Alaska Lien Law Has Something for Everyone, Everything for No One

New construction is once again predominate in the market place and the Alaska lien law and its impact on new construction is worthy of our review.

Prior to 1979, Alaska statutes gave liens for labor and material "super lien" priority, causing problems for lenders and title companies. Because of the "super lien" priority, it was difficult for lenders to establish the lien priority of their Deed of Trust with any certainty, and the issuance of an ALTA policy by a title company was very risky.

Title companies were insuring a lender's long term Deed of Trust as first lien, only to find

themselves in court defending the insured against a claim of lien recorded after the transaction was closed and the policy issued.

Because of these problems, the State Director of Insurance placed severe restrictions on the issuance of policies that purported to insure against lien rights, and finally ordered title companies to stop issuing the ALTA policy altogether.

This action forced the issue and on August 16, 1979, Senate Bill 739 became effective and amended the existing law. The new lien law is said to be "something for everyone and everything for no one." Lenders and title companies were afforded greater protection by the creation of race recording statutes, and labor and material suppliers were granted new access to construction loan proceeds. The new law provides step-by-step procedures that provide protection for all concerned. Failure to comply voids the entire process, forcing greater accountability of owners, builders, and lenders. If a claimant fails to take steps to declare and enforce his rights to a project within certain time limits, his rights terminate and recourse against the real property vanishes.

The new laws established the race recording statutes which provide that a Deed of Trust recorded before a Notice of Right to Lien or Claim of Lien would take priority over such liens or notices regardless of when labor materials were first supplied. The only exceptions to this would be a lien filed by an individual who actually performs work on a given project.

The supplier's right to lien actually commences on the first day his material is delivered or his labor is performed on a particular building site. He can record his lien at any time from that point to 90 days after he last supplies material or performs the labor. Once the lien is recorded, the claimant has six months to file suit to protect his interest, or he may extend the lien period for an additional six months if he so chooses. However, a claimant's right to foreclose was extended to one year from his initial filing date. Failure to begin foreclosure during that time voided any rights to the property.
The new law also provides for certain steps that can shorten a claimant's right to less than the usual 90 days. This may be accomplished by recording a Notice of Completion.

Once the owner of the property complies with the applicable statutes and records his valid Notice of Completion all potential lien claimants have 15 days to record a Notice of Right to Lien or Claim

of Lien instead of the usual 90 days. Failure to record a lien during the 15-day period voids the claimant's right to lien the property.

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Ordering Title Work Early and Cancellation Fees

There is no doubt that it is a good idea to order the preliminary commitment for title insurance (title report) as early as possible. By doing so, you enable the Title Company, the closers, and the real estate agents to begin solving any title problems that may exist before time becomes a critical issue. The only drawback in ordering your title work early may be he concern of the cancellation/work fee.

The question of cancellation/work fees is one that has been around the title industry for many years. Title companies put a considerable amount of time effort, and money into he production of title reports. In years past, they did not do very good job at collecting fees for this service on an equitable basis. This all changed in 1992, when the Division of Insurance issued order 92-1 which absolutely requires title companies to collect a $250 cancellation/work fee within 30 days of the issuance of a title preliminary, or face fines for not doing so.

Although the payment of $250 early in the sales process nay be unpleasant, it is certainly money well spent when it comes to clearing title problems which may exist. Also, please remember it will be applied to the title charges at closing.

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Closings. When Do They Really Happen?

In the title and real estate industry, we use the term "closing" for the appointment in which the sellers/buyers sign their document. But when is the transaction really "closed"? The actual closing of a real property transaction is when the moneys are transferred to the appropriate parties. This usually happens the day after the documents are signed and after several tasks take place.

After the sellers/ buyers sign the closing papers, the escrow/loan officers must:

1. Prepare the documents for recording and in the case of financing, get the lenders approval to record the documents.
2. The documents are then given to the title department recorder who reviews the documents for perfect accuracy, searches the records to make sure no changes have occurred in the title to the property, and then takes them to the state recorder's office the following morning for final recording.
3. Upon recording, he/she calls notice of the recording (clearance) to the lender or escrow officer who notifies the lender that the documents are recorded.
4. The lender then funds the file with the appropriate moneys needed to complete the transaction.
5. Once the escrow officer has the moneys from the lender, they are deposited into the escrow trust account and he/she is finally ready to disburse the file including the commission check and other payoffs necessary to truly close the file.

As you can see, the signing of the documents is only the beginning of the final closing process.

