

**STANDARDS FOR DOCUMENT RECORDING:  
WHAT MUST BE ACCEPTED AND WHAT CAN BE REJECTED?**

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## **INTRODUCTION**

Cases announced in the past year have dealt with acts by the County Recorder and Registrar. Decisions and statutes empower them to record and to reject proposed filings. One decision in our office involved an affidavit the Recorder accepted; but the Court of Appeals later ruled was notice of nothing.

Where priority of recording is all important (well, nearly so), what happens when a Deed or Mortgage is delayed or rejected? In a declining real estate market, often value is not sufficient for a subordinate lender to recover its debt if it is not recorded/registered when expected.

There is no formal hearing mechanism in the Recorder's office, whereas the Examiner of Titles conducts hearings in initial registrations and proceedings subsequent. We examined the bases on which the Recorder may accept or reject documents effecting valuable property rights. In challenging economic times like these, the Recorder should be on firm ground when it accepts (or rejects) documents. As there is at least in theory an action for damages against the Recorder, it's critical that standards for decisions can be pointed to. The Court of Appeals has outlined the standards which apply and described them in a way that might be characterized as limited.

A case may be made to record documents which are presented to the Recorder and to let the courts sort out disagreements later.

The Recording Act is designed to protect persons dealing with land:

...Minnesota is a race-notice jurisdiction, meaning that "a bona fide purchaser who records first obtains rights to the property which are superior to a prior purchaser who failed to record." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn.1990). A "purchaser in good faith" or bona fide purchaser is one who provides valuable consideration without actual, constructive, or implied notice of others' inconsistent outstanding rights. *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn.1989). However, any purchaser with such knowledge is not entitled to the protection of the Minnesota Recording Act. *Minn. Cent. R.R. Co. v. MCI Telecomms. Corp.*, 595 N.W.2d 533, 537 (Minn.App.1999). As such, "there is no need for parties to race to the Registrar of Titles because mortgage priority as established by a filing order is defeated by actual notice or knowledge of a superior mortgage or encumbrance." *In re Ocwen Fin. Servs., Inc.*, 649 N.W.2d 854, 857 (Minn.App.2002), review denied (Minn. Nov. 19, 2002).

*Washington Mut. Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 506 (Minn. Ct. App. 2008).

## THE RECORDER'S GATEKEEPER FUNCTION

Recording of instruments claiming an interest in real estate is critical for protection of valuable property rights. Deeds and mortgages are contracts between individuals and cannot be avoided simply because they are not recorded or registered. However, where they are not timely, properly recorded or registered, valuable rights are lost. *In re Vondall*, 364 B.R. 668 (8th Cir. BAP 2007); *In re Stepka*, 425 B.R. 820, 823 (Bankr. D. Minn. 2010); *Washington Mutual Bank, F.A. v. Elfelt*, App.2008, 756 N.W.2d 501; Minn. Stat. § 507.34.

It's well known that Torrens title conveyances often involve a hearing and involvement by the Examiner of Titles. This occurs at initial registration and at proceedings subsequent to the initial registration. Minn. Stat. 508.71; *In re Metro Siding, Inc.*, 624 N.W.2d 303, 307-08 (Minn. Ct. App. 2001). There is no hearing process for the transfer of interests in abstract property (except through the litigation process). But what standards may be applied by the County Recorder when reviewing documents prior to recording? How much discretion does the Recorder have in accepting documents? How does the Recorder ward off a liability claim if it surfaces for alleged improper rejection of a deed, mortgage, mechanic's lien, or other instrument?

## RECORDING STANDARDS/CONTESTED CASES

Provisions in both the Recording Act (Chap. 507) and the County Recorder Act (Chap. 386) detail some of the requirements for what may and what may not be recorded. Other sources include case law and the Title Standards adopted by the Minnesota State Bar Association, Real Property Section. County Recorders also provide some general guidelines on their websites. At least one county website states there are too many requirements to set forth an exhaustive list.

One recent decision states that the Recorder erred in rejecting a document presented for filing. *Chamnic Enterprises, LLC v. Colonial Pac. Leasing Corp.*, A10-784, 2011 WL 1364277 (Minn. Ct. App. Apr. 12, 2011). Another decision holds a recorded document can be ignored, *Ameriquist Mortgage v. Cleveland*, A07-1509, 2008 WL 2732066 (Minn. Ct. App. July 15, 2008).

A couple recent decisions say pretty good recording is good enough, *MidCountry Bank v. Krueger*, 782 N.W.2d 238 (Minn. 2010); *Bank of New York v. PK Inv. Properties, LLC*, A09-1897, 2010 WL 2732883 (Minn. Ct. App. July 13, 2010). Another decision discusses the title examiner's conduct and its quasi judicial role, *Ruikkie v. Nall*, 798 N.W.2d 806 (Minn. Ct. App. 2011) while another still emphasizes the important role the Examiner plays, *Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867, 871 (Minn. Ct. App. 2011).

## DEADLINES FOR ACTION BY RECORDER

In 2005, Minn. Stat. § 357.182 was enacted to set a time line for action on documents presented for recording:

**Subd. 3. Recording requirements.** Each county recorder and registrar of titles shall, within 15 business days after any instrument in recordable form

accompanied by payment of applicable fees by customary means is delivered to the county for recording or is otherwise received by the county recorder or registrar of titles for that purpose, record and index the instrument in the manner provided by law and return it by regular mail or in person to the person identified in the instrument for that purpose, if the instrument does not require certification of no-delinquent taxes, payment of state deed tax, mortgage registry tax, or conservation fee. Each county must establish a policy for the timely handling of instruments that require certification of no-delinquent taxes, payment of state deed tax, mortgage registry tax, or conservation fee and that policy may allow up to an additional five business days at the request of the office or offices responsible to complete the payment and certification process.

For calendar years 2009 and 2010, the maximum time allowed for completion of the recording process for documents presented in recordable form will be 15 business days. For calendar year 2011 and thereafter, the maximum time allowed for completion of the recording process for documents presented in recordable form will be ten business days. Instruments recorded electronically must be returned no later than five business days after receipt by the county in a recordable format.

