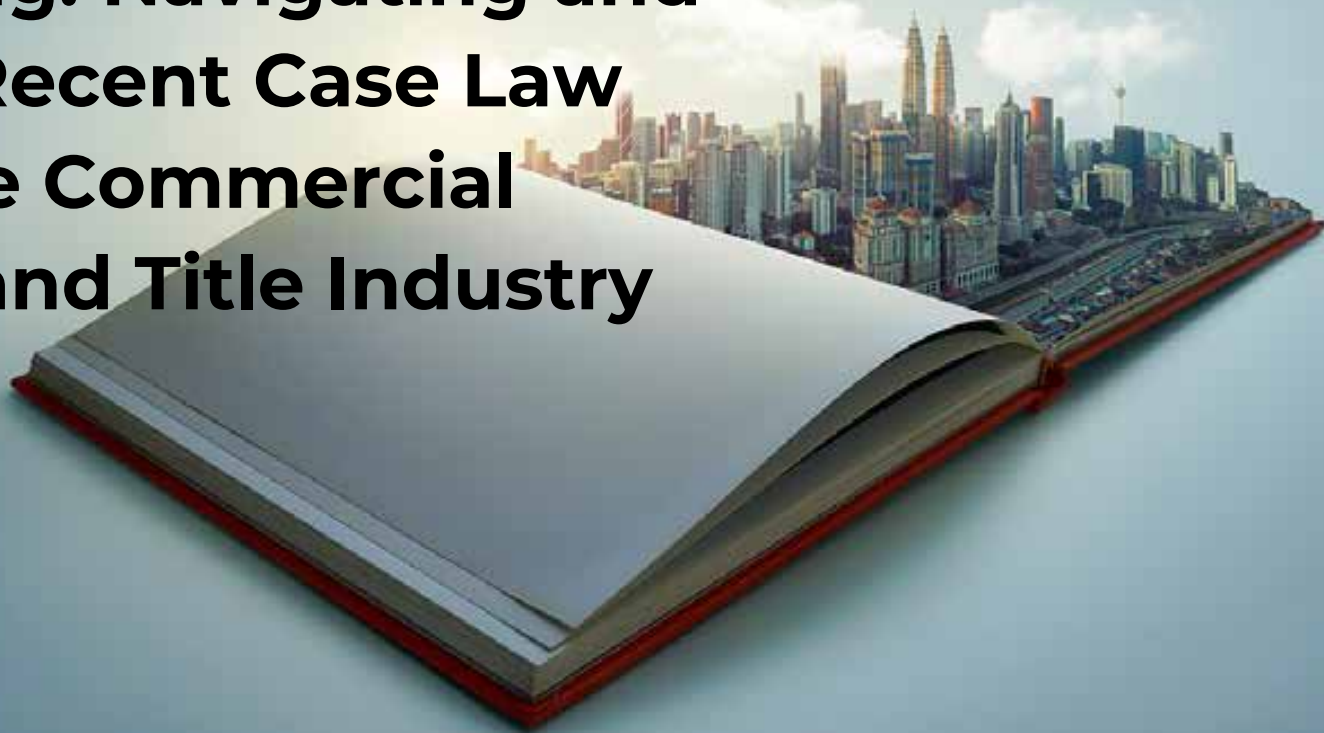


Roadmapping: Navigating and Identifying Recent Case Law Affecting the Commercial Real Estate and Title Industry

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TITLE TENETS Webinar Series



Intro:

This webinar will examine recent court cases along with new laws and legislation that may have an impact on Commercial Real Estate and Title Insurance Industry.



Cases

- Washington state Supreme Court: Gen.Receivership of EM Prop, 199 Wn.2d 725, 511 P.3d 1258
- US Supreme Court:
 - Tyler v. Hennepin County, 2023 US Lexis 1501 (2023)
 - MOAC Mall Holdings v. Transform Holdco LLC 143 S.Ct. 927 (2023)
 - Wilkins v. United States, 143 S. Ct. 870 (2023)
- US Court of Appeals, Fifth Circuit: Official Comm. V. Walk Cty. Hosp. Dist, 3 F.4th 230 (2021)
- US Court of Appeals, Ninth Circuit: United States of America v. 6.03 Acres of Land in the County of Santa Barbara, 2023 U.S. App.Lexis 11452 (2023)

