10th District Court of Appeals Rules a Lender can be Equitably Subrogated to itself: An Ohio Case Law Update

BACKGROUND

In Washington Mutual v. Hopkins, Slip Copy (Dec. 27, 2007), 2007 WL 4532679 (10th Dist. Ct. App.), our client, Washington Mutual ("WAMU"), refinanced its own first mortgage. The title company missed a home equity lien on the property. WAMU originally had the first lien; the home equity line was second. WAMU paid off that first lien. The issue for the trial court was whether WAMU's new mortgage could take the place of its former first mortgage.

The trial court held that because WAMU's title agent (and hence, WAMU) was negligent, it was not fair to let its keep its first lien position. WAMU appealed. The Tenth District Court of Appeals reversed, and WAMU was given priority.

HOLDING

The Tenth District Court of Appeals confirmed that a negligent title search, standing alone, does not prevent a lender from using equitable subrogation to give its mortgage priority. **For the first time**, an Ohio court clarified that a lender can be subrogated to itself. Prior to this decision, it could be argued that a lender could only use equitable subrogation if it paid off a different lender.

Equitable subrogation allows the lender to "step into the shoes" (subrogation) of the first lien it paid off. The law simply allows that lender to jump over a "missed lien." After all, why should a missed lienholder benefit from a pay off of a first lien?

Cases in this area have turned on **how** a lender or title agent missed an intervening lien. For example, if the lender or title agent knows about the "missed lien" and simply forgets or fails to pay it off for any reason, it cannot use equitable subrogation to get priority. This type of mistake is not forgivable. If the lender or title agent simply does not know that the lien existed at all, this type of mistake might be excused.

In this case there was no evidence that the title agent or lender knew about the "missed lien". The Tenth District held that a defective search does not necessarily prohibit equitable subrogation. Moreover, it would be unfair to allow the "missed lienholder" obtain a windfall. Finally, it didn't matter that WAMU refinanced its own mortgage.

IMPLICATIONS

It is only a matter of time before this issue gets before the Supreme Court of Ohio. Different Courts of Appeals in Ohio have reached opposite conclusions on similar facts. Some courts hold that a negligent title search is not excusable; the Tenth District under these facts held otherwise.

There will be future cases which explore what types of facts give a lender or title agent "actual notice" of a prior lien. In other words, even if a title agent performed a defective search, could a loan application or credit report that shows a prior lien exists, be enough to bar equitable subrogation?

Havens Limited and its affiliate real estate companies have served the title insurance and real estate industry for the past 25 years. A full copy of the decision, Washington Mutual v. Hopkins, Slip Copy (Dec. 27, 2007), 2007 WL 4532679 (10th Dist. Ct. App.), can be found on our web site. See Havenslimited.com "On Tract" or you can contact Jim Havens – jhavens@havenslimited.com, 141 East Town Street, Suite 200, Columbus, Ohio 43215. Phone (614) 228-6888.