A Legal Update for the Title Insurance Industry

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The authors discuss recent court decisions of note involving title insurance.

This article discusses the following:

- An appellate court in California has ruled that the state's Quiet Title Act insulated a third party from the effect of a subsequent invalidation of an earlier quiet title judgment only if the third party had no actual—or constructive—knowledge of any defects or irregularities in that judgment.
- An appellate court in Washington has ruled that purchasers of property that a court ordered to be sold had not acted in good faith given that a lis pendens was still recorded at the time the sale to the purchasers was closed.
- An appellate court in New York has ruled in favor of five homeowners associations in a dispute centering around the ownership and use of approximately 4,000 feet of oceanfront property in the Town of East Hampton.
- The U.S. Court of Appeals for the Ninth Circuit has affirmed a district court's decision dismissing as untimely a lawsuit involving a decades-old easement that was filed against the United States by owners of property near Connor, Montana.
- A court in Virginia has ruled that deeds, instruments of subdivision, and plats did not create an express easement for one property owner to travel from his property across a neighbor's property and that, as a result, he had no legal right to use his neighbor's property.

Constructive Knowledge of Defects in Quiet Title Judgment Doomed Third Party's Bid for Priority, California Appellate Court Rules

An appellate court in California has ruled that the state's Quiet Title Act insulated a third party from the effect of a subsequent invalida-

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tion of an earlier quiet title judgment only if the third party had no actual—or constructive—knowledge of any defects or irregularities in that judgment.

The Case

In February 2007, Cassandra Celestine borrowed $448,000 from CIT Group/Consumer Financing ("CIT Group") and secured the loan with a deed of trust on property in Inglewood, California (the "Property"). The deed of trust was recorded on February 28, 2007 (the "CIT Deed of Trust").

In early September 2012, CIT Group assigned the CIT Deed of Trust to U.S. Bank, N.A., as trustee on behalf of SASCO Mortgage Loan Trust 2007-RNP1 ("SASCO"). The assignment was recorded on September 26, 2012.

In early June 2014, SASCO assigned the CIT Deed of Trust to DLJ Mortgage Capital, Inc. ("DLJ Mortgage"). The assignment was recorded on June 13, 2014.

On July 3, 2014, DLJ Mortgage recorded, and mailed to Celestine, a notice of default setting forth what DLJ Mortgage asserted was the outstanding balance that Celestine owed to DLJ Mortgage and giving her 90 days to pay.

On September 11, 2014, before the 90 day deadline had expired, Celestine filed a lawsuit (the "Celestine Action") that included a claim under California's Quiet Title Act to invalidate the CIT Deed of Trust. She filed a notice of lis pendens regarding her lawsuit on September 23, 2014.

Although SASCO and DLJ Mortgage had recorded their assignment of the CIT Deed of Trust and although Celestine had exchanged letters with the loan servicers reaffirming that SASCO and then DLJ Mortgage had acquired the CIT Deed of Trust from CIT Group, Celestine did not name SASCO or DLJ Mortgage as defendants. Instead, she named only CIT Group and "All Persons Known & Unknown Claiming Any Legal Or Equitable Right, Title, Estate, Lien, or Interest In The Property Described In The Complaint Adverse To Plaintiff Title Or Any Cloud On Plaintiff Title Thereto." Moreover, Celestine did not properly serve CIT Group with her complaint.

As a result, no one with an interest in the Property was ever served with Celestine's complaint and, consequently, no one ever appeared and Celestine obtained a default.

On May 28, 2015, the trial court entered a default judgment quieting title to the Property against CIT Group and permanently enjoining CIT Group and its "successors in interest" from "[a]sserting . . . any interest or ownership" in the Property, including through the CIT Deed of Trust (the "2015 Quiet Title Judgment"). The 2015 Quiet Title Judgment was recorded on July 22, 2016.

Thereafter, on August 4, 2016, the trial court issued an order expunging the CIT Deed of Trust and declaring it to be "Reversed, Cancelled, Set Aside and made Null and Void, Ab Initio, for all purposes" (the "2016 Expungement Order"). The 2016 Expungement Order was recorded on August 10, 2016.

