC laws to Washington: the Uniform Partition of Heirs Property Act and the Uniform Easement Relocation Act. The heirs property law is likely to see very little use in Washington. That law is designed to address situations common in some states where title descends through several generations without probate and without deeds being recorded. The relocation of easements act will provide real benefits to the own-

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ers of burdened properties.

The relocation of easements act gives the owner of the burdened property the right to relocate certain easements, over the objections of the owner of the benefited property. A lawsuit is required. The law has protections for the benefited owner, including prohibiting relocations that lessen the utility of the easement or increase the burden on the benefited owner. A public utility easement cannot be relocated under the act. An easement cannot be relocated into an area burdened by a conservation easement. The burdened owner must pay for the expenses of relocation, including "applicable premiums for title insurance related to the relocation."

DISAPPEARING ACTS

DATA PRIVACY REGISTERED LAND / TORRENS

Our final category includes two topics that occupied the WLTA's time in previous sessions, but not this year. Data privacy never really showed up. And Torrens has been shown the door.

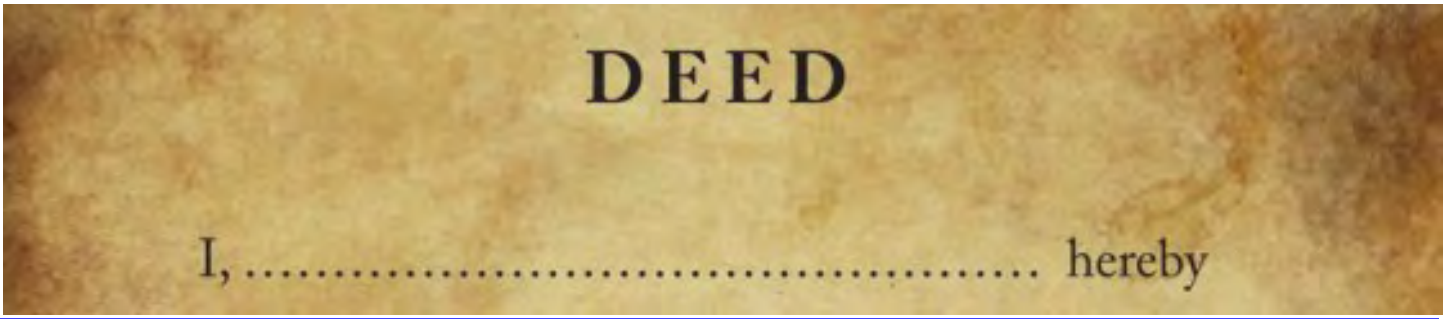
House Bill 1616 Data Privacy Did Not Pass

This year marked the fifth year in a row the legislature had one or more data privacy bills pending. A huge amount of WLTA lobbying effort was consumed in those prior sessions going back to 2018. The bills in those years sometimes came down to the last hours of the session, only to fail. This year's data privacy bill, House Bill 1616, was notable for how little progress it made. It never even had an initial hearing. It was hard to believe that a topic that had burned up so many hours in the last five sessions barely registered this time around.

House Bill 1376 Registered Land / Torrens Abolition Effective July 1, 2023

The WLTA made common cause with the county auditors to abolish Washington's registered land system starting in 2018. That year's bill failed to advance out of committee. We came so very close in

2021, with House Bill 1376 passing the House and making it to the floor of the Senate, only to fail to get a vote in the final hours of the session. The bill was reintroduced in the 2022 session and passed. The law phased out registered land, first prohibiting new registrations and authorizing withdrawals in the summer of 2022. Effective July 1, 2023, all remaining registered land was formally withdrawn from the Torrens system and will henceforth be treated the same as any other property. If you work in a county where you used to have to deal with registered land, you can celebrate now. And if "registered land" and "Torrens" mean nothing to you, consider yourself fortunate.



WLTA Education Seminars

By Gerry Guerin & Michelle Taylor

Education Committee, Gerry Guerin and Michelle Taylor, Co-Chairs

Hello members and affiliates, I hope everyone is enjoying their summer so far. It is that time of year again, where we roll out our annual, WLTA Education seminars. The dates have been added to our WLTA calendar. Our first seminar will be held in Wenatchee on September 9th and our second seminar in Lynnwood on October 21st. My Co-Chair Michelle Taylor and I will be reaching out to all members, affiliates, and past speakers as we look to fill our agenda with some amazing talent and topics. A great time to hear from some of our Industry leaders, as well as catch up with old friends and meet some new ones. Most importantly a couple of opportunities to earn some education credits. If you have any interest and or a specific topic that comes to mind, please reach out to me and or Michelle and we hope that you can join us for one or both events. Thank you—Gerry Guerin.

