ACREL News

President's Message

How time flies. It seems just a short time ago that we were in Kauai for the Spring Meeting. For those of you able to make the meeting, it was a huge success because of the concerted efforts of so many folks. While about 150 Fellows attended the meeting that is only about 16% of the College, so I think it is important to be clear and specific as to how much hard work went into the entire meeting and to be sure to acknowledge all of those who contributed so mightily. For those who saw the program and enjoyed the festivities, please bear with me, as I hopefully will illuminate how much effort goes into these meetings. I have added a bit of levity to try to make my dry prose more interesting, but I also do not intend it to take away from the enormous efforts and superb presentations for which I thank each of the presenters.

A highlight of the meeting, as always, was the Educational Program. ACREL does cutting edge sophisticated programs balanced with updates or new topics important to all Fellows. The Program Leader was Suzanne Bessette-Smith assisted by Jane Snoddy Smith as the Spring Meetings Manager, all under the guidance of Marilyn Maloney as chair of the Programs Committee. These folks started on this program approximately 18 months before it was presented and coordinated topics that were both interesting and useful. It takes many meetings and conference calls to hammer out the basic outline before the speakers are recruited. Many topics are raised, but then honed down to a final list that makes the program. So many ideas are initially put on the wall that it takes a month to clean all the graffiti off afterward. They were assisted by the Session Coordinators,

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Deborah Macer Chun, R. Marshall Grodner and Nancy Little, who worked extensively with the speakers making sure the speakers covered the material in the right depth, produced their written materials and ran through several practice sessions with them, so the final product was smooth and well presented without overlap or gaps. The final product is heavily dependent on the entire team, but the session coordinators play a major role and are the folks constantly in contact with the presenters, something that is not apparent to those not on the Program Committee. Thankfully our presenters seemed to take it in stride and through the process resisted the temptation to divert session coordinators' emails to the spam filter.

Thursday's topic was the non-profit Kamehameha Schools whose mission is to improve educational opportunities of Hawaiians. Neil Hannahs presented a compelling tale of the ups and downs in the pursuit of such a mission.

Friday was led off by Sandy Weiner, Bob Wright and Sheila Gartland talking about the role of real estate lawyers in non-real estate transactions, where we were told many things but especially that the legal fees for real estate lawyers were "merely a rounding error" (which brought smiles to all attendees and requests from some to get onto one of those transactions), and that the time for due diligence gets more compressed with every deal. Next up were Stephen Cassidy and Mike Barrett, lead by Matt Comisky, discussing gray hair and the challenges of senior housing (for which "Touch of Gray" is not the answer). In such a world, Certificates of Need and the overlay of regulations from the Centers for Medicare and Medicaid Services (CMS) for reimbursement are among the challenges encountered. Bill Weber, along with Charlie Menges and Ray Iwamoto, then took us into the world of hotels where the fault lines develop between hotel owners, managers and lenders based upon PIPS (product improvement plans), performance tests, agency law and personal service agreements, among others. Hotels today are operating business in some ways very different than pure real estate. All very important issues to contemplate, but the big unasked and unanswered question swirling through everyone's mind was, of course, "Would a hotel client consider allowing their hard working lawyers to participate in the "friends and family" discount programs for hotel employees?"

We were then flooded figuratively by a discussion of lease clauses and high water damage lead by Elwood Cahill, Neil Kahn and Rocco Sansone. We were told that excess flood coverage in some areas is expensive, but often a necessity to get the protection you really want. Georgette Phillips and Pam Westoff, led by Kevin Shepherd, then discussed changes in the ethics rules including those pesky misdirected emails (hitting "send all" can launch big problems) and the intersection of modern technology with the limits on marketing and promotion under rules started in the eras prior to Pony Express. Friday ended with a twist on the Professor's Corner, where 45 minutes was devoted to a single case – the Koontz Supreme Court decision that land-use agencies in issuing or denying permits must comply with certain standards, and its many facets and dissents. The topic raised many fundamental but unresolved issues and the time seemed to fly by. That discussion was lead by Greg Stein with assistance from Brian Rider and David Callies, a law professor at the University of Hawaii. Maybe it was the Hawaiian heat, but at the end of the session, suggested future topics for the Professors Corner, i) who is the funniest Justice, and ii) do the Justices really take off for the summer because their robes make them too hot, were not given serious consideration.

