Part 1

TITLE RECORDS IN GENERAL

Chapter 1

Proof of Title by Public Records

§ 2 What is meant by examination of title

Add at end of section:

Land titles are legal rights and the determination of who has title to land is essentially a legal conclusion. Nevertheless, courts distinguish between examining titles and rendering title opinions.[5] Though non-lawyers who render title opinions might be charged with the unauthorized practice of law, non-lawyers are authorized to examine titles for purposes of issuing title insurance in all but a few states today.[6]

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[5]*See* cases cited *infra* §§ 41 and 54.

[6]*See infra* §§ 41 and 54.

§ 4 Proof of title in the United States—Origin and use of recording system

n. 4.

In re Rivera, 513 B.R. 742, 758, (Bankr. D. Colo. 2014), *citing* 1 Patton and Palomar on Land Titles § 4 (3d ed.) (2013).

n. 7.

Other History

In re Rivera, 513 B.R. 742, 758, (Bankr. D. Colo. 2014), *citing* 1 Patton and Palomar on Land Titles § 4 (3d ed.) (2013).

Add new footnote 22.50 at the end of the first sentence of the sixth paragraph, following the words "District of Columbia.":

Recording acts are now in force in all the states and also in the District of Columbia.[22.50]

[22.50]Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 4 (3d ed.)).

n. 24.

Jackson v. Bank One, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, (Feb. 11, 2008) (penalty of failure to record a mortgage protects only a subsequent vendee without notice).

ABN AMRO Mortg. Group, Inc. v. American Residential Services, LLC, 845 N.E.2d 209 (Ind. Ct. App. 2006) (the purpose behind the recording statutes is to protect subsequent purchasers, mortgagees, and lessees of real property).

Greenpoint Mortg. Funding, Inc. v. Schlossberg, 390 Md. 211, 888 A.2d 297 (2005) ("Recordation systems . . . evolved in order to insure that owners of property were not able to convey or mortgage the same property to several people at the same time.").

Devine v. Town of Nantucket, 449 Mass. 499, 870 N.E.2d 591 (2007) ("recording acts are designed to protect purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests from the enforcement of those claims").

Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Finance & Investments, L.L.C., 2009 MT 36, 349 Mont. 207, 203 P.3d 744 (2009) (the recording system "imparts constructive notice to subsequent purchasers that there exists another interest in the property"); Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84 (2008) (a central depository of instruments affecting title to real property "enables a prospective purchaser to determine what kind of title he or she is obtaining without having to search beyond public records").

City of Rio Rancho v. Amrep Southwest Inc., 2011-NMSC-037, 150 N.M. 428, 260 P.3d 414 (2011) (purpose of state's recording act is to protect subsequent purchasers).

n. 25.

Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275, 280 (4th Cir.1998):

> Since conveyances of land, contracts and options to convey land, leases over three years, and mortgages and deeds of trusts are required to be recorded in the Registration of Titles book in order to be effective against lien creditors or purchasers for value, *see* N.C. Gen. Stat. §§ 47-18, 47-20, the book establishes a chain of title on which purchasers can rely. *See* Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1, 10 (1973) (purchaser charged with notice of all facts disclosed by an examination of the chain of title); *see also* Chrysler Credit Corp. v. Burton, 599 F.Supp.

1313, 1318 & n. 9 (M.D.N.C.1984) ("[P]ublic record concerning the status of land titles" is established by recording in the Registration of Titles as required by North Carolina General Statutes §§ 47-18 & 47-20). Moreover, the North Carolina courts have clarified that the purpose of these North Carolina recording provisions is to establish a "single reliable means for purchasers to determine the state of the title to real estate," and to impute constructive notice only of "all duly recorded documents that a proper examination of the title would reveal." *See* Stegall v. Robinson, 81 N.C.App. 617, 344 S.E.2d 803, 804 (1986).

Wailuku Agribusiness Co., Inc. v. Ah Sam, 114 Haw. 24, 155 P.3d 1125 (2007), as amended, (Apr. 12, 2007) ("the recording of deeds ensures that the public would be afforded notice of the property interests detailed in the deeds and of potential claims to the property").

Regency Commercial Associates, LLC v. Lopax, Inc., 373 Ill. App. 3d 270, 311 Ill. Dec. 636, 869 N.E.2d 310 (4th Dist. 2007) ("recording of documents with a county recorder of deeds serves to notify any interested parties in the future of the status of owners of property and/or restrictions on specific parcels").

See generally Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 4 (3d ed.) for all three purposes described herein).

Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs, N.A., 2006 WY 132, 144 P.3d 1224 (Wyo. 2006) ("the primary purpose of the recording statute is to secure certainty of title").

n. 28.

Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275 (4th Cir.1998):

> While the Registration of Titles book constitutes the "sole and conclusive legal evidence of title," N.C. Gen. Stat. § 43-22, liens, encumbrances, and other matters affecting specific parcels of real property may be recorded against the property in accordance with state statute and thereby put purchasers of that property on constructive notice also about them. For example, North Carolina provides for a "Record of Lis Pendens," *see* N.C. Gen. Stat. § 1-117; a "judgment docket" or book, *see* N.C. Gen. Stat. §§ 1-234 to 1-237, 1-208.1, 43-45; and a "Book of Wills," *see* N.C. Gen. Stat. § 31-20.

n. 42.

Applications of Rule

Lumpkins v. CSL Locksmith, LLC, 911 A.2d 418 (D.C. 2006) ("at common law, a deed is valid between the parties if signed, sealed, and delivered, though not acknowledged or recorded").

Dempsey v. Auditor of Marion County, 871 N.E.2d 1031 (Ind. Ct. App. 2007) ("although record title is evidence of ownership, whether or not a deed is recorded does not affect the deed's validity"); Patterson v. Seavoy, 822 N.E.2d 206 (Ind. Ct. App. 2005) (whether or not a deed is recorded has no effect on its validity).

Smith v. Vest, 2007 WL 4209084 (Ky. Ct. App. 2007).

Solans v. McMenimen, 80 Mass. App. Ct. 178, 951 N.E.2d 999 (2011), review denied, 460 Mass. 1115, 957 N.E.2d 241 (2011) (holding attachment took priority over the prior unrecorded mortgage).

n. 43.

In re Kyu Sup Mun, 458 B.R. 628 (Bankr. N.D. Ga. 2011) (quitclaim deed valid between parties despite being improperly recorded); Jackson v. Bank One, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, (Feb. 11, 2008) (penalty of failure to record a mortgage has reference only to the rights of a subsequent vendee without notice); Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 638 S.E.2d 760 (2006) (absent evidence of fraud, or duress, or some other coercive action, courts will uphold valid deeds between the parties, even if unrecorded).

Reicherter v. McCauley, 47 Kan. App. 2d 968, 283 P.3d 219 (2012) (citing K.S.A. 58-2223).

Smith v. Vest, 2007 WL 4209084 (Ky. Ct. App. 2007).

Standard Fire Ins. Co. v. Berrett, 395 Md. 439, 910 A.2d 1072 (2006) (an unrecorded deed is valid between the grantor and grantee, and also as to third persons with actual notice of the deed).

Ligon v. City of Detroit, 276 Mich. App. 120, 739 N.W.2d 900 (2007),

appeal denied, 480 Mich. 1009, 743 N.W.2d 20 (2008) (as between the parties, an otherwise conforming deed is valid even if it is not recorded).

Huntington City v. Peterson, 30 Utah 2d 408, 518 P.2d 1246 (1974).

§ 5 Comparison of recording acts

Add new footnote 2.50 at the end of the fifth sentence of the first paragraph, following the words "as to certain parties.":

In general, they all provide that, unless recorded or unless recorded within a specified time, certain instruments shall be ineffective or shall be void as to certain parties.[2.50]

[2.50]Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 5 (3d ed.)).

n. 4.

Particular Instruments Held Not Within the Recording Statutes

Alexson v. Foss, 276 Conn. 599, 887 A.2d 872 (2006) (describing as a recording act a statute that requires arbitration agreements affecting an interest in land to be executed with the same formality as a deed and to be recorded in the town clerk's office).

Greenpoint Mortg. Funding, Inc. v. Schlossberg, 390 Md. 211, 888 A.2d 297, n.10 (2005) (notice of *lis pendens* is an "instrument" affecting property for the purposes of the recording and indexing statutes).

Add new footnote 6.50 to the end of the following sentence "Some states' statutes list all the types of interests that may be recorded and all that must be recorded to be accorded priority over subsequent claims.":

[6.50]Merscorp, Inc. v. Romaine, 24 A.D.3d 673, 808 N.Y.S.2d 307 (2d Dep't 2005), aff'd on other grounds, 8 N.Y.3d 90, 828 N.Y.S.2d 266, 861 N.E.2d 81 (2006) (recording statute required county clerk to record and index all written conveyances, including mortgages, assignments, and discharges that were duly acknowledged and accompanied by proper fee).

§ 6 Those determining priority of right by priority of record

n. 10.

Starr v. Wilson, 11 So. 3d 846 (Ala. Civ. App. 2008) (Alabama's statute does not render void an unrecorded deed except for the benefit of those classes of persons named in the statute, such as purchasers for a valuable consideration, mortgagees, and judgment creditors without notice).

n. 11.

See generally Szypszak, North Carolina's Real Estate Recording Laws: The Ghost of 1885, 28 N.C. Cent. L. Rev. 199 (2006).

n. 12.

In re Ibach, 399 B.R. 61 (Bankr. D. Minn. 2008) (every conveyance of real estate not properly 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).

Washington Mutual Bank, F.A. v. Elfelt, 756 N.W.2d 501 (Minn. Ct. App. 2008) (Minnesota is a race-notice jurisdiction, meaning a bona fide purchaser who records first obtains rights to the property which are superior to a prior purchaser who failed to record).

Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 6 (3d ed.)).

Mansur v. Muskopf, 159 N.H. 216, 977 A.2d 1041 (2009) (New Hampshire is a race-notice jurisdiction so a purchaser with a senior claim in real estate must record such interest in order to prevail over a bona fide purchaser).

Add n. 13.50 at the end of "Under Louisiana's recording act, protection is given to all third persons,"

Under Louisiana's recording act, protection is given to all third persons,[13.50] and the matter of notice has expressly been held to be immaterial.

[13.50]Federal Trust Bank v. Sheppard, 140 So. 3d 86 (La. Ct. App. 5th Cir. 2014), writ denied, 147 So. 3d 706 (La. 2014) and writ denied, 147 So. 3d 707 (La. 2014); Black Water Marsh, LLC v. Roger C. Ferriss Properties, Inc., 130 So. 3d 968, 970 (La. Ct. App. 3d Cir. 2014), writ denied, 138 So. 3d 1248 (La. 2014) (under the Louisiana Public Records doctrine, interest in real estate must be recorded as public record in order to affect third persons).

n. 14.

Peironnet v. Matador Resources Co., 103 So. 3d 445 (La. Ct. App. 2d Cir. 2012), writ granted, 106 So. 3d 541 (La. 2013) and writ granted, 106 So. 3d 542 (La. 2013) and judgment rev'd on other grounds, 2012-2292 La. 6/28/13, 2013 WL 3752474 (La. 2013); Wede v. Niche Marketing USA, LLC, 52 So. 3d 60, 63 n.6 (La. 2010).

In re McCormick, 417 B.R. 362 (Bankr. M.D. N.C. 2009), order aff'd, 433 B.R. 532 (M.D. N.C. 2010) (North Carolina is a "pure-race" jurisdiction in which the first to record holds an interest superior to all other purchasers, regardless of any actual or constructive notice of any unrecorded conveyances).

n. 16.

In re Phalen, 445 B.R. 830 (Bankr. S.D. Ohio 2011) (stating "race" statute with respect to mortgages); In re Seymour, 442 B.R. 652 (Bankr. S.D. Ohio 2010); In re Frost, 384 B.R. 781 (Bankr. S.D. Ohio 2008) (under Ohio law, bona fide purchaser may only avoid an improperly executed mortgage if she does not have actual or constructive knowledge of that transaction).

§ 7 Acts based upon notice

n. 2.

Spickler v. Ginn, 2012 ME 46, 40 A.3d 999 (Me. 2012) (Clarifying that Maine's statute is a race-notice type).

C F Investments, Inc. v. Option One Mortg. Corp., 163 N.H. 313, 42 A.3d 847 (2012) (stating that "New Hampshire is a 'race-notice' jurisdiction"); Amoskeag Bank v. Chagnon, 133 N.H. 11, 572 A.2d 1153 (1990).

16 Okla. Stat. § 15 was amended in 1993 to omit the phrase "without actual notice thereof" following "persons."

n. 4.

In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009).

Whitehead v. Garrett, 1947 OK 303, 199 Okla. 278, 185 P.2d 686 (1947).

In re Fowler, 425 B.R. 157 (Bankr. E.D. Pa. 2010) (Pennsylvania law protects against prior unrecorded interests only if the subsequent purchaser took the property for value and without notice of any defect in title).

Add new footnote 5.50 after "Oklahoma," in second paragraph:

[5.50]Controversy exists today regarding whether Oklahoma's statute is applied as a "notice" or "race-notice" statute. The reporter from Oklahoma for the 1938 edition of this treatise, attorney Chester Brown, identified Oklahoma's as a "notice" statute. The language of the statute parallels the Massachusetts act—"[n]o . . . instrument . . . shall be valid as against third persons without actual notice thereof unless recorded." (In 1993, the phrase "without actual notice thereof" was deleted.) Since 1917 Oklahoma courts have held that "third persons" are innocent purchasers for value lacking notice of an adverse conveyance. *See* cases cited in § 7, footnote 4 *supra.* With that judicial gloss, the statute seems to provide that "no instrument shall be valid as against subsequent good faith purchasers unless recorded." The requirement that the "good faith purchasers" be "subsequent" purchasers seems implicit in that a purchaser could only have notice of a prior conveyance and not one that does not yet exist. 16 Okla. Stat. § 16 supports this interpretation by saying, "Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors." Because neither statute states that the subsequent good faith purchaser must also record before the prior purchaser in order to obtain priority for her instrument, the statute does not seem to contain a "race" element. Nevertheless, *see infra* § 7, Note 10 for the argument that absence of the word "subsequent" in the statute means that a conveyance must be recorded to have priority over either a prior or subsequent purchaser.