Prior to that order, on April 14, 2016, DLJ Mortgage transferred the loan underlying the CIT Deed of Trust to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("U.S. Bank"). On August 3, 2016, DLJ Mortgage assigned the CIT Deed of Trust to U.S.

Bank. The assignment was recorded on August 11, 2016.

On December 20, 2016, Caliber Home Loans, Inc.—the successor in interest to CIT Group—specially appeared in the Celestine Action and filed a motion to set aside the default and the 2015 Quiet Title Judgment against CIT Group on the ground that CIT Group had never received notice of the lawsuit.

On May 8, 2017, the trial court granted Caliber's motion and set aside the 2015 Quiet Title Judgment. On July 10, 2017, Caliber recorded the order setting aside the judgment.

On July 24, 2017, the trial court granted Caliber's further motion to expunge the 2015 Quiet Title Judgment and the 2016 Expungement Order from the record of title.

On August 17, 2017, the trial court dismissed the Celestine Action for lack of prosecution.

The Tsasu Deed of Trust

On September 2, 2016, Celestine borrowed $285,000 from Tsasu LLC, securing the loan with a deed of trust against the Property that was recorded on September 15, 2016 (the "Tsasu Deed of Trust"). At the time the Tsasu Deed of Trust was recorded, the recorded documents in the record of title for the Property included (1) the 2015 Quiet Title Judgment against CIT Group that invalidated the CIT Deed of Trust, and (2) the 2012 and 2014 assignments of the CIT Deed of Trust reflecting that the CIT Group had not owned the CIT Deed of Trust since 2012.

In deciding whether to loan Celestine money, Tsasu's chief executive officer later indicated that he had relied on a preliminary report prepared by a title insurance company that was based on "the results of the title search" obtained by that company. The title search results accurately reflected the above described recorded documents—namely, a "Judgment, Quiet Title" on July 10, 2015, against "The CIT Group" as well as two "Deed of Trust/Assignment[s]" (one to SASCO in 2012, and another to DLJ Mortgage in 2014).

In December 2017, Tsasu sued U.S. Bank. It sought a quiet title and declaratory judgment that the Tsasu Deed of Trust had priority over the CIT Deed of Trust because the orders setting aside and expunging the 2015 Quiet Title Judgment were ineffective as to Tsasu, and a declaratory judgment that (a) Tsasu had been denied due process because it had not been given timely notice of, or been asked to join in, the proceedings to set aside and expunge the 2015 Quiet Title Judgment, and (b) enforcing the orders setting aside and expunging the 2015 Quiet Title Judgment against Tsasu violated the "equitable doctrine of unclean hands."

The trial court granted summary judgment in favor of U.S. Bank, and Tsasu appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that, under the California Quiet Title Act, a third party who acted "in reliance on" a quiet title judgment retained its property rights—even if that quiet title judgment subsequently was invalidated as void—so long as the third party qualified as a "purchaser or encumbrancer for value . . . without knowledge of any defects or irregularities in [the earlier quiet title] judgment or the proceedings."

The appellate court then addressed whether,

for these purposes, "knowledge" meant only actual knowledge or, instead, both actual and constructive knowledge. The appellate court held that it was "the latter," such that the Quiet Title Act insulated a third party from the effect of a subsequent invalidation of an earlier quiet title judgment only if the third party had "no actual or constructive knowledge" of any defects or irregularities in that judgment.

Thus, the appellate court reasoned, whether Tsasu was entitled to the quiet title and declaratory judgments it sought turned on what effect, if any, the trial court's orders setting aside and expunging the 2015 Quiet Title Judgment had on the Tsasu Deed of Trust, which was recorded after the 2015 Quiet Title Judgment was recorded but before it was set aside as void.

The appellate court noted that it was "undisputed" that Tsasu had acquired its interest in the Property for value by loaning Celestine $248,000. It then added that it did not have to decide whether Tsasu had acted in reliance on the 2015 Quiet Title Judgment because the "undisputed facts" established that Tsasu had constructive knowledge of "defects and irregularities" with that judgment—in particular, that Celestine had knowingly named only a prior owner of the CIT Deed of Trust (that is, CIT Group) rather than its then-current owner.