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Saturday began with a discussion of form-based codes led by non-lawyers Mark Gillem and Barry Gordon (whose dad, David, was seen grinning from ear to ear and rightfully so). In those cases it is not the specific rules that govern, but a vision statement and measurable objectives. That was followed by a discussion of the thorny issues in ground leases, such as resetting rent decades later, and how to deal with the potential long list of third parties to use the property in the distant future. That presentation was led by Janet Johnson, along with Robert Shansky and Joshua Stein. "Will anyone be around 60 years, let alone 99 years after they negotiate the lease to know if their drafting was spot on?" once again remained one of the unasked questions which always seem to come to mind when dealing with ground leases. Saturday also had a series of Roundtables that were not continuations of the programs, including (i) Just-In-Time led by John Nolan with Robert Burton and Rebecca Fischer, discussing Master-Planned and Mixed-Use projects, (ii) TIC (Tenant in Common—not to be confused with deer TICS, although some co-owners, as we all know, can act like parasites) Bankruptcies led by David Kuney and Jonathan Shils, discussing the key elements with respect to a bankrupt TIC (and the answer is not to spray Raid), (iii) Charitable Gifting led by Howard Steindler, which discussed analyzing and documenting charitable gifts of real property, and (iv) the Uniform Foreclosure Act involving residential foreclosures, led by Barry Nekritz and William Breetz.

The beauty of the island and its many places to visit along with the superb hotel and guest resources at the Grand Hyatt made the meeting memorable, even when threatened rain forced the Luau indoors. The fire juggling went on indoors only after the fire sensors were turned off but additional security guards stood by with extinguishers. Finally the tours and all events at the meeting and the meeting itself were only possible because of the enormous efforts of Jill Pace and Henri Keller and the people who assisted them. They make it look so easy, but I can tell you there are always surprises and challenges that they resolve without a hitch.

The nominating committee has finished its work and its proposals will be distributed at the same time or shortly after this newsletter is launched. *[Ed. note: see p. 14 for the Nominating Committee's report.]* Thanks to Jonathan Shils, Ann Saegert, Peter Aitelli. Angela Christy, Jay Neveloff and Mark Senn for their collective efforts in this important function.

ACRELShares continues to progress to a smooth initiation in October, thanks to Gordon Tanner and Dan Smith and all the others assisting them. The search function is vastly improved and the amount of materials you can search has increased geometrically. The committee sites will also make information sharing much more robust and especially posting materials for your committee will be so simple everyone will be able to do it without assistance.

The more I work with ACREL Fellows the more I am astounded by their depth of skills and dedication. This is truly an exceptional organization. This year's addition of 40 new Fellows is a major achievement, but only the first step to assuring that this organization thrives in the future as the baby boomers age up and reduce their participation in ACREL. The Member Development Committee is working hard but they need your assistance in suggesting possible new members to them. Take a moment and forward to them the name and contact information for a possible new member. Likewise, experience has taught us that if we get new members active from the first few meetings after their selection, they are

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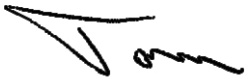
demonstrably more likely to continue to be very active in the College. Angela Christy and the Orientation Committee have to find 40 mentors to work with each of our new members. You will be hearing more about this as we seek mentors before Boston. This is an important function for the College and anyone who would like to help should contact Angela or me.

Finally, I have seen the detailed educational program and possible trips and activities associated with our Boston meeting in October – they are superb. I think that the entertainment Saturday will be fabulous and a bit different. Hope that we have a record turnout as Boston is easy to get to from nearly everywhere and is a great destination.



Tom Kaufman, President

Meetings Calendar

2014 Annual Meeting
October 16-19, 2014
InterContinental Hotel
Boston, MA

2015 Mid-Year Meeting
March 25-28, 2015
JW Marriott Camelback Inn
Scottsdale, AZ

2015 Annual Meeting
October 22-25, 2015
Four Seasons Hotel
Baltimore, MD

STAFF BOX

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Revival and Reattachment of Foreclosed Liens: What are the Priorities?[1]

by John C. Murray
First American Title Insurance Company

Under what circumstances might a court rule that a foreclosed subordinate lien would reattach and remain an encumbrance upon the real property if the property is purchased at the first lienholder's foreclosure sale by the borrower, or the borrower subsequently purchases from the purchaser at the sale? What would a court hold are the priorities of the competing lienholders? Unfortunately, the law is not clear or consistent with respect to these issues. This article will examine and analyze the case law and commentary in this area, the theories utilized by courts to apply or reject revival and reattachment, and the risks faced by first-mortgage lenders in such circumstances.