The interesting qualifier in the above section is documents must be “presented in recordable form” for the time line to literally apply. Intuitively, I conclude a document must have a legal description of the property, be acknowledged, and contain “drafted by” language to qualify as “recordable form”.

It’s doubtful this statute could be used by an individual filer whose document isn’t handled within the time line. The statute is not drawn creating any individual rights. The statute on deadlines does not contain any penalty provision favoring a holder of an interest whose document is not recorded or acted on within the time lines set forth. The time lines themselves are stepped in; allowances are made for individual counties to show progress toward compliance, and perfect compliance isn’t required. Rather, percentages of compliance for volumes of documents instead are set forth.

## **BASIC REQUIREMENTS TO RECORD**

Some of the stipulations are mundane (except the potential criminal penalty sandwiched in at the end):

Except where otherwise expressly provided by law, no county recorder shall record any conveyance, mortgage, or other instrument by which any interest in real estate may be in any way affected, unless the same is duly signed, executed and acknowledged according to law; any such officer offending herein shall be guilty of a misdemeanor and liable in damages to the party injured in a civil action.

Minn. Stat. § 386.39. Documents must be legible and suitable to be organized; they must be signed (with rare exception) and the signature must be acknowledged properly per Minn. Stat. § 507.24.

**Subdivision 1. General.** To entitle any conveyance, power of attorney, or other instrument affecting real estate to be recorded, it shall be legible and archivable, it shall be executed, acknowledged by the parties executing the same, and the acknowledgment certified, as required by law. All such instruments may be recorded in every county where any of the lands lie. If the conveyance, power of attorney, or other instrument affecting real estate is executed out of state, it shall be entitled to record if executed as above provided or according to the laws of the place of execution so as to be entitled to record in such place.

**Subd. 2. Original signatures required.** (a) Unless otherwise provided by law, an instrument affecting real estate that is to be recorded as provided in this section or other applicable law must contain the original signatures of the parties who execute it and of the notary public or other officer taking an acknowledgment. However, a financing statement that is recorded as a filing pursuant to section 336.9-502(b) need not contain: (1) the signatures of the debtor or the secured party; or (2) an acknowledgment. An instrument acknowledged in a representative capacity as defined in section 358.41 on behalf of a corporation, partnership, limited liability company, or trust that is otherwise entitled to be recorded shall be recorded if the acknowledgment made in a representative capacity is substantially in the form prescribed in chapter 358, without further inquiry into the authority of the person making the acknowledgment.

Minn. Stat. § 507.24.

The drafter of an instrument must be identified by name and address. Moreover, the statute is express that identification is required for the document to be recordable. But the document is not invalid or ineffective if the document is recorded without drafting identification. Minn. Stat. § 507.091.

And the future taxpayer must be identified in a Deed or Contract for Deed to entitle that document to recording, Minn. Stat. § 507.092.

The document must contain a 3” margin at the top of the first page (for recording information).

And for a document to be paper filed rather than electronically filed, it must be typewritten or computer generated; no larger than 8.5 x 14 inches; contain type no smaller than 8 point and be on white paper not less than 20 lb. with a border of not less than one half inch on all four sides. Minn. Stat. § 507.093.

The Mayor of my fair city sends out a Christmas/Holiday letter annually intentionally typed to the very edges of every page. He just has soooo much to say.

## WHAT MAY BE REJECTED FOR RECORDING?

What is the extent of discretion held by the Recorder's office in accepting or rejecting instruments for recording? There are some minimum standards set forth above. It's clear that if an instrument doesn't contain drafting identification; original signatures on paper documents; lacks a legal description so that it cannot be archived; or is not of sufficient type size, that then the document may be rejected. Verbiage of the statutes employs mandatory language making it seem evident the Recorder or Registrar may reject a document which doesn't contain those requirements.

And let us not omit fees. Fees such as Mortgage Registration Tax (Chap. 287) and Deed Stamp Tax (Chap. 287); and recording fees must be paid (Minn.Stat. § 357.18) to admit a document to recording.

Though it was not directly in issue in an equitable subrogation case, a Mortgage was rejected and lost priority because the check to pay the Mortgage Registration Tax was for the wrong amount.

But on March 14, 2005, the county recorder's office returned the mortgage to Land Title, Inc., unrecorded because the check for the mortgage registration tax was not for the proper amount.

*Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 276 (Minn. 2010).

If fees will be owed, a Certificate of Real Estate Value (CRV) must accompany the Deed to be entitled to recording:

**Subdivision 1. Requirement.** Except as otherwise provided in subdivision 5 or 6, whenever any real estate is sold for a consideration in excess of \$1,000, whether by warranty deed, quitclaim deed, contract for deed or any other method of sale, the grantor, grantee or the legal agent of either shall file a certificate of value with the county auditor in the county in which the property is located when the deed or other document is presented for recording.

Minn. Stat. § 272.115.

An Attorney General Opinion states that the Recorder may reject a document:

Register of deeds may refuse to file for record purported deeds which on their face disclose that they do not convey any interest in land because description therein is meaningless.

Op. Atty. Gen. 1928, No. 88, p. 92.

Where else may the Recorder reject an instrument properly? A recent Court of Appeals ruling discusses below what should be accepted; and what might constitute a wrongful rejection. *Chamnic Enterprises, LLC v. Colonial Pac. Leasing Corp.*, A10-784, 2011 WL 1364277 (Minn. Ct. App. Apr. 12, 2011).

## ALTERATIONS TO DOCUMENTS

The Hennepin County Recorder's website indicates that "most alterations (strikeout or lining through) are unacceptable on legal documents. Whiteout and correction tape are always unacceptable". The Courts have occasionally dealt with altered documents. If there was no harm resulting directly from a proven alteration, the Courts typically would not disturb it.