Some Oklahoma Supreme Court opinions have applied the statute as if it is a notice act; yet, others have applied it as if it were a race-notice act. *Compare* McAllister v. Clark, 1923 OK 343, 91 Okla. 205, 217 P. 178 (1923) ("the law will declare the party holding the first deed filed for record to be the owner of the land"); Stroheker v. Torrence, 1928 OK 608, 134 Okla. 167, 272 P. 432 (1928) (holding that subsequent bona fide purchaser obtained priority over prior conveyance); Bates v. Rogers, 1936 OK 694, 178 Okla. 164, 62 P.2d 481 (1936) (ruling as if the act were race-notice); Colby v. Hayes, 1939 OK 550, 186 Okla. 283, 97 P.2d 65 (1939) ("We think that [application as a race-notice statute] has now become a 'rule of property' and is not open to reconsideration, even though there be reasonable doubt as to its correctness"); Davis v. Lewis, 1940 OK 105, 187 Okla. 91, 100 P.2d 994 (1940) (applying like a notice statute).

n. 6.

Colorado was inadvertently continued in this list from the 2nd edition of this treatise. Footnote 2 of § 8 correctly reflects the fact that in 1984, Colo. Rev. Stat. § 38-35-109 was amended to state that it is a race-notice statute. The act is clearly distinguishable from a notice statute because it provides that an "unrecorded instrument or document shall be valid" only "against any person with any kind of rights in or to such real property who first records" . . .. (emphasis added). Prior to the amendment, attorneys disagreed on the proper interpretation of the statute. *See* article and cases cited in § 8 footnote 2 *infra.*

Subsequently construing Virginia's statute as race-notice, *see* In re Perrow, 498 B.R. 560, 571 (Bankr. W.D. Va. 2013) ("Virginia is a race notice jurisdiction; meaning, generally, the first creditor to record its interest has priority over others who record or purchase thereafter.").

n. 7.

In re Kasparek, 426 B.R. 332, 344, 63 Collier Bankr. Cas. 2d (MB) 1037 (B.A.P. 10th Cir. 2010).

Devine v. Town of Nantucket, 449 Mass. 499, 870 N.E.2d 591 (2007) ("recording acts are designed to protect

purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests from the enforcement of those claims").

Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 484, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 7 (3d ed.)).

In re Scott, 424 B.R. 315 (Bankr. S.D. Ohio 2010), aff'd, 2011 WL 1188434 (S.D. Ohio 2011) (no one may avoid mortgages based on bona fide purchaser status if recording of mortgages provided constructive notice).

Ward v. Evans, 387 S.C. 401, 693 S.E.2d 7 (Ct. App. 2010), cert. denied, (Mar. 17, 2011).

n. 8.

Rice v. Greene, 941 So. 2d 1230 (Fla. Dist. Ct. App. 5th Dist. 2006) (first purchaser to record his deed, as between two purchasers of same land, held superior title, although the purchaser who recorded last had purchased earlier, where purchaser to record his deed first had no notice of earlier transaction).

Schlup v. Bourdon, 33 Kan. App. 2d 564, 105 P.3d 720 (2005) (neighbor's late-filed contract for deed did not give landowners' notice as contract for deed was not of record when landowners purchased property).

Devine v. Town of Nantucket, 449 Mass. 499, 870 N.E.2d 591 (2007) (holding that real estate investor was a *bfp* without notice and could not have obtained actual notice by means of a search conducted in the usual method).

n. 9.

Argent Mortg. Co., LLC v. Wachovia Bank N.A., 52 So. 3d 796 (Fla. 5th DCA 2010) (holding "mortgage that was second to be executed and recorded was entitled to priority due to lack of notice of the first mortgage at the time of execution").

n. 10.

Nelson and Whitman comment that statutes with wording like the Massachusetts act may permit application as a race-notice statute if they do not specify that the persons protected are *subsequent* purchasers. Grant S. Nelson & Dale A. Whitman, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT, 6TH ED., p. 204 (2003 Thomson/West), *citing* Simmons v. Stum, 101 Ill. 454, 1882 WL 10184 (1882). In *Simmons,* however, the statute protected "subsequent purchasers" but "all creditors." For that reason, and to prevent fraud in the particular case, the *Simmons* court required that a subsequent purchaser must have recorded before her conveyance could be valid against *any person*, *including* a prior unrecorded creditor. In general, however, statutes like the Massachusetts act make a conveyance invalid against any persons who do not have actual notice of it or constructive notice from the record. Only subsequent purchasers could have actual or constructive notice of a conveyance.

§ 8 Acts based upon both notice and priority of record

n. 2.

Guaranty Bank and Trust Co. v. LaSalle Nat. Bank Ass'n, 2004 WL 2278343 (Colo. App. 2004) (unpublished).

In Ilinois, Simmons v. Stum, 101 Ill. 454, 1882 WL 10184 (1882) construed the statute as race-notice in relation to creditors.

Spickler v. Ginn, 2012 ME 46, 40 A.3d 999 (Me. 2012) (Clarifying that Maine's statute is a race-notice type).