The common-law rule is explained in Baxter Dunaway, 2 L. DISTRESSED REAL ESTATE, § 26.37 (Purchase by mortgagor after junior liens/mortgages eliminated by foreclosure of senior mortgages), as follows:

The common law rule is that the foreclosure of a senior mortgage eliminates the equity of redemption and the lien of a junior lienor or mortgagee. The purchaser at the foreclosure acquires the mortgagor's equity of redemption and a title free of all interests that were junior to the lien that was foreclosed. The foreclosure eliminates the lien against the property, but it does not eliminate the debt; the debt just becomes unsecured. This is well understood and accepted if the property is purchased by the foreclosing mortgagee or an independent third party. What if the property is purchased by the mortgagor or the mortgagor purchases from the purchaser at the sale? Is this not a way for the mortgagor to eliminate junior liens, that is, by allowing a foreclosure to cleanse the junior liens?

Repurchase With Purchase-Money Loan

An exception to the common-law rule may apply, with respect to priority, when the purchaser repurchases the foreclosed property with a purchase-money loan. *See, e.g., DMC, Inc. v. Downey Savings & Loan,* 99 Cal. App. 4th 190 (4th Dist. 2002). This case held that when the mortgagor repurchased the property after foreclosure with a new purchase-money loan, the foreclosed lien re-attached, but was junior to the new purchase-money lien.

According to the court:

> If we assume, as do the parties, that the junior lien reattaches after the original owner reacquires the property, reattachment occurs simultaneously with the creation of the new purchase-money deed of trust. Furthermore, as the cases suggest, reattachment or revival occurs as a function of equity. The revived junior lien therefore is an equitable as opposed to a legal encumbrance. All else being equal, the law prefers legal over equitable liens. Accordingly, as between two simultaneously created and recorded liens on real property, the legal lien has priority.
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> . . . . . .
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> Under these circumstances, we conclude that, when the original owner's repurchase of the property after a trustee's sale revives the junior deed of trust, that lien remains second to the purchase-money deed of trust that essentially replaced the original senior lien and made possible the repurchase,

[1] Nothing contained in this Article is to be considered as the rendering of legal advice for specific cases, or creating an attorney-client relationship, and readers are responsible for obtaining such advice from their own legal counsel. This Article is intended for educational and informational purposes only. The views and opinions expressed in this Article are solely those of the Author.

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and hence, the revival of the junior lien. *Id.* at 199-200.

See also Smith v. Byrnes, 2010 WL 3687514 (Cal. App. 4 Dist.), Sept. 22, 2010, at *6 (citing the DMC case, *supra,* and stating that "purchase money deeds of trust, by operation of law, have priority over any other liens (with the exception of other purchase money deeds of trust), even those recorded *prior* to them . . . Because they have priority over any other liens, *even those created and recorded first*, knowledge of a prior lien is irrelevant"). (Emphasis in text).

Arguments for and against Revival

As noted above, it appears that revival and reattachment of a subordinate loan is still a somewhat unsettled area of the law, with arguments on both sides, i.e., fairness and equity as to the rights of the junior lienholder(s) on the one hand versus finality of judgments (and sales) and compliance with statutory requirements on the other hand. There is also an issue as to whether a mortgagee who "colludes" with the borrower (or an entity including the borrower) in advance to resell the property to the mortgagor after the sale is a bona fide purchaser ("BFP"). The price paid by the original mortgagor upon the resale may be a factor in this analysis.

See Dixieland Realty Co. v. Wysor, 272 N.C. 172, 176 (N.C. 1967) ("There is a sharp divergence of opinion on this question [whether or not a subordinate lien should be revived] in several jurisdictions"); *Mooney v. Provident Savings Bank*, 308 N.J. Super. 195, 203 (1997) (setting forth examples of collusive conduct and breach-of-covenant whereby mortgage may be revived, and stating that "The remedy of reviving the lien of a previously extinguished mortgage is purely equitable in nature. Its purpose is to undo what otherwise would be an unjust and unconscionable result"); *Federal Land Bank of Columbia v. Bank of Lenox*, 192 Ga. 543, 552 (1941) ("The status of a junior mortgagee, where the mortgagor reacquires title from the purchaser at a sale under a senior mortgage, has long troubled the courts, and there is a strange dearth of decisive authority on the subject").