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Title Options Depend On Circumstances

How should title be taken to real property? The answer to that question depends on your circumstances. Title may be held in various ways and by various entities, each having advantages or disadvantages depending on the situation. Consult a real estate attorney to determine which method of ownership is right for you. Here are some of your options:

1. **Tenant in Severalty:** Sole ownership of property by one person. If you are married, and the property is the family home, your spouse must join in any document conveying or encumbering your property. A discussion of homestead laws with your attorney may be advisable.
2. **Tenancy by the Entireties:** The most common form of ownership by husband and wife and presumed if your vesting deed reads "husband and wife" without designating any other tenancy. Title to real property vests in the surviving spouse upon the death of the other, saving the cost and delay of probate. Usually, a certified copy of the death certificate must be recorded.
3. **Tenants in Common:** Tenants own separate interests in the real property. One tenant may own an undivided 60% interest, another 30%, and another, 10%. Each tenant

may convey his or her interest without the consent of the others, and upon the death of a tenant, that interest passes to the estate of the deceased to be probated under the terms of his or her will or operation of law.

4. **Partnerships:** Title to real property is held by partners- and usually takes one of two forms; general partnership or limited partnership. In a general partnership, any one of the general partners may deal with the property. In a limited partnership, the general partner or partners may deal with partnership property while the limited partners have no authority to bind the partnership.

Title to real property also may be held by corporations, trusts, joint tenants (not applicable in Alaska), joint ventures, or by court appointed conservators and trustees. Ownership of various properties may necessitate different forms of ownership. Only you and your real estate attorney can decide which method of ownership is right for you.

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What is A "Closing?"

The terms ''escrow" and "closing" are used interchangeably. The process is that of completing a real estate transaction during which deeds, mortgages, leases, and other required instruments are signed and delivered, an accounting between parties is made, and the papers are recorded. Money is then disbursed and details are attended to, such as payment of outstanding liens and transfer of hazard insurance policies. Closing is a service provided by all ten branches of Trans Alaska Title.

Through the earnest money agreement, the escrow officer should receive clear and proper instructions about the disposition of money, documents, and other items being deposited. Receiving complete information (such as the full names of the buyers and sellers. addresses. phone numbers, social security numbers. and the correct legal description as well as property address) is appreciated. Important details frequently are incomplete on earnest money agreements or cannot be easily read. If a loan is assumed or paid off through the purchase, the lender's/servicer's name, address, and loan number are helpful.

Title companies are usually involved in two types of closings: a mortgage loan closing, where a lender deposits loan funds for disbursement with a letter of closing instructions: and a sale closing,

which often is originated by a real estate broker, buyer, or seller delivering to the title company a copy of an earnest money agreement with verbal instructions to proceed. In many instances sale and mortgage transactions interre-late and are so dependent on each other that there closings must take place simultaneously.

Closing can involve raw land, commercial real estate and one to four family dwellings, as well as refinancing your current mortgage or the sale of a deed of trust.

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Month End Escrow Closings

We are all aware of month-end in the real estate industry. There is no way to avoid it, but we can do some things to improve those last days on the calendar for the real estate agent, the closer, and most importantly, the customer. If a file must close by the end of the month, the agent or loan processor can let the escrow closer know as soon as possible and confirm all of the addendums to the earnest money agreement and loan numbers to order the necessary payoffs are available. If there is a homeowner's association the agent must be sure to allow time for the Resale Certificate and closing information for the closer to be completed.

In some cases, customers think that they have to close at the end of the month or it will cost them more money. It is no more expensive to close on the 15th than on the 30th. True, if the transaction is closed on the 15th, the customer has to pay interest to the first of the following month. However, the payment won't be due for 45 days. If they close on the 30th, the customer does not have the interest to pay, but he has a payment in 30 days. While there is no way to avoid the "month-end" rush, by working together we can make it much less painful.

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Homestead Rights, What Are They?

The married person/homestead rights problem is one that we face quite frequently in Alaska. Basically, the question revolves around the issue of one spouse holding title to property. What are the rights of the other spouse? Do they have to sign closing and loan documents? Are they liable if they do?

In Alaska, the homestead right of a non-titled spouse protects them against loss of their residence due to judgments and executions on unsatisfied debts of the spouse in title. Alaska is not a community property state, so property acquired in the name of a married person, which is not the residence of the non-acquiring spouse, is in control of their person in title. Quite simply, this provision means that I may own property in my name only and control that property on my own, unless it is the residence of my spouse with me. In that case, my spouse is protected through the homestead provisions of the Alaska Statutes.

When does a non-title spouse have to sign closing documents?

1. Upon the sale of a residence property, if the non-titled spouse does not sign the deed, they may claim an interest in the property for up to one year afterwards.