C F Investments, Inc. v. Option One Mortg. Corp., 163 N.H. 313, 42 A.3d 847 (2012) (stating that "New Hampshire is a 'race-notice' jurisdiction"); Amoskeag Bank v. Chagnon, 133 N.H. 11, 572 A.2d 1153 (1990).

Add new footnote 2.50 at the end of the first sentence of the second paragraph, following the word "or similar limitation.":

A large group of acts expressly limit their protection to a subsequent purchaser without notice "whose conveyance is first duly recorded," or similar limitation.[2.50]

[2.50]*Montana:* Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 8, n.8 (3d ed.)); Hastings v. Wise, 91 Mont. 430, 435–36, 8 P.2d 636, 638–39 (1932); Mont. Code Ann. §§ 70-20-303, 70-21-304.

n. 8.

In re Rivera, 513 B.R. 742, 753, (Bankr. D. Colo. 2014); In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009), citing Joyce Palomar, Patton & Palomar on Land Titles, 3rd Ed., § 81; Guaranty Bank and Trust Co. v. LaSalle Nat. Bank Ass'n, 2004 WL 2278343 (Colo. App. 2004) (unpublished).

In re J.H. Inv. Services, Inc., 418 B.R. 413 (M.D. Fla. 2009), aff'd in part, rev'd in part, 2011 WL 330242 (11th Cir. 2011) (deed must be recorded to protect the grantee's interest in real property).

Plaza Corp. v. Alban Tractor Co., 219 Md. 570, 151 A.2d 170 (1959).

MidCountry Bank v. Krueger, 782 N.W.2d 238, 244 (Minn. 2010).

Montana: Northland Royalty Corp. v. Engel, 2014 MT 295, 377 Mont. 11, 339 P.3d 599, 602 (2014) (describing Montana's recording statute in *dicta* as race-notice); Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 483, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 8, n.8 (3d ed.)).

First Citizens Nat. Bank v. Sherwood, 583 Pa. 466, 879 A.2d 178 (2005), construing 21 P.S. § 357 and 16 P.S. § 9853.

Stransky v. Monmouth Council of Girl Scouts, Inc., 393 N.J. Super. 599, 925 A.2d 45 (App. Div. 2007), certification denied, 194 N.J. 271, 944 A.2d 31 (2008); Hyland v. Kirkman, 204 N.J.Super. 345, 498 A.2d 1278 (1985).

Sprint Equities (N.Y.), Inc. v. Sylvester, 71 A.D.3d 664, 896 N.Y.S.2d 134 (2d Dep't 2010).

Utah Code Ann. § 57-3-3 (1994) superseded by Utah Code Ann. § 57-3-103 (2000); Salt Lake County v. Metro West Ready Mix, Inc., 2004 UT 23, 89 P.3d 155 (2004) citing Palomar, Patton and Palomar on Land Titles § 10 (3rd ed. 2003).

Subsequently construing Virginia's statute as race-notice, *see* In re Perrow, 498 B.R. 560, 571 (Bankr. W.D. Va. 2013) ("Virginia is a race notice jurisdiction; meaning, generally, the first creditor to record its interest has priority over others who record or purchase thereafter.").

Wyo. Stat. Ann. § 34-1-121; Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs, N.A., 2006 WY 132, 144 P.3d 1224 (Wyo. 2006).

n. 9.

See supra § 7, Note 5.10 discussing the controversy over whether Oklahoma's statute is race-notice or notice. *See also supra* § 7, Note 10, considering whether the absence of the word "subsequent" in the statute's description of the purchasers protected leaves it open to the construction that unrecorded conveyances are invalid both as to subsequent and prior purchasers.

Stransky v. Monmouth Council of Girl Scouts, Inc., 393 N.J. Super. 599, 925 A.2d 45 (App. Div. 2007), certification denied, 194 N.J. 271, 944 A.2d 31 (2008) ("because New Jersey is a notice/race state, if a common grantor sells the same land to two persons, the first to record will prevail").

n. 11.

Lott v. Saulters, 133 So. 3d 794, 798 (Miss. 2014) (subsequent purchaser who recorded her deed first was estopped from claiming priority because she knew of the unrecorded first deed at the time of obtaining the subsequent deed).

n. 12.

In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009), citing Joyce Palomar, Patton & Palomar on Land Titles, 3rd Ed., § 81.

Earl v. Pavex, Corp., 2013 MT 343, 372 Mont. 476, 484–485, 313 P.3d 154 (2013) (citing 1 Patton and Palomar on Land Titles § 8 (3d ed.)).

In re Geraci, 507 B.R. 224, 231, 71 Collier Bankr. Cas. 2d (MB) 1216 (Bankr. S.D. Ohio 2014) (holding constructive notice of mortgage was not imputed when mortgage was outside

the chain of title after being improperly indexed due to an inaccurate legal description of the real property).

n. 14.

Guaranty Bank and Trust Co. v. LaSalle Nat. Bank Ass'n, 2004 WL 2278343 (Colo. App. 2004) (unpublished).