Commentators have duly noted the problems in this area. *See, e.g.*, Grant S. Nelson in *Symposium: A Festschrift in Honor of Dale A. Whitman: The Foreclosure Purchase by the Equity of Redemption Holder or other Holder or Other Junior Interests,* 72 MO. L. REV. 1259, 1271-73 (2007):

> We already have learned that if a mortgagor (or other holder of the equity of redemption) and a third party collude to have the latter purchase at the foreclosure sale and then transfer title back to the mortgagor, junior interests revive upon the mortgagor's reacquisition of title. *Even in the absence of collusion, revival is the norm when the mortgagor reacquires title.* [Emphasis added.]
>
> On the other hand, suppose the mortgagor reacquires title from a bona fide purchaser (BFP). This can be the case where either the foreclosure purchaser or a subsequent grantee qualifies for BFP status. The Restatement rejects revival of junior liens and other interests in this context.
>
> Under normal recording act principles, a bona fide purchaser of real estate that is subject to a prior unrecorded interest may transfer good title to a transferee even though that transferee has knowledge of that interest. The latter principle enhances the alienability of real estate and gives a bona fide purchaser the ability to transfer good title to a subsequent person who cannot qualify for bona fide purchaser status. Under this approach, the original holder of the equity of redemption, albeit tainted by unclean hands, becomes the beneficiary of a policy designed to protect bona fide purchasers and foster real estate marketability.
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> On the other hand, the case law is far from unanimous on this issue. Some courts hold that the mortgagor or other holder of the equity who reacquires title from

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> a BFP takes title subject to the revived junior interest. Other decisions are consistent with the Restatement approach.
>
> The BFP issue is admittedly a tough call. On the one hand, there is the unclean hands problem - it is difficult to support a result that rewards a person who has violated his or her obligation to lienholders. Yet there is a strong countervailing consideration - public policy generally supports a BFP's ability to alienate real estate freely.

As Prof. Nelson also notes in his article:

> However, unless a mortgagee who purchases at a foreclosure sale knows or suspects that former holder of the equity of redemption will likely attempt later to repurchase the land from it, it certainly acquired the title as a BFP.
>
> *Id.* at n. 59.

Prof. Nelson further notes that:

> A bona fide purchaser (other than the owner) on an unconditional sale of real property pursuant to a regular foreclosure acquires a clear and absolute title as against all parties to the suit and their privies which relates back to the date of the mortgage so as to cut off all intervening rights and equities As to those whose interests in the property are cut off by the foreclosure, such a purchaser has no further obligation or duty after the actual delivery of the referee's deed. He may do with the property as he sees fit. He may convey it back to the original owner without thereby revesting liens which were cut off by the [foreclosure] sale. The mere fact that the original owner acquired title subsequent to the purchaser on the sale did not reinstate the second mortgage lien.
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> *Id*. at n. 61.

Finally, as Prof. Nelson also notes in his article:

> A frequent student reaction to the foregoing is to ask: "Why not have a friend of the mortgagor purchase and take title at the foreclosure sale and later convey the property to mortgagor?" My response usually is: "Should the mortgagor be able to accomplish in two steps what cannot be carried out in one?" Or, "if it sounds too good to be true, it usually is." Ultimately, we come to the conclusion that the survival principle "may not be evaded by collusive arrangements which call for a third party to purchase at the foreclosure sale and thereafter to transfer title to the prior [mortgagor]."
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> *Id.* at 1265.

What if the first mortgagee itself purchases the mortgaged property at its foreclosure sale and then conveys the property back to the grantor? In *Federal Land Bank of Columbia v. Bank of Lenox,* 192 Ga. 543, 547-550 (1941), the Georgia Supreme Court held that in this "exceptional situation" the lien of the junior mortgage, as against the grantor and his "privies with notice," is not extinguished based on the doctrine of estoppel and becomes a first lien against the property, even though the second mortgage states on its face that it is a junior encumbrance.