1. Upon the refinance of a residence property, although they may sign to encumber their homestead right only and not be an obligation the promissory note. The deed of trust should contain a notation of such.

A non-title spouse would not have to sign closing documents if they signed a waiver of homestead rights or if they execute a quit claim in conjunction with the closing.

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Judgments In Bankruptcy

There is a common misconception that once a debtor is discharged from bankruptcy all debt and judgments against the bankrupt are gone. FALSE! We should be aware that there are certain "Non-dischargeable" debts which survive bankruptcy and will generally fall into one of the following broad classifications:

1. Debts the debtor has a moral as well as legal obligation to pay.
2. Debts incurred by a debtor's unlawful or oppressive conduct.

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Non-Dischargeable Debts

Section 523 of the US Bankruptcy Code provides that the following debts are not dischargeable in bankruptcy:

- Certain taxes and custom duties.
- Debts arising from obtaining property, services, or credit by false pretenses or fraud, including use of false financial statements.
- Unlisted, unfiled, and unscheduled debts.
- Debts incurred for fraud or defecation while acting in a fiduciary capacity; by embezzlement; or by larceny.
- Debts for alimony, spousal support, or child support and maintenance.
- Debts arising through willful and malicious injuries to others or to property of others.
- Fines, penalties, or forfeitures due to governmental agencies.
- Criminal restitution orders.
- Certain educational loans.
- Debts arising in prior bankruptcies not listed or claimed.
- On and after October 9, 1984, debts evidenced by judgments or consent decrees resulting from debtor's operation of a motor vehicle while intoxicated.

As you can see, this is quite a list. We must be aware that even if a judgment rendered on any of the above types of debts is properly scheduled in the bankruptcy, it cannot be discharged.

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Dischargeable Debts

There is also a situation where a dischargeable judgment will survive bankruptcy. First, we should understand that a judgment creditor in bankruptcy will be a secured creditor if his money judgment is:

1. A lien upon real property of a judgment debtor prior to the date the judgment debtor becomes a debtor in bankruptcy.

2. If that judgment is not voided by order of the court.

Secured judgment creditors are entitled to have their liens adequately protected and preserved by the bankruptcy court throughout the bankruptcy proceeding.

One of the most confusing and least understood aspects of bankruptcy law is the effect of a discharge in bankruptcy upon judgments. The key to understanding the effect of a discharge in bankruptcy upon a judgment against the debtor and the effect of a discharge in bankruptcy upon a judgment lien lies in an analysis and thorough understanding of the following distinct and separate elements:

A. The **DEBT** owed by the judgment debtor to the judgment creditor, which is evidenced by the judgment, and
B. The **LIEN** the judgment creditor has on the property of the judgment debtor to secure satisfaction of the debt.

The judgment in **"A"** is a **DEBT** the judgment debtor is legally obligated to pay. The **LIEN** in **"B"** is a charge on real property of the judgment debtor. Thus, an unpaid creditor who has obtained a judgment lien possesses two sources to look to for payment of a money judgment. One is the personal obligation of the judgment debtor to voluntarily satisfy the judgment. The other is enforcement of the judgment.

A discharge of the judgment debtor in bankruptcy will relieve the judgment debtor of the personal obligation of the judgment debtor to voluntarily satisfy the judgment. The other is enforcement of the judgment.

A discharge of the judgment debtor in bankruptcy will relieve the judgment debtor of the personal obligation to satisfy the judgment. Therefore, source of recovery **"A"** is eliminated as a remedy for the creditor. However, the discharge of the debtor in bankruptcy will have absolutely no effect upon source **"B"**. A secured judgment lien creditor who obtains an order lifting the bankruptcies automatic stay provisions can execute on the debtor's real property to which the lien of the judgment was attached prior to bankruptcy. Thus the cardinal rules are:

A discharge in bankruptcy may extinguish a DEBT evidenced by a judgment (which means that the judgment would continue to be shown as a lien on real property of the bankrupt acquired prior to the bankruptcy, subject to the possible effect of a valid homestead).

So you can see, contrary to popular belief, all judgments of the bankrupt are not wiped from the face of the earth by bankruptcy.

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What Is Meant By "Fee Simple Title?"

A "fee simple absolute" is an estate passing absolutely to an owner and his heirs and assigns forever without limitations or condition. An absolute of "fee simple" estate is one in which the owner is entitled to the entire property with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate. The terms "Fee simple" and 'fee simple absolute" are equivalent.

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Title Lingo Unabridged

The title industry like other professions or trades, has it's own vernacular. Here are a few words we use almost daily and are readily understood by us, yet we are surprised when others do not understand them. Aren't these words self-explanatory?