JUDICIARY REPORT

Ashley Callahan, Judiciary Committee Chair

See also the Report of the Native American Affairs Committee in the Article on Page 13 Regarding a Bankruptcy Case

Prelien Notice Requirement for Construction Lien

Velazquez Framing LLC v. Cascadia Homes, Inc., 24 Wn.App.2d 780 (2022), rev. granted 1 Wn.3d 1002 (2023)

Cascadia Homes is a general contractor and hired High End Construction ("High End") for the framing. High End orally agreed with Velazquez Framing ("Velazquez") to complete the framing, unbeknownst to Cascadia. Velazquez worked from Oct 15-Nov 1, 2019. Cascadia paid High End in October and November. High End did not pay Velazquez. Velazquez invoiced Cascadia in October and contacted it seeking payment but Cascadia did not pay.

In January 2020, Velazquez filed a lien and followed up with a complaint in September 2020. There was no evidence that Velazquez gave any prelien notice to Cascadia. Cascadia successfully moved for summary judgment to dismiss the case. Velazquez appealed and the appellate Court affirmed the dismissal.

RCW 60.04.031(1) required Velazquez to file a prelien notice to Cascadia because its lien was for labor and materials and no exception applied. RCW 60.04.031(2) provides an exception to the prelien notice for parties contracting directly with the owner or owner's common law agent, laborers whose claim of lien is based solely on labor, or subcontractors who contract directly with the contractor.

Velazquez argued unsuccessfully that all liens for labor are excluded from the prelien notice requirements. The court disagreed finding that Velazquez's interpretation of the statute would render RCW 60.04.031 (2) regarding laborers superfluous. The appellate Court did reason that a plain language reading of the statute provides inconsistencies and leads to two unreasonable results. To exempt prelien notice for all labor would render parts of the statute superfluous, but to require all second-tier subcontractors to provide prelien notice for labor is also inconsistent with the plain language of portions of the statute. Because there are no reasonable interpretations of the language, there is not a plain, unambiguous meaning of the statute. After looking to legislative history, which focused on consumer protections relating to construction liens and an attempt to avoid the consumer paying twice for services when the owner had no knowledge of second-tier subcontracts, the Court found that not all liens for labor are exempt from the prelien notice requirements. Requiring a prelien notice for second-tier subcontractor labor aligns with legislative intent.

The Washington Supreme Court unanimously granted review on April 5, 2023.

Members of the WLTA Judiciary Committee are Ashley Callahan, Chair, and Erin Stines, Craig Trummel, Chris Rollins & Sean Holland

Escrow Theft

Ticor Title Company, et al. v. Kiavi Funding, Inc., 23 WL 3075766 (W.D. Wash. April 25, 2023)

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Tang Real Estate Investments, Inc. ("Tang") owned property. Kiavi Funding, Inc. ("Kiavi") held a deed of trust on the property and agreed to refinance Tang's loan. Tang selected Escrow Services of Washington ("ESW") owned by Lynn Rivera ("Rivera") to provide escrow and closing services. Rivera obtained a commitment and closing protection letter ("CPL") from Ticor Title Company ("Ticor"), as agent for Commonwealth Land Title Insurance Company ("Commonwealth").

On September 13, 2021, Ticor's sub-escrow department sent wiring instructions to Rivera. Rivera's "Borrower's Estimated Closing Statement" stated that the premium and sub-escrow fee to Ticor were to be paid to Ticor at closing from the Kiavi loan proceeds. The loan closed October 22, 2021 and the deed of trust from Tang to Kiavi recorded. Rivera instructed Kiavi to send the loan funds to ESW rather than Ticor, in contravention of what Ticor had instructed Kiavi to do. Kiavi wired the funds to ESW.

On March 4, 2021, Kiavi learned that Rivera never paid Ticor the policy premium or sub-escrow fee, and did not satisfy Kiavi's pre-existing loan or pay the $152K loan proceeds to Tang. Tang filed suit. *See*, *Tang v ESW, et al.*, King County Superior Court Case No. 21-2-15612-2 SEA, currently stayed because of Rivera's bankruptcy proceedings and Tang's appeal of Kiavi's dismissal (the "Tang Lawsuit"). On March 11, Ticor provided Kiavi with a copy of the policy and Kiavi submitted a title claim.