New Legislation and Administrative Rules

- Arizona Department of Water Resources: Arizona will not allow new housing construction in the Phoenix area that depends on groundwater
- New State Laws Restricting Foreign Ownership
 - Florida -
 - Tennessee -
 - Texas -



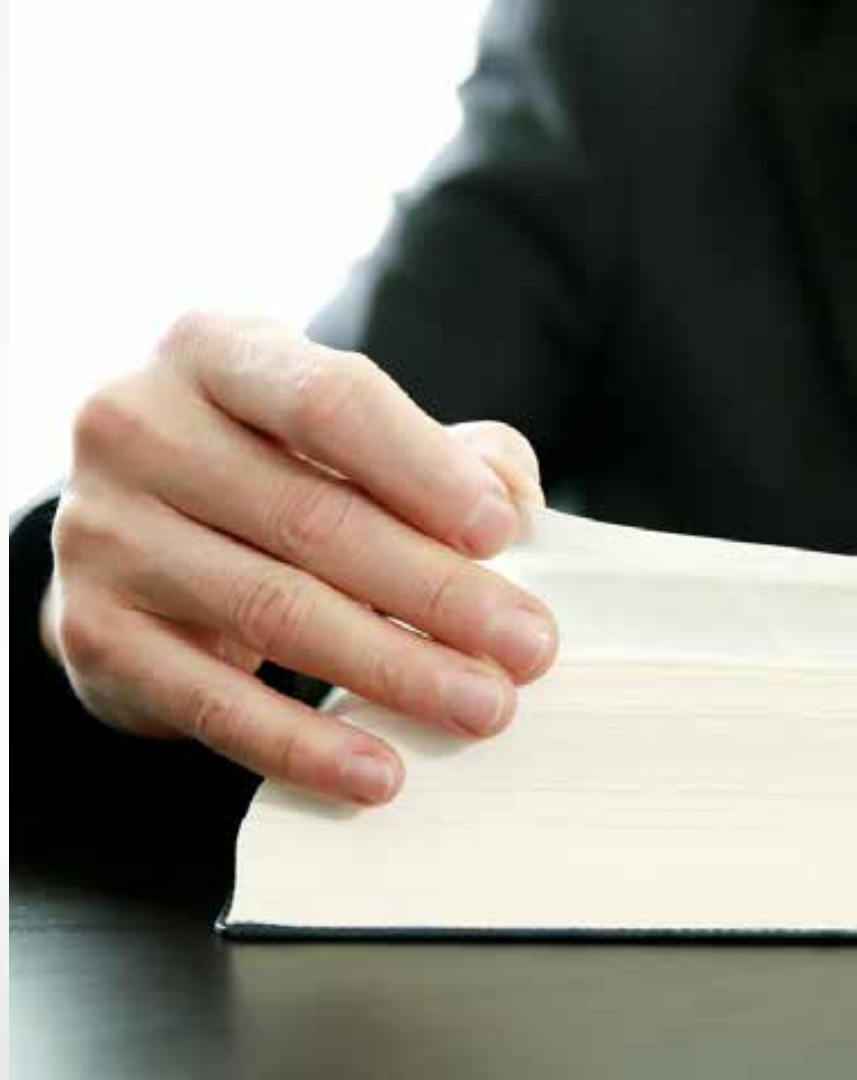
First Case:

Gen.Receivership of EM Prop, 199
Wn.2d 725, 511 P.3d 1258 (2022)



Nature of Action:

“The holders of promissory notes secured by deeds of trust on real property filed claims in a receivership exercising control over the property. The senior note holder asserted that it had priority for the full amount of its loan, despite the fact that the loan amount increased and an amended deed reflecting the increase was recorded after the junior note holder recorded its deed of trust.” at 726



Case Holding:

HOLDINGS: [1]-[Wash. Rev. Code § 60.04.226](#) did not apply to the instant case which involved a mortgage lien because the language and context of the statute plainly showed that it applied only to construction liens; [2]-The court held that the common law optional/obligatory distinction for future advances applied outside of the construction context. Because whether there was a future advances clause in the contract at issue was a fact-finding issue, the court left it to the lower court to apply common law principles for future advances and modifications to determine the proper lien priority; [3]-The court denied the senior mortgage holder's request for attorney fees based on the contracts and on equitable grounds.