§ 9 Effect of simultaneous purchasing or recording

n. 1.

First Bank v. East West Bank, 199 Cal. App. 4th 1309, 132 Cal. Rptr. 3d 267 (2d Dist. 2011) (holding instruments were simultaneously recorded when two lenders placed their deeds of trust into the recorder's "night deposit" on the same date).

n. 5.

Mortgage and Judgment

First Bank v. East West Bank, 199 Cal. App. 4th 1309, 132 Cal. Rptr. 3d 267 (2d Dist. 2011) (holding instruments were simultaneously recorded when two lenders placed their deeds of trust into the recorder's "night deposit" on the same date).

Mortgage and Judgment

Henrickson's Appeal, 24 Pa. 363 (1855), and Wilson's Appeal, 90 Pa. 370 (1879), which followed it, were decided before technology made certain the time judgments are entered. Arnold B. Kogan of the Goldberg Katzman Law Firm in Harrisburg, PA, has advised that the Judicial Code, 42 Pa.C.S. § 8142, now requires the courts, their clerks (Prothonotary), and the recorders to enter the time on the instrument, and both Pa.R.C.P. Rule 3022(a) and Rule 3023(a) provide that the lien is on real estate in the county, "title to which at the time of entry is recorded . . .." Pa.R.C.P. Rule 3021(b) specifically requires the judgment index to contain the date and time of the entry. The notes under Rules 3021, 3022, and 3023 reference the particular subdivision of 42 Pa.C.S. § 8142 requiring the entry of time on the verdict, order or judgment. Legislation also is being considered in Pennsylvania to establish whether the priority of mortgages other than purchase money mortgages should now run from the entry into the recorder's index, as well as the issue of time entry on an instrument versus a time entry when entered on the index.

n. 6.

Mortgage and Judgment

Borrenpohl v. DaBeers Properties, LLC, 276 Neb. 426, 755 N.W.2d 39 (2008).

The technology available for electronic recording should reduce the sort of issues this section considers. The programs are able to precisely notate not only date, but the minute and second that an instrument is received electronically for recording. State legislation enabling electronic recording should be checked for any statement about the effect of the time the system electronically receives an instrument on its priority.[11]

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[11]See generally infra Chapter 15 and especially § 704 regarding states that have enacted versions of the Uniform Real Property Electronic Recording Act.

§ 10 Who are "purchasers" under recording acts

n. 4.

Protection Afforded by a Recorded Notice of Lis Pendens

Compare Chaney v MCDA, 641 N.W.2d 328 (Minn.App. 2002) (holding that purchaser who paid for property before a lis pendens was recorded, but recorded deed after, acquired its interest without constructive notice of the litigation).

n. 8.

See Salt Lake County v. Metro West Ready Mix, Inc., 2004 Utah 23, 89 P.3d 155 (2004) citing Palomar, Patton and Palomar on Land Titles § 10 (3rd ed. 2003), and holding that a grantee who acquires property through a wild deed does not qualify for protection as a subsequent good faith purchaser against a prior unrecorded interest in the property. The absence of any deed to its grantor in the public land records puts such a grantee on constructive notice that its grantor had no record title to the property conveyed.

Zimmer v. Sundell, 237 Wis. 270, 296 N.W. 589, 591 (1941).

But see Hyland v. Kirkman, 204 N.J.Super. 345, 498 A.2d 1278 (1985).

Ameriquest Mortg. Co. v. Gaffney, 41 A.D.3d 750, 839 N.Y.S.2d 203 (2d Dep't 2007) (purchaser could not claim status of bona fide purchaser, where deed it acquired was void).

n. 12.

Rule Statutory

16 Penn. Stat. § 9853.

Strekal v. Espe, 114 P.3d 67 (Colo. Ct. App. 2004) citing Palomar, Patton and Palomar on Land Titles § 10 (3rd ed. 2003).

First Citizens Nat. Bank v. Sherwood, 583 Pa. 466, 879 A.2d 178 (2005) (construing 21 P.S. § 357 and 16 P.S. § 9853); Pines v. Farrell, 577 Pa. 564, 848 A.2d 94 (2004) ("In all questions upon the recording acts, the mortgage is spoken of as a conveyance of land.").

Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs, N.A., 2006 WY 132, 144 P.3d 1224 (Wyo. 2006).

n. 13.

Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs, N.A., 2006 WY 132, 144 P.3d 1224 (Wyo. 2006).

Rule Statutory

Wyo. Stat. § 34-1-121; *cited in* Countrywide Home Loans, Inc. v. First Nat. Bank of Steamboat Springs, N.A., 2006 WY 132, 144 P.3d 1224 (Wyo. 2006).

First American Title Ins. Co. v. Action Acquisitions, LLC, 218 Ariz. 394, 187 P.3d 1107, 1112 (2008), citing Palomar, Patton and Palomar on Land Titles § 41 (3d ed. 2003).

n. 14.