Ticor denied coverage on June 8, 2022 on the grounds that it had not received the premium payment within 180 days of issuance of the commitment (September 3, 2021) and therefore the policy (which was inadvertently issued) was void. Ticor also stated that even if the policy were not void, because the Tang Lawsuit did not state a claim that would trigger coverage under it, none existed. Ticor and Commonwealth filed this action on June 14, 2022 seeking a declaration that their coverage determination was proper.

Both parties moved for summary judgment. The court held that the title company had no liability under either the policy or the CPL. No premium had been paid and therefore the policy was void. Regarding the CPL, the court agreed that ESW was not the "Settlement Agent" or "Approved Attorney" upon whose actions (or inactions) liability was based. Nor was the sole cause of the loss the Settlement Agent's (Ticor's) failure to comply with written closing instructions or mishandling of funds. Here, Kiavi wired funds to Rivera's bank in violation of Ticor's wiring instruction and Kiavi's loss was caused by Rivera's misappropriation of those funds. Therefore, Ticor had no liability to Kiavi under the CPL.

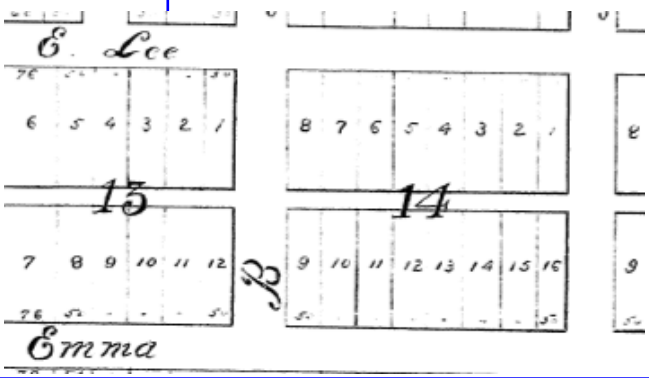
Nonuser Statute and Roadways

Harold Messersmith & Lisa Bryant v. Town of Rockford (Wash. Ct. of Appeals, Div. III, May 18, 2023)

Plaintiff Messersmiths filed suit to gain title to land they thought they owned, arguing the roads and alleys in the plat reverted to them by virtue of the Nonuser statute of 1889-1890. The Court of Appeals reversed the Summary Judgment in favor of the Messersmiths, holding the platted roads and alleyway of the Plat were not subject to the Nonuser statute and thus did not revert to the Messersmiths. The Messersmiths appealed.

The Messersmiths purchased the property in 2019, an improved property with a single-family residence, outbuildings and fenced pastures. The legal description set forth on their deed identified the Land as Lots 1 through 16, Block 14 of Waltman's addition to Rockford as depicted below.

The Messersmiths occupied the alley within Block 14, the west half of Center street (labeled as B Street on plat), and the north half of Emma Street. The Nonuser statute of 1889-1890, stated that "[a]ny *county* road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for pub-



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lic use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time" (emphasis added) (Laws of 1889-1890, Section 32, p. 603). The trial court was persuaded by Messersmith, ruling the roads and alley were never open to the public and thus automatically vacated per the Nonuser statute, inuring to the Messersmiths' benefit. The City appealed, arguing that the statute did not apply to city roads after annexation in 1890.

The Court reversed the trial court, holding the platted roads and alleyway which were never developed were not subject to the nonuser statute and thus did not revert to the property owners. The plain language of the nonuser statute as it existed in 1890 limited its application to "county" roads and ceased to apply to the roads on property owners' land when the property was annexed into and became part of the town one year after having been platted.

The Messersmiths filed a motion for re-consideration, but it was denied on June 29, 2023. The Messersmiths filed a Claim with their title insurer after the City filed its appeal of the summary judgment. The claim was denied because the roads and alleys were outside the boundaries of the Schedule A legal description. The policy issued was a ALTA Homeowner's Policy.

Bankruptcy – Statute of Limitations/ Foreclosure

Copper Creek v. Kurtz and *Merritt v. USAA Federal Savings Bank*

The Washington Supreme court affirmed the holdings in the two Division 1 cases reported in the July 2022 issue of the **For Land's Sake** Newsletter (Issue 15). The Court affirmed the holding a discharge in Bankruptcy does not trigger the 6-year statute of limitations for initiating a foreclosure of the Deed of Trust. The court held each installment due after discharge has its own 6-year statute of limitations and that only those installments that predate the discharge are not collectable by the lender. Note that if the lender were to accelerate the entire debt, then upon the date of acceleration the 6-year of limitations does start.