RCW 60.04.226:

Except as otherwise provided in RCW [60.04.061](#) or [60.04.221](#), any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.



Restatement 3rd of Property: Mortgages § 7.3

Lender argued that the court in Hu Hyun Kim v. Lee, 145 Wn.2d 79, 31 P.3d 665 (2001) adopted all of section 7.3. This court declined to accept that view and stated that the court in Kim only adopted section (a) and (b) of 7.3 regarding equitable subrogation.



Restatement 3rd of Property:

Mortgages § 7.3

- § 7.3 Replacement and Modification of Senior Mortgages:
Effect on Intervening Interests.

- (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except

- (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or

- (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

- (b) If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify as provided in Subsection (c).

(c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).

(d) If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

Restatement 3rd of Property: Mortgages 7.3 (c) and (d)

Court did not adopt:

(c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).

(d) If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

Restatement 3rd of Property

Mortgages §2.3 Priority Future Advances

(a) If a mortgage secures repayment of future advances, all advances have the priority of the original mortgage. Whether or not the mortgage secures repayment of future advances, if the parties have agreed that the mortgage secures payment of interest, costs of collection or foreclosure, or attorneys' fees, these items have the priority of the original mortgage.



Footnote 10 of Decision:

Adopting [Restatement § 7.3](#) in full without also adopting [Restatement § 2.3](#), which pertains to future advances, will result in inconsistent outcomes between modifications and future advances. There may be benefits to adopting both sections at this time. However, neither party briefed this issue or discussed [Restatement § 2.3](#), and we decline to take this step without argument or briefing.



The Court Adopted The Common Law Rule Which Is:

“[A]ny future advance that is the optional loses priority to any subsequent mortgages that come before the optional advances are distributed.”



Obligatory Advance v. Optional Advance

Obligatory advances can also include revolving lines of credit and home equity lines of credit.



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“Thus, under our current common law rule, it is unnecessary to decide if a future advances clause is required to contain a statement of the maximum amount that may be secured by the mortgage” at p 740



Covered Risk 10 of 2021 Jacket.

The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance on the Title as security for the following components of the Indebtedness:

- a. the amount of the principal disbursed as of the Date of Policy;
- b. the interest on the obligation secured by the Insured Mortgage;
- c. the reasonable expense of foreclosure;
- d. amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and
- e. the following amounts advanced by the Insured before the acquisition of the estate or interest in the Title to protect the priority of the lien of the Insured Mortgage:
 - i. real estate taxes and assessments imposed by a governmental taxing authority; and
 - ii. regular, periodic assessments by a property owners' association.

ALTA Endorsement 14 paragraph 1.b.

b. "Advances," as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

ALTA 14

2. The Company insures against loss or damage sustained by the Insured by reason of:

a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Advance.

b. The lack of priority of the lien of the Insured Mortgage as security for each Advance over any lien or encumbrance on the Title.

c. The invalidity or unenforceability or lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, Advances and unpaid interest resulting from (i) re-Advances and repayments of Indebtedness, (ii) earlier periods of no indebtedness owing during the term of the Insured Mortgage, or (iii) the Insured Mortgage not complying with the requirements of state law of the state in which the Land is located to secure Advances.

3. The Company also insures against loss or damage sustained by the Insured by reason of:

a. The invalidity or unenforceability of the lien of the Insured Mortgage resulting from any provisions of the Agreement that provide for (i) interest on interest, (ii) changes in the rate of interest, or (iii) the addition of unpaid interest to the Indebtedness.

b. Lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, including any unpaid interest that was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the Insured Mortgage, which lack of priority is caused by (i) changes in the rate of interest, (ii) interest on interest, or (iii) increases in the Indebtedness resulting from the addition of unpaid interest.