A deed is merely the medium for the transfer of the title from the grantor to the grantee, and where its purpose is once fully accomplished its subsequent disposition cannot affect the title it has conveyed. It may be altered, mutilated, lost, or destroyed; its executory provisions may be rendered inoperative by fraudulent changes or otherwise; but the title which has passed by it will remain undisturbed...

...Title does pass and is not divested by the subsequent alteration, and, notwithstanding the unauthorized erasures or interlineations, it is open to the grantee named in the paper to show, by any competent evidence, the passing of title to him. In other words, he may and must show that a deed conveying the land to him was executed by the grantor named in the altered paper; he must prove the execution and contents of a deed, and this, of course, by the best evidence the case admits of. He cannot resort to parol evidence to prove the contents of a paper which has not been lost or physically destroyed, but, on the contrary, is then in his possession, and in court.

*Robbins v. Hobart*, 157 N.W. 908, 909-10 (Minn. 1916).

Further:

If, as plaintiff claims, McGuigan's name was in the deed at that time, title then passed to McGuigan and any subsequent alteration in the instrument would not revert the title in plaintiff, although it would destroy the force of the executory covenants in behalf of the party who made or caused such alterations.

*Green v. Lidberg*, 232 N.W. 511, 512 (Minn. 1930).

In another very early case, the drafter corrected the Section number in the legal description of a Mortgage, after execution. The Supreme Court upheld enforcement of a foreclosure. *Ames v. Brown*, (Minn. 1875).

The Attorney General has also weighed in on corrections to deeds:

Notwithstanding the lack of statutory authority for register of deeds to re-record an instrument, register of deeds may re-record a deed (a) in order to correct ministerial or clerical error where it clearly appears to register of deeds that such error was result of his recording of instrument and parties have requested that error be corrected, or (b) where deed as originally recorded was not then legally

entitled to record and legal disability has since been removed without any alteration in deed as recorded.

Op. Atty. Gen., 373-B-9, Sept. 6, 1946.

Where there is error in recorded deed and new deed cannot be executed, as where one of grantors is deceased, register of deeds, on proper decree of court in action to reform deed, could be authorized and permitted to correct record so as to conform to decree.

Op. Atty. Gen., 373-B-9, Sept. 6, 1946, cited under Minn. Stat. Ann. § 507.24 (West).

## **LOT SPLITS**

Additional requirements are inserted where land is divided. An example is cited from Hennepin County's website instructions:

Tax Parcel Split - Conveyance of part of an Auditor's tax parcel - When a deed is submitted for recording that conveys less than the whole of an existing Auditor's tax parcel, then for property located within the Hennepin County cities that have elected to be governed by MN Statute 272.162, evidence of Municipal subdivision approval must be presented, in order for the deed to be accepted for recording.

When a deed is submitted for recording that conveys less than the whole of an Auditor's tax parcel, then the current year taxes must be paid in full on the whole parcel (Minn. Stat. § 272.121) in order for the deed to be recorded. This requirement is in addition to the certification of no delinquent taxes.

Any time we settle boundary litigation which results in deviation from an original survey, we consider whether some governmental approval must be obtained.

## **RESULT OF RECORDING/REGISTRATION**

The purpose of recording is simply to protect against someone else acquiring a superior interest in real property. Recording gives constructive notice to all the world of the filer's rights set forth in the recorded document. A purchaser of an interest is charged with knowledge of record interests.

There is a distinction between actual, constructive and implied notice:

This court has defined the types of notice which would take away an individual's status as a good faith purchaser. "Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record." Anderson, 263 N.W.2d at 384. As such, a purchaser may be held to have constructive notice of a properly recorded interest, even though he has not



actually seen the recorded deed. A recorded interest is constructive notice “only of the facts appearing on the face of the record.” *Id.* at 385. If a county chooses to maintain a tract index, “the county is required by law to make accurate and appropriate entries and the tract index is part of the record of which a purchaser is charged constructive notice.” *Howard McRoberts & Murray v. Starry*, 382 N.W.2d 293, 297 (Minn.App.1986); see also Minn.Stat. § 386.05 (1986).

Implied notice has been found where one has “actual knowledge of facts which would put one on further inquiry.” *Anderson*, 263 N.W.2d at 384-85. For example, if a subsequent purchaser was aware that someone other than the vendor was living on the land, the purchaser would have a duty to inquire concerning the rights of the inhabitant of the property and would be charged with notice of all facts which such an inquiry would have disclosed.

*Miller v. Hennen*, 438 N.W.2d 366, 369-70 (Minn. 1989); see also *Clafin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. Ct. App. 1992), a fairly harsh application of the limits of constructive notice. In *Clafin*, a bank’s Mortgage was voided because it ignored the rights of a party in possession who was swindled out of her home ownership by her son. Salt was added to the wound by an award of punitive damages against the lender.

Implied notice has been found where one has ‘actual knowledge of facts which would put one on further inquiry.’ ” *Id.* at 370 (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384-85 (Minn.1978)). If one is aware that someone other than the vendor is living on the land, one has a duty to inquire concerning the rights of the inhabitant of the property and is chargeable with notice of all facts which such inquiry would disclose. *Id.*

*Clafin, supra.*

And time is money. And order and sequence does matter. A judgment creditor was barred from redeeming because his Notice of Intent to Redeem was filed hours before his Judgment was docketed.

From the time of docketing the judgment is a lien ... upon all real property in the county then or thereafter owned by the judgment debtor.” Thus, by statute, a judgment becomes a lien against a debtor's property when the judgment is docketed.

*C & M Real Estate Services, Inc. v. Thondikulam*, 739 N.W.2d 725, 728 (Minn. Ct. App. 2007).

In *Slattengren & Sons Properties, LLC vs. RTS River Bluff LLC*, A11-322 (Minn. Ct. App. October 11, 2011), the court for the first time was faced with the question of how to determine priority between a seller’s purchase money mortgage and a commercial lender’s purchase money mortgage arising as part of the same transaction. Normally, a purchase money mortgage will take priority over other mortgages. *Kloster-Madsen vs. Tafi’s*, 226 N.W.2d 603, 608 (1975).