The court stated in *Merritt*:

> But the discharge does not extinguish the underlying debt itself. *Id.* § 524(a). Instead, it "extinguishes *only* 'the personal liability of the debtor'" on the creditor's claims. *Johnson*, 501 U.S. at 83 (quoting 11 U.S.C. § 524(a)(1)), 85 n.5. Over a century of United States Supreme Court bankruptcy precedent confirms that bankruptcy discharge has no effect on a lien on real property and that "a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Id.* We disavow this dicta in *Edmundson*. As the Court of Appeals explained in today's companion case, *Copper Creek*, *Edmundson*'s "rule" is incorrect because a lien survives bankruptcy discharge;

> bankruptcy eliminates only the debtor's personal liability on the note, leaving "the debt, the note, and the payment schedule. . . unchanged"; and "[m]issing a payment in an installment note does not trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature." (emphasis in original)

ALASKA: Equitable Mortgages

Jae Chang v. Jungmok Rhee & Ukyung Lee, Alaska Supreme Court, 2022 WL 17484301 (Dec. 7, 2022) – Unpublished case so do not cite.

From 2014-2016, plaintiff Chang issued 3 personal loans to Hyeran and George Hunziker ("Hunzikers") totaling $115,000. Each loan had a promissory note stating that the collateral for the loan was the Hunziker's residence. For the first loan in February 2014, a Claim of Lien was recorded using a mechanic's lien form. The Claim of Lien stated plaintiff/ lender was "lienholder", the Hunzikers (borrowers) were "property owners," and contained an accurate description of the property. It was properly signed and notarized, but contained no information about lien expiration or duration. No other documents were recorded for any of the loans.

In April 2018, the Hunzikers sold their Property to Rhee &

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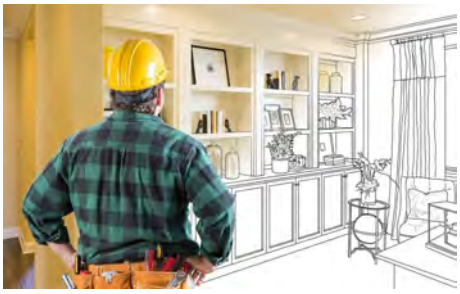
Lee. Their title policy did not except the Claim of Lien. Plaintiff Chang filed suit for breach of contract against Hunzikers and to foreclose the Claim of Lien against current owners Rhee & Lee.

Rhee & Lee moved for summary judgment that they were bona fide purchasers for value, having paid value for the land and lacking actual and constructive notice of the lien. Bona fide purchasers take property free of prior adverse interests. The Hunzikers (borrowers) admitted in discovery that they never disclosed the loans to Rhee & Lee prior to purchase. The trial court held that Rhee & Lee were bona fide purchasers. Plaintiff Chang appealed.

The AK Supreme Court first found that the Claim of Lien was an equitable mortgage because it "[h]as the intent but not the form of a mortgage..." Second was the question of notice. Plaintiff Chang argued that Rhee & Lee were on "inquiry notice" because the Claim of Lien was recorded. The Court disagreed stating that no facts disclosed in the Claim of Lien revealed a still-existing lien (expiration, duration, etc.). Moreover, the Court held that the "contents of the document" that Plaintiff Chang recorded failed to provide constructive notice of an existing equitable mortgage because the Claim of Lien was not itself an equitable mortgage, but simply evidence of it. The "existence, duration, and other terms [of the loan]" were not discernable from the document. Absent notice, Rhee & Lee were bona fide purchasers. The Supreme Court affirmed the trial court's decision.

Washington state recognizes



equitable mortgages. An invalid lien may be an equitable mortgage if it contains enough details and depending on the circumstances. The bona fide purchaser defense prevailed in this case but may not have if the Claim of Lien had contained more detail.

ARIZONA: CREATED, SUFFERED, ASSUMED EXCLUSION

Fidelity National Title Insurance Company v. Osborn III Partners LLC, et al., Arizona Supreme Court, 254 Ariz 440, 524 P.3d 820 (2023)

In April 2006, Osborn III Partners LLC (the "Developer") hired Summit Builders (the "Contractor") to construct a condominium. Developer obtained a loan from Mortgages Ltd. (the "Lender") for $41.4M, secured by a deed of trust on the property. Fidelity insured the loan. At some point, the Developer failed to make interest payments on the loan. The Lender ceased funding the condominium project. At generally the same time, the Developer failed to pay the Contractor. The Contractor filed a mechanic's lien that had priority over the insured deed of trust. The Lender tendered a claim to Fidelity and Fidelity denied the claim under Exclusion 3(a) of the title insurance policy. The Exclusion 3(a) read that the policy would not cover loss or damage arising out of "…[d]efects, liens, encumbrances, adverse claims, or other matters…created, suffered, assumed, or agreed to by the insured claimant…" The Developer sued Fidelity.