For additional commentary in this area, *see* Miller and Starr, 5 CAL. REAL EST. § 11:100 (Priority of the purchaser's title from a foreclosure sale); Elizabeth A. Smith-Chavez, Richard J. Stratton, Judge James R. Trembath, CAL. CIV. PRAC. REAL PROPERTY LITIGATION § 4.62 (Revival of discharged lien); Joyce Palomar, 3 PATTON AND PALOMAR ON LAND TITLES § 566 (3d ed.) (Revival of mortgages); Joseph G. Wood and Richard Oberreich, *Revival of a Second or Subsequent Mortgage, Upon Reacquisition of Title by the Original Mortgagor, After Foreclosure of a First Mortgage*, 11 IND. L.J. 429 (1936); Baxter Dunaway, supra, 2 L. DISTRESSED REAL ESTATE, § 26.37 (referring to § 4.9 of the RESTATEMENT

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(THIRD) OF PROP: MORTGAGES ("RESTATEMENT"), and stating that "The [RESTATEMENT] rule not only revives the lien against the original mortgagor but the lien attaches to the property in the hands of transferees of the mortgagor. The same rule is applicable even if the original mortgage was non-recourse").

Legal Theories for Revival and Reattachment

Section 4.9 of the RESTATEMENT states as follows:

§ 4.9 Acquisition of Foreclosure Title by the Holder of the Equity of Redemption or Other Junior Interests: Effect Upon Junior Interests

(a) A holder of the equity of the redemption who purchases real estate at a foreclosure sale of any lien on that real estate acquires title subject to any lien or other interest that was junior to the foreclosed lien.

(b) A holder of a junior interest who purchases real estate at the foreclosure sale of any senior lien on that real estate acquires title free and clear of the interest of the holder of the equity of redemption and of any interest that was junior to the foreclosed lien.]

Sec. 4.9 cmt. b. of the RESTATEMENT (which takes a distinctly "pro-survival" approach) states that "It is clear that the acquisition of title by a mortgagor at the foreclosure sale of a senior lien does not terminate junior liens." This comment also contains numerous case citations and "Illustrations" (i.e., examples of various fact situations). (Keep in mind that the RESTATEMENT is aspirational and is not necessarily a definitive statement of the actual law.)

For a discussion of the three major legal theories utilized by courts to justify the revival and reinstatement of junior lien interests, *see* Baxter Dunaway, 2 L. DISTRESSED REAL ESTATE, § 26.37, *supra,* which states as follows:

> Even in the absence of fraud, the reacquisition of title by the mortgagor is held to revive the second mortgage on three distinct theories (citation omitted). First, under the payment theory, when the mortgagor purchases the property at the sale, the mortgagor is in effect paying the first mortgage and the second mortgage moves into first position. The mortgagor should not profit by its own wrong in failing to pay when due. Second, is the covenant to defend title theory. Under this approach, the second mortgage that is revived usually contains a warranty that the mortgagor agrees that he will defend the title against all lawful claims. Permitting the foreclosure of the first mortgage is a breach of the warranty to defend the title. Even if the second mortgagee takes subject to the first mortgage, it has been held that the warranty to defend is not affected by the reference to the first mortgage (citation omitted). Third, the warranty of title theory is based upon the warranty of title contained in the second mortgage. The mortgagor has warranted that the mortgaged premises shall be security for the debt and that the mortgagor will produce the property if the debt is not paid. When the mortgagor reacquires the property, it then must provide the property as security for the debt. This after-acquired title doctrine is an ancient equitable remedy designed to effectuate the intention of the parties (citation omitted).

See also Grant S. Nelson and Dale A. Whitman, 1 REAL ESTATE FINANCE LAW § 4.44 (5th ed.) (Acquisition by Mortgagor) (Database Updated July 2010), which contains an excellent analysis and discussion of this issue as well as numerous case citations. The authors state that:

> A mortgagor is under a duty to the mortgagee to discharge the secured obligation. Hence, she cannot fail to do so,

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> buy the property at a foreclosure sale, and hold it free of the mortgage (footnote omitted). She can do this neither directly nor through intermediaries.
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> Suppose, however, the mortgagor reacquires title from an independent third party rather than by purchasing at the foreclosure sale. Some courts hold that the mortgagor is still subject to the lien of the subsequent mortgage (citation omitted). Others hold that she will take free and clear in the absence of any contract duty or fraudulent conduct by the mortgagor toward the second mortgagee (citation omitted). Courts follow this approach are influenced by a policy that favors a bona fide purchaser being able to convey good title to any subsequent grantee, the mortgagor included.