*Slattengren* expanded on this general rule, noting that the lender's mortgage was recorded immediately before the seller's mortgage:

The Minnesota Supreme Court has acknowledged, without deciding, that a vendor's purchase-money mortgage and a third-party lender's purchase-money mortgage would attach simultaneously and the order in which they recorded their interests would overcome their otherwise equal standing. *Olson*, 203 Minn. at 201, 280 N.W. at 640 (observing that "[f]irst of record is ordinarily first of right").

Holding that the lender's mortgage had priority over the seller's mortgage, the Court of Appeals emphasized that the date and time of recording would determine priority between two purchase money mortgages where other indicators did not dictate a different result.

### **AVENUES TO RECORDING WHERE INSTRUMENT REJECTED**

Should an instrument be rejected, the surest fallback method is to commence suit against interested parties and file Notice of Lis Pendens. The Notice is filed with the County Recorder (or Registrar) while the lawsuit is, of course, filed in District Court. The Notice may only be filed when the Summons and Complaint have been filed; this avoids the prospect of someone filing Notice of Lis Pendens without ever filing a lawsuit. The lawsuit must be served within 90 days of filing of the Notice of Lis Pendens; (Minn. Stat. § 557.02). It would seem that filing a Notice of Lis Pendens without simultaneously filing a Complaint would constitute slander of title. It isn't every adverse filing which is slanderous, but those that are unauthorized, are adverse to the record owner and violate the requirements of statute are fairly high risk.

For registered property, another route which may be less costly (at the outset at least) is to file "Notice of Unregistered Claim", Minn. Stat. § 508.70. The Torrens Act recognizes there may be valid interests in real estate which cannot be otherwise recorded and could lead to loss if no streamlined route to registration were available.

In one case involving registered title, a Mortgage was given before a Notice of Lis Pendens was filed; but the Mortgage was not registered until after the Notice of Lis Pendens was memorialized on the Certificate. In that instance, the claimant prevailed in its lawsuit and the claim took priority over the later filed Mortgage. *Fingerhut Corp. v. Suburban Nat. Bank*, 460 N.W.2d 63, 64 (Minn. Ct. App. 1990).

### **WHEN CONSTRUCTIVE NOTICE IS NOT CONSTRUCTIVE NOTICE**

In one case our office handled, the Court of Appeals agreed with us that an Affidavit filed with the County Recorder in an attempt to cure the public record due to a mistaken satisfaction of mortgage was notice of nothing and not enforceable. With some surprising frequency, lenders mistakenly satisfy mortgages. It's usually in a case where they have more than one loan with a particular borrower, but then trouble can follow when another party obtains an interest without notice. In this case involving a dispute between two lenders, the Court ruled that an Affidavit accepted for recording in an attempt to perpetuate an interest was properly disregarded. In one sense, this is an argument to allow filing of dubious papers to allow all interests to be heard.

In this case, the parties do not dispute that the affidavit of recission of mistaken satisfaction of mortgage was filed and recorded. Appellant argues that because the affidavit was recorded, it follows that, under Minn.Stat. § 507.32, respondent and the Kromahs had constructive notice of it. However, the question still remains as to the legal effect of this constructive notice. To put it more plainly, what precisely was respondent on notice of? See Anderson, 263 N.W.2d at 385 (explaining that “a recorded interest is constructive notice only of the facts appearing on the face of the record”). Specifically, did the affidavit disqualify respondent and the Kromahs from being considered good faith purchasers because it provided constructive notice of the “inconsistent outstanding rights of others?” Id. at 384.

*Ameriquet Mortg. Co. v. Cleveland*, A07-1509, 2008 WL 2732066 (Minn. Ct. App. July 15, 2008).

We pointed out that many interests on record may be ignored, such as interests which have expired by law, e.g. a claim of a mechanic’s lien where suit has not been timely filed; a mortgage with a 15 year old maturity date; or a money judgment over 10 years old which hasn’t been renewed.

#### **RECORDER’S ERROR-COURT OF APPEALS RECORDING CRITERIA**

In a recent Court of Appeals’ decision, a County Recorder rejected an otherwise recordable Mortgage because the Mortgagor (borrower) was not the record owner. A lender of purchase money lost its rights in a property altogether in the process. In deciding the case, the Court engaged in a discussion of recording standards.

After closing of a purchase, the buyer decided he would rather title the property to himself instead of his corporation. No one told the lender who had funded the purchase, though. This led to some painful litigation in *Chamnic Enterprises, LLC v. Colonial Pac. Leasing Corp.*, A10-784, 2011 WL 1364277 (Minn. Ct. App. Apr. 12, 2011) where a slander of title damage award against the lender was ultimately overturned. However, the critical point for this discussion is that the Court of Appeals expressly stated the County Recorder acted improperly in rejecting a Mortgage presented for recording. The Court’s list of criteria for acceptance of an instrument for recording was extremely limited.

But respondents contend that even if the mortgage was operative when Hershey Oil signed it, by the time that Drewes recorded the affidavit, appellant knew that the mortgage was inoperative because the Wabasha County Recorder’s Office had rejected it for recording. We disagree. The statutory recording standards for documents are contained in Minn.Stat. §§ 507.093, .24 (2010). The Citicorp mortgage met the requirements for recording, and it was not within the authority of the Wabasha County Recorder’s Office to reject the mortgage simply because Hershey Oil was not yet the record owner of the property. This rejection caused appellant to lose its priority dispute with ICG because the district court found that ICG did not have notice of the Citicorp mortgage in Wabasha County.

The Court went on to hold that a jury question on the slander of title verdict form was improper because the question assumed the Mortgage was invalid, which was “not legally supportable”.

It is also interesting to see what the *Chamnic* Court included in its determination the Mortgage should have been accepted for recording. The Court considered unrecorded documents, specifically a purchase agreement between the original seller and corporate buyer, to determine that the corporate buyer had had an equitable interest in the real property. This interest entitled the Mortgage to be recorded. Following this conclusion a reasonable distance raises the question how much discretion the Recorder has to reject a facially proper instrument. If an instrument meets the few requirements of Minn. Stat. § 507.091-093 and 507.24, is it entitled to record even though the Recorder may have other reasons to challenge it?