Among other things, the appellate court decided that Tsasu had constructive knowledge because Tsasu (through its chief executive officer) had treated its title insurer as its agent when the chief executive officer had relied on the title insurer's preliminary report and, by extension, the insurer's title search in deciding whether to loan Celestine money. The appellate court concluded that because the title search also reported the quiet title judgment against CIT Group and the two earlier assignments of the CIT Deed of Trust to parties other than CIT Group, and because an agent's knowledge was imputed to its principal, Tsasu had constructive knowledge of the defect and irregularity in the 2015 Quiet Title Judgment by virtue of its insurer's awareness of these circumstances.

The appellate court was not persuaded by Tsasu's argument that it had not been on "inquiry notice" on the basis of the information its title insurer had learned from the title search results because a title insurer's knowledge was "not imputed to its insured." The appellate court acknowledged that the "bare relationship between a title insurer and its insured" was not enough to make the former an agent of the latter. It added, however, that a title company can sometimes act as an agent of its insured. The appellate court stated:

Here, Tsasu used its title company as its agent for purposes of acquiring knowledge about the record of title for the [P]roperty because Tsasu's CEO admitted he looked to the title insurer's preliminary report and title search results when evaluating whether to loan Celestine money. As a result, Tsasu is charged with its title insurer's knowledge of the results of the title search.

Accordingly, the appellate court held that because Tsasu had constructive knowledge of defects or irregularities in the 2015 Quiet Title Judgment at the time it acquired its interest in the Property, it was not insulated from the effect of the subsequent invalidation and expungement of the 2015 Quiet Title Judgment. As a result, the CIT Deed of Trust—as the lien recorded first in time—had priority over the

Tsasu Deed of Trust and the trial court had properly granted summary judgment against Tsasu, the appellate court concluded.

The case is *Tsasu LLC v. U.S. Bank Trust, N.A.*, 62 Cal. App. 5th 704, 277 Cal. Rptr. 3d 76 (2d Dist. 2021), review denied, (June 23, 2021).

Lis Pendens Barred Purchasers' Claim That They Acquired Property in Good Faith

An appellate court in Washington has ruled that purchasers of property that a court ordered to be sold had not acted in good faith given that a lis pendens was still recorded at the time the sale to the purchasers was closed.

The Case

When Otto and Diana Guardado dissolved their marriage, Otto Guardado was awarded the couple's home in Vancouver, Washington, and he agreed to pay the mortgage on the residence. Thereafter, Diana Guardado executed a quitclaim deed, releasing her interest in the property, which she claimed was in response to an oral agreement with Otto Guardado providing that he would remove her name from the mortgage. Otto Guardado, however, allegedly failed to remove Diana Guardado's name from the mortgage.

Diana Guardado subsequently brought suit in a state court in Washington for breach of contract. In 2016, the trial court ruled in her favor. On May 6, 2016, before the trial court had reduced its oral ruling to writing, Otto Guardado filed a notice of appeal. He also asked the appellate court for a stay.

On May 26, 2016, the trial court issued its findings of fact and conclusions of law resolving the contract action. It determined that Otto Guardado had violated the dissolution decree and concluded, "The sale of the [p]roperty is the elegant solution to this manifest injustice." The trial court then ordered that a special administrator be appointed to sell the property.

In the meantime, the appellate court denied Otto Guardado's request for a stay, advising, however, that he could stay enforcement of the judgment by filing a supersedeas bond or cash in the amount of $10,000.

On June 2, 2016, the trial court formally ordered the decree that dissolved the Guardados' marriage modified to require a sale of the property. It further ordered that Otto Guardado would need to post a $40,000 supersedeas bond if he wished to stay enforcement of the judgment.

Otto Guardado paid $10,000 toward superseding the judgment and, several weeks later, an acquaintance of his attempted to post a bond to supersede the judgment. Otto Guardado also filed an emergency motion for a stay with the appellate court, which denied his motion and which also ruled that his acquaintance's supersedeas bond failed to meet the requirements of Washington law so that it did not stay the trial court's enforcement of its June 2, 2016 order. Thus, no stay or supersedeas bond prevented a sale of the property.

On October 10, 2016, Otto Guardado recorded a lis pendens in the county in which his property was located.