As the authors also point out (and as noted earlier in this article), some courts utilize the "payment" theory to justify lien survival. *See, e.g.*, *Old Republic Ins. Co. v. Currie*, N.J. Super. 571, 575 (1995), where the court stated as follows:

> [U]nder the payment theory, when the mortgagor purchases the property at the sale, the mortgagor is in effect paying the first mortgage and the second mortgage moves into first position. This is what would have occurred if the mortgagor had paid the first mortgage when it became due. If payment after foreclosure were to alter this result, the mortgagor would be profiting by its own wrong in failing to pay when due.

Historical Basis for Revival

The principles supporting the revival of junior liens (when title is reacquired by a former owner whose equity of redemption was foreclosed by a valid foreclosure sale) are established by approximately 100 years of court decisions in those states that support the revival of the "extinguished" liens as equitable liens (with certain limited exceptions). *See, e.g., Ayer v. Philadelphia & Boston Face Brick Co*., 159 Mass. 84, 87 (1893), where the court held -- applying the "estoppel by deed" theory, i.e., that the mortgage is in reality a warranty deed -- that where the second mortgage contained a covenant of warranty against the first mortgage, and the borrower afterward obtained title through foreclosure of the first mortgage, the second mortgage was revived, and also would be enforceable against a subsequent purchaser from the borrower; *Martin v. Raleigh State Bank*, 146 Mass. 1, 111 So. 448, 450 (1927) (holding that where third party purchased property at foreclosure sale by first lienholder and later sold it to borrower, title so reacquired inured to benefit of holder of second mortgage, which stated that it was subordinate to first mortgage); 28 MASS. PRAC. REAL ESTATE LAW § 10.17 (Foreclosure by sale – Purchase by owner of equity) (database updated Nov. 2013) ("If the owner of the equity of redemption purchases the property at the foreclosure sale, or subsequently acquires title, this revives any junior mortgages made by a mortgagor"). *Cf. Huzzey v. Heffernan*, 143 Mass. 232 (1934), in which the court forcefully stated the general rule that a foreclosure sale under a senior lien terminates the inferior lien interest in the property, but nonetheless held that the mortgagor, who bought the title from a stranger after foreclosure of the first mortgage, was entitled to hold the property free from all mortgages or other liens created subsequent to the foreclosure of the first mortgage. The court reasoned that the estoppel argument did not apply because there was no warranty in the second mortgage against the prior mortgage; in fact the covenant of warranty in the second mortgage against claims and demands contained the express exemption "except those claiming under the prior mortgage." The court reasoned that "To give the doctrine of estoppel operation the demandant claims, would be to enlarge [the] covenant [contained in the second mortgage] to a general covenant of warranty." *Id* at. 234.

See also Dorff v. Bornstein, 277 N.Y. 236, 242 (N.Y. Ct. of Appeals, 1938), where the court stated as follows:

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> In the case at bar there was no fraud affecting the foreclosure proceedings or the sale or transfer by the purchaser to the [original owner], the foreclosure proceedings were regularly conducted, and the conveyance made upon the sale was unconditional. The mere fact, if it be a fact, that the original owner acquired title subsequent to the purchaser on the sale did not reinstate the second mortgage lien.

If the mortgagor cuts off a junior mortgage by purchasing the property at or after the foreclosure of a senior mortgage, the purchase could be construed as a constructive fraud on the junior lienholder. This could occur even if there is no allegation of actual fraudulent intent. *See Holland v. Fulbert, Inc*., 371 N.Y.S. 2d 509, 513 (3d Dep't 1975). Query: Whose (if anyone's) duty should it be to inquire into the makeup of a purchaser at a foreclosure sale (or at a subsequent sale of the property) to determine if the original borrower has any equity interest or participation in the purchasing entity, in order to avoid the possibility of previously foreclosed liens and judgments being reinstated? There are conflicting decisions and commentaries in this area as noted in this article, and in any event there appears to be some element of risk involved.