First American Title Ins. Co. v. Action Acquisitions, LLC, 218 Ariz. 394, 187 P.3d 1107, 1112 (2008), citing Palomar, Patton and Palomar on Land Titles § 41 (3d ed. 2003).

§ 11 Classes of purchasers protected

n. 3.

In re Crane, 742 F.3d 702, 709, 58 Bankr. Ct. Dec. (CRR) 232, 70 Collier Bankr. Cas. 2d (MB) 1226, Bankr. L. Rep. (CCH) P 82555 (7th Cir. 2013), quoting US Bank Nat. Ass'n v. Villasenor, 2012 IL App (1st) 120061, 365 Ill. Dec. 847, 979 N.E.2d 451 (App. Ct. 1st Dist. 2012) ("A bona fide purchaser in Illinois is one who acquires an 'interest in [the] property for valuable consideration without actual or constructive notice of another's adverse interest in the property.' ").

In re Kasparek, 426 B.R. 332, 344, 63 Collier Bankr. Cas. 2d (MB) 1037 (B.A.P. 10th Cir. 2010).

In re Harrison, 503 B.R. 835, 842 (Bankr. N.D. Okla. 2013).

In re Perrow, 498 B.R. 560, 571 (Bankr. W.D. Va. 2013), quoting Neff v. Edwards, 148 Va. 616, 139 S.E. 291, 294 (1927) ("A *bona fide* purchaser,—that is, one who, without such knowledge or notice, actual or constructive, and who has not been put on such inquiry as would lead to knowledge or notice, and has paid the consideration . . .").

n. 4.

First Properties, L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n, 2008 WL 110477 (Ala. 2008) ("bona fide purchaser" is one who (1) purchases legal title, (2) in good faith, (3) for adequate consideration, (4) without notice of any claim of interest in the property by any other party); Wallace v. Frontier Bank, N.A., 903 So. 2d 792, 796–800 (Ala. 2004).

In re Savage, 504 B.R. 921, 924 (Bankr. W.D. Ark. 2014), *citing* Bill's Printing, Inc. v. Carder, 357 Ark. 242, 161 S.W.3d 803, 807 (2004).

Clarkson v. Neff, 878 N.E.2d 240 (Ind. Ct. App. 2007) ("to qualify as a bona fide purchaser of land, one must purchase in good faith, for valuable consideration, and without notice of the outstanding rights of others, which notice may be either actual or constructive").

In re Kasparek, 2009 WL 2366400 (Bankr. D. Kan. 2009), rev'd on other grounds, 2010 WL 1270341 (B.A.P. 10th Cir. 2010) citing Joyce Palomar, Patton & Palomar on Land Titles, 3rd Ed., § 11.

MidCountry Bank v. Krueger, 782 N.W.2d 238, 244 (Minn. 2010).

Swift v. Federal Home Loan Mortg. Corp., 417 S.W.3d 342, 346 (Mo. Ct. App. S.D. 2013) (citing State ex rel. Missouri Highways and Transp. Com'n v. Westgrove Corp., 364 S.W.3d 695, 702 (Mo. Ct. App. E.D. 2012)); Brown v. Mickelson, 220 S.W.3d 442 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (May 1, 2007) (*bona fide purchaser* pays a valuable consideration, has no notice of outstanding rights of others, and acts in good faith).

Northland Royalty Corp. v. Engel, 2014 MT 295, 377 Mont. 11, 339 P.3d 599, 602 (2014) (describing Montana's recording statute in *dicta*).

In re Cerrato, 504 B.R. 23, 33 (Bankr. E.D. N.Y. 2014).

Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

Saravia v. Benson, 433 S.W.3d 658, 666 (Tex. App. Houston 1st Dist. 2014) (*citing* Madison v. Gordon, 39 S.W.3d 604, 606 (Tex. 2001)); Fletcher v. Minton, 217 S.W.3d 755 (Tex. App. Dallas 2007) ("bona fide purchaser" acquires real property in good faith, for value, and without notice of any third-party claim or interest).

In re Perrow, 498 B.R. 560, 571 (Bankr. W.D. Va. 2013), quoting Neff v. Edwards, 148 Va. 616, 139 S.E. 291, 294 (1927).

Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007) ("bona fide purchaser" is purchaser (1) in good faith, (2) for valuable consideration, not by gift, (3) with no actual, constructive, or inquiry notice of any alleged or real infirmities in title, and (4) who would be prejudiced by cancellation or reformation).

First American Title Ins. Co. v. Action Acquisitions, LLC, 218 Ariz. 394, 187 P.3d 1107, 1112 (2008).

n. 6.

In re Perrow, 498 B.R. 560, 572 (Bankr. W.D. Va. 2013); Stith v. Thorne, 488 F. Supp. 2d 534, 547 (E.D. Va. 2007) (applying Virginia law) ("To attain the status of a *bona fide* purchaser for value, a mortgagee must establish that it paid value for its interest in the property without notice of the *plaintiff's* rights.").

n. 9.