The trial court held that if the Lender withheld payments as part of its loan agreement with the Developer, its (the Lender's) action cannot be said to have caused the lien as a matter of law. No exclusion applied. Fidelity appealed. The appellate court held that whenever a lender cuts off funding, it creates the lien that arises out of it. The exclusion applied. This approach was articulated in *BB Syndication Services, Inc. v. First American Title Insurance Company*, 780 F.3d 825 (7th Cir. 2015). The Arizona Supreme Court disagreed with both approaches and ruled that a causation framework would be applied, consistent with the unambiguous language of the exclusion. The Court remanded the case to determine if the Lender's action (of withholding payments to the Developer) was an intentional, affirmative act that caused the lien. Intent to withhold payments, not the intent to cause the lien, was the first question, followed by whether the act of withholding payments caused the defect. Here, if the intent to withhold payments caused the lien, the exclusion would apply. If the intent to withhold payments did not cause the lien, *e.g.*, the Developer failed to pay the Contractor before the Lender withheld payments, the exclusion would not apply.

(Continued on page 14)

Native American Affairs Report

Megan Powell, Native American Affairs Committee Chair

Tribes Subject to Bankruptcy Stay

On June 15, 2023 the United States Supreme Court held that the Bankruptcy Code abrogates the sovereign immunity of all governments, which includes all federally recognized Indian tribes.

The Lac du Flambeau Band of Lake Superior Chippewa Indians own and operate an online payday lending business called Lendgreen. In July of 2019 Brian Coughlin took out a $1,100 loan from Lendgreen without subsequently repaying it. Later that year Coughlin filed a petition for Chapter 13 bankruptcy in the District of Massachusetts, on which he listed his debt to Lendgreen. The filing of the petition automatically stays all creditor collection efforts. Despite this, Lendgreen aggressively continued their efforts to collect, even after Coughlin notified them of his bankruptcy filing and provided his attorney contact information. Two months after filing his initial petition Coughlin attempted suicide, which he claims was triggered by the "regular and incessant telephone calls, emails and voicemails" from Lendgreen.

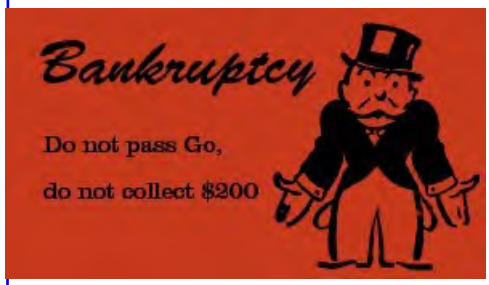
Couglin moved for enforcement of the automatic stay and requested an order prohibiting Lendgreen and the tribe from further collection attempts. He also requested damages from the tribe for violating the automatic stay.

The Bankruptcy Code provides that "sovereign immunity is abrogated as to a governmental unit". 11 U.S.C. § 101(27) defines "governmental unit" as inclusive of all foreign and domestic governments. The tribe argued that the language in the Bankruptcy Code is ambiguous because it does not explicitly identify Native American Tribes in the definition of governmental unit, and therefore, their sovereign immunity exempts them from the automatic stay.

The Bankruptcy Court granted the tribes motion to dismiss, but the United States Court of Appeals for the First Circuit reversed this ruling. The decision of the First Circuit was then affirmed by an 8-1 majority of the Supreme Court who concluded that the abrogation provision intended to include federally recognized Indian tribes regardless of the fact that they were not explicitly identified.

The opinion of the court states that the Bankruptcy Code "unequivocally abrogates the sovereign immunity of any all governments, categorically. Tribes are indisputably governments."

Justice Jackson delivered the opinion of the court, and Justice Gorsuch filed a dissenting opinion.



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CALIFORNIA: Voluntary Conveyance Terminates Coverage

Jay C. Shah v. Fidelity National Title Insurance Company, 2022 WL 17333295 (California Court of Appeal, November 30, 2022). Unpublished case so do not cite.