Competing Mortgage Foreclosures on Same Property

In an interesting -- and highly unusual -- recent state-court decision involving conflicting priority issues with respect to "competing" mortgage foreclosures on the same property, *Bank of New York v. Langman,* 2013 Ill. App. 2d 120609, 986 N.E. 2d 749 (2nd Dist. 2013), *appeal denied,* 996 N.E. 2d 9 (Table) (Ill. Sup. Ct., Sept. 25, 2013), the initial mortgagee successfully foreclosed upon the mortgaged property, but a subsequent mortgagee also successfully foreclosed upon the same property in a separate action and claimed that its mortgage had priority. The court held in favor of the initial mortgagee, reasoning that the subsequent mortgagee was on constructive notice of the earlier mortgage lien even though a forged release of the initial mortgage had been recorded prior to the initial mortgagee's notice of foreclosure. Because notice of the initial mortgagee's foreclosure action had been recorded more than two weeks before the grant of the subsequent mortgage, the court held that the initial mortgagee was not equitably estopped from asserting priority of its mortgage lien -- despite its failure to record an affidavit of correction after it discovered that the earlier-filed release of mortgage was forged. (The facts of this case are very complicated, and hopefully will not be repeated any time soon.)

See Michael J. Rooney, Zombie Mortgages in Illinois' Second Appellate District, BAR BRIEFS, Kane County, Illinois Bar Association, June 2013, pp. 35-37 (copy available from the author of this article). As incredulously noted by Mr. Rooney:

> In this case [*Langman*] two different foreclosure cases, by two different lenders (or their assignees) were filed in the same court before the same judge and both cases had judgments against the *same real property* without anyone noticing and without the judge making a determination as to which mortgage had priority! (Emphasis in text.)

Mr. Rooney further notes that given the overwhelming number of foreclosure cases filed in Illinois (as well as many other states), it is actually surprising that this problem does not arise more often. Mr. Rooney advises that:

> The simple solution [at least in Illinois], from a purely cost-effective practical view, may be a simple spreadsheet of all cases, including the Parcel Identification Number (PIN) so that duplicates may be easily discovered simply by sorting the spreadsheet by PIN.
>
> *Id.* at 35.

["Curiouser and curiouser!" Cried Alice . . . (Lewis Carroll, *Alice's Adventures in Wonderland & Through the Looking-Glass*)]

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Conclusion

Given the uncertainty in predicting when and under what circumstances a court may rule that a foreclosed subordinate lien may be revived and reinstated and what the resulting priorities will be, a first-mortgage lender seeking to foreclose against real property that is also subject to a subordinate recorded mortgage may be wise to carefully consider who the purchaser is at its foreclosure sale, if the purchaser is not the first mortgagee itself. This is not always easy, especially where the purchaser is not the mortgagor itself but is rather a "straw man," i.e., a person or entity that is in collusion with the borrower to purchase the foreclosed property with the goal of extinguishing the second mortgage and enabling the grantor-borrower to avoid payment of the junior lien. The courts basically apply an equitable analysis in their reasoning on this issue, and it may be extremely difficult to determine what factors will be considered by a particular court if a subsequent challenge to the foreclosure arises from a subordinate lienholder whose interest was allegedly wrongfully terminated. However, even if the second lien is revived, the subordinate lender may need to then consider the applicable statute of limitations and subsequent transfers. Also, if there has been an intervening borrower bankruptcy, no personal judgment for the debt could be obtained against the borrower although the revived lien may survive the bankruptcy filing. There are no easy answers, and case law should be closely monitored for further developments and precedents. ■

In Memoriam

The Fellows, Governors, officers and staff of the College acknowledge with sadness the passing of:

Lester Rosen, Chicago, IL

We extend our condolences to family and friends.

A Note from the Programs Committee

I want to thank those Fellows who attended the Hawaii Meeting in Kauai and especially those who responded to the evaluations survey. The responses we received gave us some very useful suggestions which we are already using for the meetings in Boston and Scottsdale. Overall the evaluations of the educational program were very favorable and the members of the Programs Committee are pleased to know that Fellows who attend our meetings feel that ACREL is providing relevant substantive CLE to its Fellows, and to their firms though The ACREL Papers.