But contrast this statement from *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989):

In addition to the requirements of providing valuable consideration without notice, a good faith subsequent purchaser under the Recording Act must also record title to the property first. In order to qualify as a valid recording, the purchaser must show record title back to the record fee owner.

And note this language in the Torrens Act:

No lesser estate than a fee simple, except an appurtenant easement as defined in subdivision 2, and no mortgage, lien, or other charge upon land, shall be registered, unless the estate in fee simple therein is registered.

Minn. Stat. § 508.04.

One could argue a different result might obtain in an instance where the County was being directly sued. However, the language used by the Court suggests the panel takes a dim view of the rejection of a Mortgage meeting the limited standards contained in Minn. Stat. § 507.093 and 507.24.

## **NON-CONSENSUAL LIENS**

Some documents are specifically given the boot by statute. With the increase of tax protesters and the dissemination of form documents via the Internet, there have been filings of purported liens against property which “liens” were never authorized or consented to by the property owner. I’m aware of an attorney having a fraudulent lien placed on his home by an angry debtor. The legislature addressed this problem by enacting a statute authorizing government officials with recording duties to reject certain “non-consensual liens.” Minn. Stat. § 514.99:

**Subd. 2. No duty to accept nonconsensual common law liens; notice of invalid lien.** (a) No person has a duty to accept for filing or recording a claim of nonconsensual common law lien unless:

(1) the claim is accompanied by a specific order from a court of competent jurisdiction authorizing the filing of the lien;

- (2) the lien statement is accompanied by an affidavit of personal service or service by certified mail of notice of the proposed lien on the subject of the lien; and
- (3) the lien statement includes the mailing address of the lien claimant.
- (b) No recording officer, recording office, or governmental entity is liable for the acceptance or rejection for filing or recording of a claim of nonconsensual common law lien or a notice invalid lien.

This statute plainly contemplates a review of documents submitted for recording claiming a lien by the Recorder; Registrar; Court Administrator; or Secretary of State. And the official is absolved of liability whether they accept or reject such a lien.

## **RECORDING INDEXES—GRANTOR-GRANTEE AND TRACT INDEXES**

The County Recorder must maintain indexes called Grantor Grantee index, and a separate Tract Index. The Grantor Grantee index is also called the Reception index. Minn. Stat. § 386.03. That index must note time of day, day, month and year when the document was recorded. The Grantor Grantee index is kept in alphabetical order by the last name of the grantor and of the grantee. Minn. Stat. § 386.32 requires that the County make a consecutive index of documents recorded. Indexing is considered part of the complete recording process,

Because information in the indexes maintained by a county recorder is considered part of the record of a document, indexing is part of the recording process. M.S.A. §§ 386.03-386.05.

*MidCountry Bank v. Krueger*, 782 N.W.2d 238 (Minn. 2010).

It's clear under Minn. Stat. § 507.34 that consequences will follow if an instrument is not recorded:

Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance. The fact that such first recorded conveyance is in the form, or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser or be of itself notice to the subsequent purchaser of any unrecorded conveyance of the same real estate or any part thereof.

Priority is determined by order of recording (Race theory) generally. The Counties are required to note order of recording and priority is presumptively determined by order of recording (Minn.Stat. 386.31). (The presumption is rebuttable); see also *Edmonston v. Wilbur*, 99 Minn. 495, 110 N.W. 3 (1906). The first recorded Mortgage is presumed to have higher priority but

contrary proof might hypothetically counter the presumption. A county website requires written instruction by filers as to priority when multiple mortgages are filed.

Every county recorder shall endorse upon each instrument recorded, over the recorder's official signature, OFFICE OF THE COUNTY RECORDER,... COUNTY, MINNESOTA, CERTIFIED, FILED, AND/OR RECORDED ON, the date and time when it was recorded and the document number and/or book and page in which it was recorded; and every instrument shall be considered as recorded at the time so noted.

Minn. Stat. § 386.41.

The record, as herein provided, of any instrument properly recorded shall be taken and deemed notice to parties...

Minn. Stat. § 507.32.

The same is true of Torrens title even against a competing claim to an attorney's lien in a probate proceeding where the Mortgage lender did not perfect a probate claim against the Estate:

Priority of instruments affecting title to Torrens property is established from the date of filing with the registrar of titles. Minn.Stat. § 508.48 (2008); see *Imperial Developers, Inc. v. Calhoun Dev., LLC*, 790 N.W.2d 146, 148-49 (Minn.2010) (holding that mortgage was "of record" at the time it was filed with registrar of titles and therefore had priority over later-filed mechanic's lien).

*Somsen, Mueller, Lowther & Franta, PA v. Estates of Olsen*, 790 N.W.2d 194, 197 (Minn. Ct. App. 2010).

Priority is established by the date and the time of recording or registration. *Imperial Developers, Inc. v. Calhoun Dev., LLC*, 790 N.W.2d 146, 147 (Minn. 2010). But see *Fender v. Appel*, 245 N.W. 148, 150 (Minn. 1932), an unusual case finding two mortgages to be coordinate and order of recording not dispositive as to their relative priority.

In any event, the implications arising out of a warranty contained in each mortgage against other encumbrances must prevail over the kind of presumption that can arise out of one instrument having been assigned a number prior to that given to the other.

Minn. Stat. § 508.55 of the Torrens Act specifies the manner of registration of a Mortgage. It states the registration process includes memorialization upon the Certificate of Title:

The registration of a mortgage made by the registered owner, the registered owner's attorney-in-fact, or by a party having an interest registered on the certificate of title, other than the registered owner or the registered owner's attorney-in-fact, shall be made in the following manner: The mortgage deed or

other instrument to be registered shall be presented to the registrar, and the registrar shall enter upon the certificate of title a memorial of the instrument registered, the exact time of filing, and its file number. The registrar shall also note upon the registered instrument the time of filing and a reference to the volume and page where it is registered.