Mark and Michelle Taylor were interested in purchasing Otto Guardado's property. Guardado emailed Mark Taylor on November 15, 2016, and advised, "The next purchaser (if

any) will be subject to the decision of the appeals court. I am, of course, asking for my property rights to be restored. You can find out more info, and my arguments, from the brief." Otto Guardado attached multiple documents to this email, including his appellate brief and the lis pendens.

In addition, the title insurance report prepared for the Taylors noted Otto Guardado's pending action and the lis pendens recorded on the property. The Taylors initialed next to this notice. They also signed an acknowledgment that the title company had "strongly suggested seeking legal advice" but that they had declined to do so.

Diana Guardado responded to the lis pendens on the property by filing a motion to hold Otto Guardado in contempt. He signed a release of the lis pendens that same day. The trial court declined to hold Otto Guardado in contempt for continuing to interfere with the sale, but it ordered him not to have any contact with potential buyers until after the closing.

That same day, November 17, 2016, the statutory warranty deed conveying the property to the Taylors was signed. The court-appointed special administrator signed on Otto Guardado's behalf.

The deed was recorded on November 18, 2016 at 9:55 a.m. and issued recording number 5348564. The release of the lis pendens was recorded at the same time and issued the next recording number, 5348565.

The Taylors paid $240,000 for the property. After paying off the mortgage and various fees, the remaining $15,579.55 was paid to Otto Guardado. The Taylors paid him an additional $7,000 to move out. Otto Guardado filed a second lis pendens on the property on December 28, 2016.

The appellate court subsequently granted review of the trial court's order modifying the dissolution decree to require a sale of the property. On August 22, 2017, it reversed and vacated the trial court's modification of the dissolution decree, and remanded for further proceedings.

On February 1, 2018, the trial court entered two orders vacating its prior judgments.

Otto Guardado next filed a separate lawsuit against the Taylors, seeking to regain title to the property. The Taylors asserted as an affirmative defense that they "were good-faith purchasers, the property had no recorded lis pendens at the time of the sale, and [p]laintiff Guardado failed to post a supersedeas bond to stay enforcement of the underlying [c]ourt [o]rder directing sale of the property." The Taylors also claimed that they had "justifiably relied on representations made by [the realtor] and the fact that the title was free and clear at the time the purchase and transaction was confirmed and transferred."

The trial court denied the Taylors' motion for partial summary judgment, determining that material issues of fact existed regarding whether or not they were good faith purchasers.

The case reached a Washington appellate court. There, the Taylors argued that their knowledge of Otto Guardado's appeal did not defeat their status as good faith purchasers because they had purchased the property pursuant to a court order that was presumptively valid and because Otto Guardado had failed to post a supersedeas bond. They further

argued that Otto Guardado's lis pendens had been released, so "reasonable inquiry into the status of the home's title would have revealed nothing. No encumbrance was recorded."

The Appellate Court's Decision

The appellate court held that the Taylors' actual knowledge of Otto Guardado's pending appeal did not defeat their status as good faith purchasers because they had purchased the property pursuant to a court order that was effective at the time.

However, the appellate court also held that because a lis pendens was still recorded at the time of the sale's closing on November 17, 2016, because the Taylors took no steps to have it canceled before closing the sale, and because a recorded lis pendens precluded subsequent purchasers from taking the property in good faith, the Taylors were not good faith purchasers, and Otto Guardado was entitled to judgment as a matter of law.

The appellate court observed that Guardado had recorded his lis pendens when the property was still in his name and his appeal was pending; it then rejected the Taylors' characterization of it as "fraudulent" or "legally unjustified," even though it was not accompanied by a stay. According to the appellate court, the lis pendens served its purpose of putting subsequent purchasers on notice that they would be bound by the outcome of the pending litigation. The Taylors could have moved to cancel the lis pendens, but they did not, the appellate court concluded.

The case is *Guardado v. Taylor*, 17 Wash. App. 2d 676, 490 P.3d 274 (Div. 2 2021).

New York Appellate Court Rules in Favor of Homeowners Associations in Quiet Title Action Against East Hampton

An appellate court in New York has ruled in favor of five homeowners associations in a dispute centering around the ownership and use of approximately 4,000 feet of oceanfront property in the Town of East Hampton.