Silva had a life estate in property. In 1995, Silva conveyed to Shah. Fidelity insured Shah's purchase in fee (the life estate was missed). Silva died on May 4, 2002, after which her interest in the property passed to her heirs. Silva's heirs did not challenge Shah's possession of the property. Shah conveyed the property to his parents in June of 2002. Shah's parents deeded the property back and Shah obtained a loan secured by a deed of trust on the property in 2007. Shah defaulted and attempted to refinance in 2009. At that point, the life estate issue was discovered. Shah sued to quiet title and tendered a claim to Fidelity.

Fidelity denied coverage based on Shah's voluntary conveyance of the property to his parents in June of 2002. The 1990 CLTA loan title insurance policy defined "insured" as "the insured named in Schedule A, …. and those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributes, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." Shah sued Fidelity.

Fidelity established that Shah's conveyance to his parents in June of 2002 was voluntary and terminated the policy. But what did Shah convey to his parents? Shah's interest, obtained from Silva, was a lesser interest than fee simple title absolute because of Silva's life estate (Shah had a fee simple pur autre vie) that terminated when Silva died on May 4, 2002. Fidelity argued that Shah alleged in his quiet title action that he had maintained possession of the property since 1995 and had otherwise met the conditions of adverse possession. This evidence established that Shah obtained fee title absolute to the property on May 4, 2007, which was 5 years after Silva's death (5 years being the applicable adverse possession limitations period). Under the after-acquired title doctrine, as a matter of law, fee passed to his parents via the June 2002 grant deed on May 4, 2007, which - being a voluntary transfer - terminated coverage under the title insurance policy.

This case rests on older policy language. Generally, post-1990 policies broaden the definition of insured.

For Your Calendar

2023 SEMINARS

The WLTA will have two educational seminars this fall with MCLE and WTP credit hours.
Dates:
Saturday, September 9—Wenatchee
Saturday, October 21-Lynnwood Convention Center

Check our webpage for registration links.

2024 CONVENTION

The Pacific Northwest Land Title Convention will be hosted by the WTLA in 2024.
When:
May 19—May 21, 2024
Where:
Skamania Lodge, WA

TITAC of WASHINGTON

A Political Action Committee of the Land Title Insurance Industry

We need your support. The Title industry has faced our fair share of challenges over the past 8 months. Changes to interest rates and our economy have created a very different market for our associates. Together with our lobbyist's help, we are monitoring roughly 40 bills that have a direct impact to the title industry. Couple that with dramatic upcoming changes to our elected officials in the state government landscape, creates a volatile environment for the years to come. Staying in front of influential representatives and maintaining a voice in Olympia will be vital.

Remember that 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 a contribution to the address below. Any amount is appreciated and truly put to great use. Contributions can come from your company or yourself.

Chairperson
Kris Weidenbach,
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Attn: Kris Weidenbach

TITLE ACTION NETWORK

Maureen Pfaff, Chair TAN

Title Action Network 2023

While most of us are focused on the day to day running of our companies, there are always issues brewing at the state and federal level that can have significant impact on our operations that we should be aware of. The challenge is finding the time to research the issues, decide what they might mean to our businesses and keep track of what is happening far off in state capitals or Washington DC. This is where ALTA and the Title Action Network come in. The ALTA staff work together with the Board of Governors and industry members who are involved on the Title Action Network committee to identify key issues, develop strategy, and engage with state and federal regulators and policymakers to promote the industry's value. Additionally, ALTA works to educate title industry professionals on regulatory compliance.

Some of the current issues that ALTA is engaged on include Data Privacy, Digital Closings, Risks of Alternatives to Title Insurance, GSE Reform, Non-Title Recorded Agreements for Personal Service, Flood Insurance, Good Funds and the SECURE Notarization Act among others. Members of the Title Action Network are kept informed of current activity via email, zoom meetings and ALTA events. When needed, members are alerted with call-to-action emails and can easily reach out to their elected officials through pre-written, automated messages that only take minutes to send.

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 on 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.

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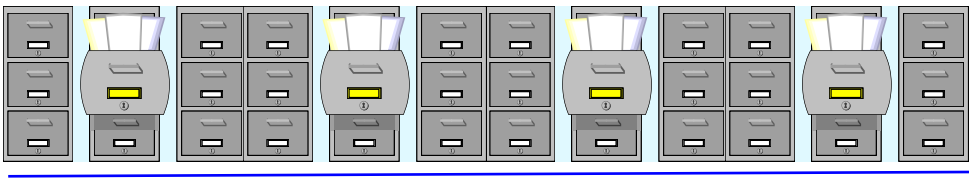

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