Minn. Stat. § 508.55. This language was subject to dispute as to effect between a mechanic's lien claimant and a Mortgage lender in *Imperial Developers, Inc. v. Calhoun Dev., LLC*, supra. The essential problem was that though a Mortgage had been registered, the Registrar had not yet memorialized it on the Certificate of Title. Arguably then, the interest was not properly registered. But here the Supreme Court found that the lender's filing alone was sufficient to rate higher priority than the mechanic's lien claimants:

The arguments of the parties center on when a mortgage is "of record" under Minn.Stat. § 514.05 (2008), an issue of first impression in Minnesota. That statute requires a mortgage to have been "of record" at the time a mechanic's lien attaches in order to have superior priority to the lien. Respondent lien-holders contend that "of record" means that a mortgage against Torrens property has been both filed and memorialized on the Torrens certificate (i.e., "registered"). See Minn.Stat. § 508.55 (2008).

## **CERTIFICATES OF RELEASE**

With the glut of refinances and other closings, lenders were challenged to keep up with issuance of Satisfactions of Mortgage. The problem was multiplied with the growth of transactions in Mortgage instruments. Owners wishing to sell or to refinance were routinely finding that previously paid Mortgages were not satisfied of record. The legislature enacted Minn. Stat. § 507.401 to permit certain third party title insurance companies to release mortgages. It's a breathtaking concept if you think about it. The law empowers an agent to declare a lender no longer has a mortgage on a property. This has led to litigation, but no reported decisions I've seen to date.

I've been involved in litigation on certificates of release on more than one occasion. The intention is to sweep away unreleased mortgages from the record.

The language of the Certificate is spelled out by statute which authorizes the Recorder and Registrar to accept them for filing.

**Subd. 5. Effect.** For purposes of releasing the mortgage, a certificate of release containing the information and statements provided for in subdivision 3 and executed as provided in this section is prima facie evidence of the facts contained in it, is entitled to be recorded with the county recorder or registrar of titles, and operates as a release of the mortgage described in the certificate of release. The county recorder and the registrar of titles shall rely upon it to release the mortgage.

Minn. Stat. § 507.401.

The question raised in a couple cases I've had is whether the Certificate is only "prima facie" evidence of release which can be generally rebutted; or whether it is absolute, as the statute also says. If it is absolute, why is the language prima facie evidence used?

One case I litigated involved dueling chains of title where one side relied on a Certificate of Release. That lender ignored a current Power of Attorney to Foreclose the Mortgage which was filed after the foreclosing lender's Mortgage was supposedly released by a title company.

Everyone thought it best to settle.

### **LIABILITY FOR NEGLIGENCE BY COUNTY RECORDER?**

All persons and institutions are fallible. Even the Recorder or Registrar may err and the negligence could contribute to a loss. In limited circumstances, the Recorder might be liable to an injured person. There is no compensation fund set up or provided for in connection with the Recorder's Office. Though not express as in the Torrens Act, the legislature appears to contemplate the Recorder might be liable in some circumstances.

**Subd. 3. Recording officers, liability not affected.** This section shall not be construed as relieving the county recorder or the registrar of titles of any county in this state from any penalty or liability imposed by law for accepting and recording or filing an instrument not legally entitled to record or filing.

Minn. Stat. § 507.251. On the other hand, no appellate decision determining the potential of Recorder liability has been located.

The Supreme Court has held that the County is required to make accurate entries in the indexes:

If a county chooses to maintain a tract index, however, the county is required by law to make accurate and appropriate entries and the tract index is part of the record of which a purchaser is charged constructive notice. See Minn.Stat. § 386.05 (1984).

*Howard, McRoberts & Murray v. Starry*, 382 N.W.2d 293, 297 (Minn. Ct. App. 1986); *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989). (Note that maintenance of a tract index is no longer optional per Minn. Stat. § 386.05.)

And, the Recorder is statutorily required to give a bond which may imply potential liability.

Every county recorder, before entering upon the duties of office, shall give bond to the state in the penal sum of \$5,000, to be approved by the county board, conditioned that the recorder will faithfully and impartially fulfill the duties of office. The bond and an oath of office shall be filed for record with the court administrator of the district court.



Minn. Stat. § 386.01. However, the surety may not be held liable for negligence by the Recorder in performance of a duty not mandated to the office. *Fed. Intermediate Credit Bank of St. Paul v. Maryland Cas. Co.*, 259 N.W. 793, 794 (Minn. 1935).

There is one old case, the headnote of which indicates the Recorder was negligent, but...

**---- Negligence, liability**

*A register of deeds is negligent in relying on a marginal entry without examining the record itself. Wacek v. Frink, 1892, 51 Minn. 282, 53 N.W. 633, 38 Am.St.Rep. 502. Absentees 3; Registers Of Deeds 6*

However, the headnote is not the holding in the case. As in the facts of the case, it is necessary to actually read the decision as the Recorder (Register of Deeds) was not even a defendant in the lawsuit. Actually, an Abstractor was sued on account of an erroneous entry made by the Register of Deed (Recorder). The Recorder was not sued. The Recorder noted a Mortgage as fully, rather than partially satisfied. The defendant Abstractor failed to read the document itself relying on the margin entry. The land in question was not part of the land released. Justice Mitchell stated this was negligence as a matter of law:

The record, and not a marginal reference to it by the register, (which is required merely for convenience in making searches,) is what determines the character and legal effect of an instrument; and the duty of an examiner of titles is not fulfilled by merely assuming the accuracy of such a reference, without examining the instrument itself. Any other rule would render abstracts of title so unreliable as to be of little value...

...The fair and reasonable import of defendant's undertaking was to obligate him to make a full and true search and examination of the records relating to the title of the land, and to note upon the abstract accurately every transfer, conveyance, or other instrument of record in any way affecting the title.

*Wacek v. Frink*, 51 Minn. 282, 284, 53 N.W. 633, 634 (1892). (Note: see treatment of *Wacek* by *Midcountry Bank vs. Krueger* below.