Virtual Underwriter

Link to Virtual Underwriter regarding how additional advances are treated in each State:

<https://www.virtualunderwriter.com/bin/vu/PdfGeneratorCRXServlet?path=/content/stewart/virtualunderwriter/en/underwriting-manuals/2013-11/UM00000072>



Second Case:

Tyler v. Hennepin County, 2023

US Lexis 1501 (2023)



Facts:

“Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one [*6] in 2010. Nobody paid the property taxes on the condo in Tyler’s absence and, by 2015, it had accumulated about \$2300 in unpaid taxes and \$13,000 in interest and penalties. Acting under Minnesota’s forfeiture procedures, Hennepin County seized the condo and sold it for \$40,000, extinguishing the \$15,000 debt. App. 5. The County kept the remaining \$25,000 for its own use.” at page 6



Standing Issue

Court ruled there was injury in fact:

At this initial state of the case, Tyler need not definitively prove her injury or disprove the County's defense. She has plausibly pleaded on the face of her complaint that she suffered financial harm from the County's action, and that is enough for now. See Lujan, 504 U.S., at 561, at page 4.



Holding

[1]-A homeowner had standing to assert a takings claim where the county had submitted no records showing that encumbrances on the home were worth more than the surplus from its tax sale, the county kept the surplus from the sale, and thus, the homeowner had plausibly alleged financial harm; [2]-The homeowner had plausibly stated a claim under the Takings Clause and was entitled to just compensation where the majority of States and the federal government recognized that excess value from a tax sale was to be returned to the taxpayer, and Minnesota law in contexts other than real property and federal judicial precedents recognized that rule. The homeowner had not abandoned her home by failing to pay her taxes as Minnesota gave no weight to the taxpayer's use of the property, but instead cared only about the taxpayer's failure to contribute her share to the public fisc.

Outcome



Judgment reversed.
Unanimous decision with one
concurrence.

Justice Gorsuch in
concurrence also concluded
that the Eight Amendment's
Excessive Fines Clause was
triggered as well.

Next Case:

*MOAC Mall Holdings v. Transform
Holdco LLC* 143 S.Ct. 927 (2023)



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Subject Matter Jurisdiction Case and 11 U.S.C. §363(m)



Case Summary:

Overview: HOLDINGS: [1]-Where debtor in possession agreed to sell most of its assets to respondent, including its right to designate to whom a lease between the debtor and some landlord should be assigned, a challenge of a transfer by a landlord was not moot, on the basis that the transfer could not be undone, because the landlord's prospects of success were not pertinent to the mootness inquiry; **[2]-11 U.S.C. § 363(m), which permits a debtor (or a trustee) to sell or lease the bankruptcy estate's property outside of the ordinary course of the bankrupt entity's business, was not a jurisdictional provision because nothing in § 363(m)'s limits purported to govern a court's adjudicatory capacity.**

Outcome: Judgment vacated and case remanded; 9-0 Decision.

11 USC 363(m) states:

“[t]he reversal or modification on appeal of an authorization under [§363\(b\)](#) or [§363\(c\)](#) of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed [\[***8\]](#) pending appeal.”



Key quotes From Decision

- *The “Jurisdictional” label is significant because it carries with it unique and sometimes severe consequences. An unmet jurisdictional precondition deprives courts of powers to hear the case, thus requiring immediate dismissal.*
- *. This case exemplifies why the distinction between nonjurisdictional and jurisdictional preconditions matters. At page 7*
- *We have clarified that jurisdictional rules pertain to “the power of the court rather than the right or obligations of the parties.” Reed Elsevier, 559 U.S. at 161. And we only treat a provision as jurisdictional if congress “clearly states” as much. Boechler, 596 U.S. at _ (Slip. Op., at 3).*

Next Case:

*Official Comm. v. Walker Cty.
Hosp. Dist.* (In re Walker Cty.
Hosp. Corp.), 3 F.4th 230 (Fifth
Circuit, 2021)



Although not considered jurisdictional, statutory mootness defense is still available if appeal to set aside order of sale is filed but no “stay pending appeal” is obtained prior to sale.



Next Case: Another Subject Matter Jurisdiction Case

Wilkins v. U.S, 143 S.Ct. 870 (2023)

Quiet Title Act is not jurisdictional but is a nonjurisdictional claims processing rule and the Statute of limitation is subject to equitable tolling

Next Case:

US Court of Appeals, Ninth Circuit:

United States of America v. 6.03 Acres
of Land in the County of Santa Barbara,
2023 U.S. App.Lexis 11452 (2023)



- Case was originally decided based on the statute of limitations running under the Quiet Title Act.
- Because of *Wilkins decision*, court decided on merits.
- *Court ruled for Government. Although road existed prior to Government taking, landowner cannot acquire easement over his own property.*

Thank You

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