The evaluations are reviewed by the Programs Committee, the Executive Committee and the Meetings Committee. Suggestions from past meetings resulted in changes to the meeting format and to the structure of the evaluations survey itself, and in Kauai the link to the survey was available throughout the Meeting, providing the opportunity to evaluate sessions, log out and log back in to add to what was already done. Those of you who are planning to attend the meeting in Boston will see still more changes to the survey format which will make it much shorter and easier to complete.

On behalf of the Programs Committee, I thank you again for your participation in the evaluations process and your contributions to the cutting-edge programming provided by the College for its Fellows. We look forward to seeing you in Boston in October.

David S. Gordon
Programs Committee Vice-Chair,
Evaluations & Orientation

Got Programs?

If you'd like to volunteer,
or communicate ideas for
Plenary Sessions,
Roundtables,
or Internal Webinars,
contact
programideas@acrel.org

ACREL Gatherings!

Please consider holding an
ACREL event in your city.

Fellows who have attended these gatherings have been pleased with the opportunity to connect with their ACREL colleagues.
The event can be whatever you want it to be! You can have a speaker, discuss prospective members or just have lunch or a cocktail party.
Options range from brown bags at a law firm to cocktails at a local hotel.

If you are interested in holding a session, please contact **Angela Christy** at angela.christy@faegrebd.com, (612) 766-6833, or **Cathy Gale** at cgale@bhfs.com, (303) 223-1139.

ACRELades

William H. Locke, Jr. has authored the Texas Foreclosure Manual (3rd ed.), with co-authors Ralph Martin Novak, Jr., and G. Tommy Bastian, a two-volume manual for practicing lawyers, published by TexasBarBooks.

John B. Neukamm and **Jerry E. Aron** were recognized with the William S. Belcher Lifetime Professionalism Award at The Florida Bar's Real Property, Probate & Trust Law Section's 2014 Annual Convention. The award was given for their contributions to Florida attorneys and the public in promoting the highest standards of ethics and professionalism.

Ira J. Waldman was honored by the Real Property Section of the LACBA as Outstanding Real Estate Lawyer at a dinner on May 29, 2014. At the same event, **Sarah V.J. Spyksma** was recognized as Outgoing Chair Ex-Officio and **Susan J. Booth** was installed as Second Vice Chair. Past Outstanding Real Estate Lawyer Award Recipients include **Lawrence G. Preble** (1999), **Marvin Leon** (2001), **Alan Wayte** (2002), **Richard S. Volpert** (2003), **Phillip R. Nicholson** (2004), **Dennis B. Arnold** (2009), **Arthur Mazirow** (2010), **Michael E. Meyer** (2011) and **Susan Fowler McNally** (2013).

Send us your news for future issues!

Report of the 2014 ACREL Nominating Committee

The College's 2014 Nominating Committee consisted of Jonathan Shils (GA), Chair, Peter Aitelli (CA); Angela Christy (MN), Jay Neveloff (NY); Ann Saegert (TX); and Mark Senn (CO) and submits this report to President Thomas Kaufman in accordance with Article V, Section 3 of the College's Bylaws.

1. Pursuant to Article VI, Section 2(b) of the College's Bylaws, Kenneth M. Jacobson (IL) becomes President on January 1, 2015.

2. In accordance with the provisions of Article VI, Section 2(a) of the Bylaws, the Nominating Committee nominates the following Regular Fellows for election at the Annual Meeting as officers for the indicated positions commencing January 1, 2015:

Kathryn C. Murphy (MA)	President-Elect
Roger D. Winston (MD)	Vice President
Jay A. Epstien (DC)	Treasurer
Steven A. Waters (TX)	Secretary

3. Pursuant to Article V, Section 3 of the Bylaws, the Nominating Committee nominates the following Regular Fellows for election as Governors at the Annual Meeting for the indicated terms commencing January 1, 2015:

Ann Peldo Cargile (TN)	3 year term
Michael D. Hamilton (CA)	3 year term
Barry A. Hines (KY)	3 year term
Richard C. Mallory (CA)	3 year term
Marilyn C. Maloney (TX)	3 year term
Gordon W. Tanner (WA)	1 year term (to complete Steven Waters' unexpired Board term)

Submitted: June 3, 2014

Jonathan Shils
Chair