In a 2001 Hennepin County Trial Court decision, I represented a lender whose Mortgage was misindexed. A later lender missed it. That lender brought suit against Hennepin County for negligence. The Trial Court denied the County's Motion to Dismiss. Judge Gary Larson ruled that a Recorder could as a matter of law be subject to liability for misindexing a Mortgage. At the time, Judge Larson did an extensive survey of decisions over the United States and also commented he believed that the case was one of first impression in Minnesota. He noted the Registrar by statute may be liable for negligence, but the Recording Act is silent, or at least not express on the topic. The case was called *The Bank Of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 Under the Pooling and Servicing Agreement Dated as of September 1, 1997 vs. Groveland Credit Company, a Minnesota Corporation and Hennepin County*; 27-CV-00-006410.

In his 2001 decision, Judge Larson called the case one of first impression. Our office looked but found no case at the appellate level deciding the issue. However, the public will be held to a high standard. Though a record may not be perfectly filed and indexed, in that it could not be located in the tract index due to misindexing, if it could be located in the reception or grantor grantee index, it will still constitute constructive notice. See *Midcountry Bank vs. Krueger*, *supra*; and *Bank of New York v. PK Inv. Properties, LLC*, A09-1897, 2010 WL 2732883 (Minn. Ct. App. July 13, 2010).

In *PK Inv. Properties*, the legal description of a condominium was erroneous in one recorded document. The Court held that it was nevertheless of record and could have been located had a searcher checked both the tract and grantor-grantee index.

The holding in *Midcountry Bank* was foreshadowed by an opinion of the Attorney General in 1946. While it is duty of register of deeds to record properly a deed or conveyance entitled to record, yet grantee named therein also has duty to see that proper record of deed or conveyance has been made. Op. Atty. Gen., 373-B-9, Sept. 6, 1946.

## **LIABILITY OF REGISTRAR-TORRENS OFFICE**

A limited number of decisions have considered liability of the Registrar for a mistake made in the registration process. Recent decisions in both abstract and in torrens hold that an imperfect recording or registration may still suffice as constructive notice to purchasers. And see the Attorney General opinion cited above regarding the duty of the public to make a thorough inquiry of the public record. This trend will protect the public purse while imposing greater responsibility for examination of the public records on purchasers and lenders (and their title insurers).

## **ASSURANCE FUND**

In 1930, a suit was brought against a County Treasurer for the Registrar's alleged negligence resulting in loss, *Horgan v. Sargent*, 182 Minn. 100, 106, 233 N.W. 866, 869 (1930). There the Supreme Court indicated it had found only one 1915 decision dealing with the office's potential liability.

The only case in this court called to our attention, where recovery from the assurance fund has been sought, is *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871. The case is not in point here on the facts, but holds that, for a mistake or failure of the examiner of titles to ascertain the facts, a purchaser in good faith, suffering loss thereby, may recover from the assurance fund.

In *Shevlin-Mathieu Lumber*, the Registrar when issuing a Certificate of Title to a homesteader failed to indicate that no patent from the U.S. had ever been granted. That record owner later lost the property by tax forfeiture. It was later resold; but after a number of transactions occurred which were dependent on the original registered title, the United States sold and conveyed the

land to another party who was declared to have a superior title. The Supreme Court found the injured party might recover from the Assurance Fund.

In *Horgan v. Sargent*, 182 Minn. 100, 106, 233 N.W. 866, 869 (1930), the Supreme Court considered a case where a Mortgage was granted for approximately \$3,800 but memorialized as a Mortgage for only \$3,300. The Buyer agreed to assume the Mortgage based only on the notation in the record. He had never examined the Mortgage itself. The County defended saying this was negligence on the part of the purchaser which should excuse it from liability. The Supreme Court affirmed a Jury verdict that the buyer was not negligent and could recover against the County due to the Registrar's negligence.

The fact that a purchaser of registered land in good faith relies upon the certificate of title and upon the memorials entered thereon, without going to the files of the registrar to examine an instrument described in a memorial, should not be held negligence as a matter of law. Negligence is ordinarily a question of fact. We conclude it was a question of fact in this case and that the evidence sustains the finding of the jury that plaintiff was without negligence.

*Horgan v. Sargent*, 182 Minn. 100, 106, 233 N.W. 866, 869 (1930).

See the more recent decisions, particularly, *Midcountry Bank vs. Krueger*, supra, to consider whether *Horgan* would be decided the same way today.

A predecessor to the present statute on Registrar liability quoted below dates at least to 1913.

**Subdivision 1. Compensation for loss or damage.** Any person who, without negligence on that person's part, sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar or the registrar's deputy, or of any examiner or of any court administrator, or of a deputy of the court administrator or examiner, in the performance of their respective duties under this law, and any person who, without negligence on that person's part, is wrongfully deprived of any land or of any interest therein by the registration thereof, or by reason of the registration of any other person, as the owner of such land, or by reason of any mistake, omission, or misdescription in any certificate of title, or in any entry or memorial, or by any cancellation, in the register of titles, and who, by the provisions of this law, is precluded from bringing an action for the recovery of such land, or of any interest therein, or from enforcing any claim or lien upon the same, may institute an action in the district court to recover compensation out of the general fund for such loss or damage...

Minn. Stat. § 508.76.

The availability in Torrens of the Assurance Fund, however, does not equate to a guaranteed recovery if a claimant loses the underlying case.

The statute does not guarantee relief, it only guarantees a chance to make a claim against the general fund if a party was unable to litigate the claim in the first instance.

Respondents were allowed to litigate; and and (sic) we cannot find that the statute allows a second chance against the general fund after a claimant's action in district court was litigated and lost.

*Zahradka v. State, Office of State Treasurer*, 515 N.W.2d 611, 614 (Minn. Ct. App. 1994). Put another way, it would seem the Registrar's negligence would have to directly cause the loss by the owner of an interest.