ALTA (American Land Title Association): An organization composed of title insurance companies, which has adopted certain insurance policy forms to standardize coverage on a National basis. Usually used to refer to an "extended or full coverage" lender's policy.

Arb: An arbitrary number assigned to a specific piece of property for easy identification. A tax lot number is an "arb" number assigned by the taxing authority.

Bunny: A title search/examination, which is very simple.

Clearance: Verbal assurance given by the title company as to recordation and compliance with the recording instructions.

Cloud on Title: An invalid encumbrance or documentation of record affecting a specific parcel of real property, which, if valid, would affect the rights of the owner.

G.I. (General Index): A form of filing used to identify liens, judgment, divorces, or bankruptcies against individuals which may affect real property, but which are not recorded against the property.

Hypothecate: To pledge property to another as security without transferring possession or title.

Jurat: The certification by an officer (such as a notary public) before whom a document was signed stating where, when, and before whom the document was signed.

Plant: All the recorded information on real property, paralleling the records of the Recorder's office, arranged according to legal description.

Plant Date: The date through which the recorded documents are posted to the title plant. This is the date that appears on a preliminary title report.

Plat: A map dividing a parcel of land into lots, as is a subdivision filed with the Recording District in which the property lies.

Plot Plan: A drawing by a licensed surveyor of the location of improvements on a parcel of land. Also called an as-built survey."

Post: (Two definitions)

1.

1. To give public notice by attaching to a post or wall or displaying in a public place:
2. To enter additional recorded information to the title plant.

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ALTA vs. Standard Coverage Policies

Extended coverage policies afford the consumer far broader coverage for title matters than do standard coverage policies. A majority of lenders require extended coverage policies, also referred to as ALTA policies, on their long term loans. Title insurers also offer extended coverage policies for owner's policies of title insurance. Because of the additional risks assumed by the title insurer, the cost of an extended coverage' policy is greater than that of a standard policy.

When an extended coverage policy is written, your title insurer assumed the risk of loss resulting from the following matters, all of which are specific, known and proven risks and all of which are excepted from coverage under a standard policy:

When an extended coverage policy is written, your title insurer assumed the risk of loss resulting from the following matters, all of which are specific, known and proven risks and all of which are excepted from coverage under a standard policy:

1. Taxes or assessments which are not shown as existing liens by the records or by any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of person in possession thereof.
3. Easements, claims of easements or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments or any other facts, which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims, reservations, or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
6. Any lien, or right to lien for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
7. The title insurance company will need certain assurances if extended coverage is to be written.

- Have all taxing authorities been contacted?
- Have all bills for labor and materials been paid?

- Has an adequate survey been provided for review?
- Did the survey disclose any matters the company cannot insure against?

The title insurance company will need certain assurances if extended coverage is to be written.

The great misconception in connection with extended coverage policies is that matters disclosed by the survey will be covered by your title insurer. To the contrary, although the standard exception for survey matters may be deleted from your policy, matters disclosed by the survey which pose the risk of loss should be dealt with prior to closing or they will be excepted from coverage. Your survey may disclose matters for which the company cannot assume liability. Perhaps a road crosses your property, which has been used by others for access to their land - a valid easement may be proven to exist. Perhaps the neighbor has fenced a portion of your property or his house is sitting on your land - your neighbor may have a right to your property. The risk of loss on an extended owner's policy is far different from the risk on an extended loan policy. A lender will not necessarily suffer damage if a shed sitting in utility easement is torn down, as their loan would really not be impaired, however, an owner might be damaged. The same holds for driveways that cross a utility easement. A lender probably wouldn't suffer a loss, but an owner who had to repair a damaged driveway would probably consider the funds expended as a loss.

Because of the increased potential liability under an extended owner s policy, a more detailed survey may be required. Most title insurers will require an ALTA/ACSM Land Title Survey which meets the requirements of the American Title Association and the American Congress on Surveying and Mapping.

Insurance against loss or damage by reason of:

1. Title to the insured interest being vested otherwise than as slates in the policy.
2. Any defect in or lien or encumbrance on such a title.
3. Lack of a right of access to and from the land.
4. Unmarketability of the insured's interest in the title.
5. Usury or any consumer credit protection or truth in lending law.
6. Labor or materal mens' liens, which may gain priority over the ensured interest (except for work contracted for and commenced after date of policy).
7. Present violations of enforceable covenants.
8. Encroachments of buildings or other improvements from other or into other adjoining lands.

9. Damage to improvements, which may encroach within any recorded easement.

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