First American Title Ins. Co. v. Action Acquisitions, LLC, 218 Ariz. 394, 187 P.3d 1107, 1112 (2008).

n. 10.

First American Title Ins. Co. v. Action Acquisitions, LLC, 218 Ariz. 394, 187 P.3d 1107, 1112 (2008).

n. 18.

Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).

n. 26.

In re Perrow, 498 B.R. 560, 572 (Bankr. W.D. Va. 2013) (Actual notice is "never to be presumed, but must be proved, and proved clearly. A mere suspicion of notice, even though it be a strong suspicion, will not suffice." . . . The proof of actual notice "must be such as to affect the conscience of the purchaser" and "must be so strong as to fix upon [the purchaser] the imputation of [bad faith].).

n. 29.

Devine v. Town of Nantucket, 449 Mass. 499, 870 N.E.2d 591 (2007) (burden of proving that a person was

not a *bfp* lies with the party making that claim).

n. 30.

Fletcher v. Minton, 217 S.W.3d 755 (Tex. App. Dallas 2007) (status as a *bfp* is an affirmative defense to a title dispute).

Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007) (subsequent purchaser must show that he is "bona fide purchaser").

n. 31.

Brown v. Mickelson, 220 S.W.3d 442 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (May 1, 2007) (party claiming to be a bona fide purchaser bears the burden of proof by a preponderance of the evidence); 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858, 884 (Mo. Ct. App. E.D. 1995).

§ 12 What constitutes notice under recording acts

n. 1.

Carpenter v. Glenn, 156 Wash. App. 1018, 2010 WL 2178940 (Div. 1 2010) *citing* Joyce Palomar, Patton and Palomar on Land Titles § 12 at 58 (3d ed. 2003).

n. 2.

Lott v. Saulters, 133 So. 3d 794, 798 (Miss. 2014) (subsequent purchaser who recorded her deed first was estopped from claiming priority because she knew of the unrecorded first deed at the time of obtaining the subsequent deed).

Carpenter v. Glenn, 156 Wash. App. 1018, 2010 WL 2178940 (Div. 1 2010) *citing* Joyce Palomar, Patton and Palomar on Land Titles § 12 at 57-58 (3d ed. 2003).

n. 3.

In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009), citing Joyce Palomar, Patton & Palomar on Land Titles, 3rd Ed., § 81.

Lott v. Saulters, 133 So. 3d 794, 798 (Miss. 2014) (subsequent purchaser who recorded her deed first was estopped from claiming priority because she knew of the unrecorded first deed at the time of obtaining the subsequent deed).

Fletcher v. Minton, 217 S.W.3d 755 (Tex. App. Dallas 2007) (absence of actual or imputed knowledge of competing claims is critical to preservation of the bona fide purchaser shield).

In re Perrow, 498 B.R. 560, 572 (Bankr. W.D. Va. 2013).

Carpenter v. Glenn, 156 Wash. App. 1018, 2010 WL 2178940 (Div. 1 2010) *citing* Joyce Palomar, Patton and Palomar on Land Titles § 12 at 57-58 (3d ed. 2003).

Trans Energy, Inc. v. EQT Production Co., 743 F.3d 895, 904 (4th Cir. 2014) (quoting Farrar v. Young, 159 W. Va. 853, 858, 230 S.E.2d 261, 264 (1976)) (Under West Virginia law, unrecorded written contracts . . . that purported to sever the gas rights underlying the property, are "as effective as a recorded deed" against purchasers with notice of the unrecorded transfer.).

n. 5.

In re Borges, 510 B.R. 306, 323 (B.A.P. 10th Cir. 2014) (Constructive notice includes both record notice, such as that provided by the recording acts, and inquiry notice, arising from facts as ought to put a prudent person upon inquiry as to the title.).

Peoples Nat. Bank, N.A. v. Banterra Bank, 719 F.3d 608, 57 Bankr. Ct. Dec. (CRR) 281 (7th Cir. 2013) (citing 1 Patton and Palomar on Land Titles § 12 (3d ed.)).

In re Taylor, 422 B.R. 270 (Bankr. D. Colo. 2009), citing Joyce Palomar, Patton & Palomar on Land Titles, 3rd Ed., § 81; In re Moreno, 293 B.R. 777 (Bankr. D. Colo. 2003); Franklin Bank, N.A. v. Bowling, 74 P.3d 308 (Colo. 2003).

McLeod v. Clements, 326 Ga. App. 840, 755 S.E.2d 346, 349 (2014), cert. granted, (Nov. 3, 2014) and judgment aff'd, 2015 WL 3936638 (Ga. 2015) (a bona fide purchaser for value is not bound by a covenant running with the land if said covenant is recorded outside of his chain of title unless he has either actual or constructive notice of the covenant); Leeds Bldg. Products, Inc. v. Weiblen, 267 Ga. 300, 477 S.E.2d 565 (1996) (describing the substance of the notice as needing to be