The phrasing of the statute raises a question whether any amount of comparative fault on the part of a claimant would bar a recovery. Obviously, the Comparative Fault Act, Minn. Stat. 604.01 did away with contributory negligence as a complete bar of recovery against general negligence claims. It introduced the comparison of fault by fact finders and the allowance of recovery by a negligent plaintiff if he was not more negligent than a defendant. This statute creating Registrar liability retains language which, read literally, requires a claimant be "without negligence".

And the Statute also refers to negligence of a Court Administrator which raises the question whether an omission of a judgment could somehow authorize an action against the Court Administration. Purists will note that a Judgment creditor must request a judgment be memorialized upon the Certificate to create a lien on registered land, Minn.Stat. 508.63

Minnesota Statute § 548.09, subd. 1, provides in relevant part:

Except as provided in § 548.091, every judgment requiring the payment of money shall be docketed by the court administrator upon its entry ... From the time of docketing the judgment is a lien, in the amount unpaid, upon all real property in the county then or thereafter owned by the judgment debtor, but it is not a lien upon registered land unless it is also filed pursuant to sections 508.63 and 508A.63 ... [emphasis added].

*In re Strom*, 97 B.R. 532, 535 (Bankr. D. Minn. 1989) *subsequently aff'd*, 921 F.2d 836 (8th Cir. 1991).

The Torrens Act also specifically sets out a way to file an interest when one is otherwise unable to register (due for example to the requirement that the claimant show direct link to the fee owner.

Any person claiming any interest in registered land arising or created after the date of the original registration, which does not appear on the certificate of title, may, if there is some impediment to registering the claimed interest, file with the registrar of titles a verified claim of unregistered interest...

Minn. Stat. § 508.70.

As a discussion of the impact of a filed Notice of Adverse Claim under the older incarnation of Minn. Stat. 508.70, see 8<sup>th</sup> Circuit decision, *United Fire & Casualty Co. v. Fidelity Title Ins. Co.*, 258 F.3d 714, 716 (8th Cir. 2001). The 8<sup>th</sup> Circuit questioned the Examiner's Ruling where it had accepted our client's filing of a Notice of Adverse Claim (a Mortgage on an unregistered vendee's interest in a Contract for Deed). The Examiner held and the District Court confirmed that the Notice of Adverse Claim gave sufficient notice of the existence of the Mortgage such

that a later purchaser was charged with notice and took subject to the Mortgage. (The Federal Court litigation took place around the availability of errors and omissions coverage to insure the title agent for a known defect in title he ignored. The Eighth Circuit ruled no coverage was available).

The statute as amended provides a mechanism to trigger the claimant to file an action to maintain its claim. The claimant must file an action within 90 days of filing the demand to remove the claim, or the claim is automatically terminated; and can be ignored; and shall be omitted from future certificates of title.

## **EXAMINER OF TITLES AS JUDICIAL OFFICER**

A current decision considered conduct by the Examiner which might be seen as routine. The Court of Appeals made clear that the Examiner must be available to meet with both parties if it meets with one to discuss a problem:

The Ruikkies appear to claim that it was wrong for the St. Louis County title examiner, surveyor, and deputy recorder to have met with Nall and his associates in July 2005 regarding the status of the Nalls' CIC application. The Ruikkies have requested no relief from this alleged error. Because we are reversing and remanding this case to the district court, we do not discuss this matter further. We do recognize that a county official's expertise and availability may be of significant practical value and a public service in matters regarding real property. We do not suggest in this opinion that informal consultation with county officials is improper, so long as all interested parties have an opportunity to seek such guidance.

*Ruikkie v. Nall*, 798 N.W.2d 806 (Minn. Ct. App. 2011).

## **SCOPE OF TORRENS PROCEEDINGS IMPORTANCE OF TITLE EXAMINER PARTICIPATION**

Yet another decision underscored the vital role of the Examiner of Titles. In a boundary dispute between adjoining owners of registered parcels, the defendant's counterclaim to establish a boundary was ruled properly stricken because of failure to comply with various procedural requirements of the Torrens Act. The Court of Appeals noted the Examiner of Title's vital role:

The title examiner participates in proceedings, and all interested parties, including mortgagees, are notified of proceedings and allowed to participate. This process ensures compliance with due process and statutory requirements

*Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867, 871 (Minn. Ct. App. 2011). While practical location is available to settle boundary disputes involving torrens titles, a party must bring the action as a proceeding subsequent to registration and involve the Examiner of Titles:

The procedure for seeking a judicial determination of a boundary line of one or more Torrens properties is set forth in Minn.Stat. § 508.671: "Section 508.671

*shall* apply in a proceedings subsequent to establish a boundary by practical location for registered land.” Minn.Stat. § 508.02 (emphasis added); *see also* Minn.Stat. § 645.44, subd. 16 (2010) (“ ‘Shall’ is mandatory.”). A proceeding under section 508.671 must follow several steps, including filing a certified copy of the petition with the registrar of titles and providing notice to all interested parties. *Phillips*, 776 N.W.2d at 758–59.

*Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867, 870 (Minn. Ct. App. 2011)

And for a decision emphasizing the breadth of scope of Torrens proceedings subsequent, see *In re Metro Siding, Inc.*, 624 N.W.2d 303, 307-08 (Minn. Ct. App. 2001). Mechanic’s lien holders various ownership rights could be decided in a PS. However, specific notice was required in order to try the issue, citing Minn. Stat. § 508.71, subd. 2.

## CONCLUSION

With apologies to Ecclesiastes, where it was written:

I returned and saw under the sun that - The race is not to the swift, Nor the battle to the strong, Nor bread to the wise, Nor riches to men of understanding, Nor favor to men of skill; But time and chance happen to them all. Ecclesiastes 9:11

And with further apologies to *In Re Collier* where it was also written that first in time is not always first in right.

Still, recording continues as the single most important act to secure one’s rights in real property. And should a document be rejected for any reason, it becomes urgent the filing party or title agent correct the deficiency and re-present for filing timely.

Prompt recording beats engaging in lengthy expensive litigation.