The Case

Five homeowners associations—Seaview at Amagansett, Ltd. ("Seaview"), Dunes at Napeague Property Owners Association, Inc. ("Dunes"), Tides Homeowners Association, Inc. ("Tides"), Whalers Lane Homeowners Association, Inc. ("Whalers"), and Ocean Estates Property Owners Association, Inc. ("Ocean" and, collectively with Seaview, Dunes, Tides, and Whalers, the "homeowners associations")—filed a lawsuit against the Town of East Hampton (the "Town") seeking to quiet title to part of an ocean beach located in the Town, spanning approximately 4,000 feet of oceanfront (the "beach"). In particular, the dispute was over property that included the portion of the beach lying landward of the mean high water mark of the Atlantic Ocean.

Since 1991, the Town, acting pursuant to its town code, has issued permits authorizing holders of the permits to, among other things, operate and park vehicles on the beach. The town code's definition of "beach" included both the upland title claimed by the homeowners associations, which extended to the mean high water mark, as well as the foreshore beyond it, i.e., the underwater land "between high and low water mark."

In their lawsuit, the homeowners associa-

tions first sought to quiet title to the beachfront portions of their respective properties and, in effect, a judgment declaring that they owned title in fee simple to the disputed area.

The homeowners associations also sought, in their second cause of action, in effect, a judgment declaring that a reservation contained in a certain deed dated March 15, 1882, and recorded in the office of the Clerk of the County of Suffolk on October 25, 1882, in Liber 268 at page 478 (the "Benson Deed") had been terminated or, in the alternative, could not be construed as authorizing the Town to issue permits to operate and park vehicles on the homeowners associations' properties.

Relatedly, in their third cause of action, the homeowners associations sought to enjoin the Town from issuing permits purporting to authorize their holders to operate and park vehicles on those properties. In addition, the homeowners associations also asserted causes of action sounding in private and public nuisance and breach of fiduciary duty.

After a nonjury trial, the trial court dismissed the homeowners associations' complaint, and the homeowners associations appealed.

The Appellate Court's Decision

The appellate court, in large measure, reversed and:

(1) Ruled that Seaview, Dunes, Tides, and Whalers owned title in fee simple absolute to their respective properties extending to the mean high water mark of the Atlantic Ocean;

(2) Ruled that Ocean owned title in fee simple absolute to the westernmost 400 feet of its property extending to the mean high water mark of the Atlantic Ocean;

(3) Ruled that the reservation contained in the Benson Deed permitted the public use of the properties described therein only for fishing and fishing-related purposes; and

(4) Enjoined the Town from issuing permits purporting to authorize their holders to operate and park vehicles on property owned by the homeowners associations.

In its decision, the appellate court explained that, at trial, the homeowners associations had produced a land title expert who testified to the homeowners associations' chains of title to their respective properties. Specifically, the appellate court continued, that expert testified, based on documentary evidence, that Seaview, Dunes, Tides, and Whalers owned fee simple title to their respective properties, extending to the mean high water mark of the Atlantic Ocean, and that Ocean owned fee simple title extending to the mean high water mark of the Atlantic Ocean as to the westernmost 400 linear feet of its property.

Moreover, the appellate court noted, the homeowners associations "produced all of the deeds in those respective chains of title, beginning with the Benson Deed," which was common to all of the homeowners associations' chains of title.

Based on that evidence, the appellate court decided, the homeowners associations established that they owned title in fee simple absolute to the disputed portion of their respective properties.

The appellate court added that the Town

was empowered, in 1882, to validly convey to the homeowners associations' common predecessor-in-interest, Arthur W. Benson, title to the disputed portion of the beach, which was landward of the mean highwater mark, and that it had done so.

By contrast, the appellate court found that the Town had produced "no evidence that any of the deeds in the respective title chains were invalid" or any evidence controverting the chains of title to the respective properties. According to the appellate court, the fact that certain of the conveyances in those chains of title were made by way of "quitclaim deeds" did not, by itself, undermine the homeowners associations' title claims.

The appellate court rejected the Town's contention that even if the homeowners associations established their respective title claims, the Town nevertheless retained the right to allow the public to operate and park vehicles along the entire beach—including the portion owned by the homeowners associations—based on a reservation contained in the Benson Deed that "reserved to the inhabitants of the Town of East Hampton the right to land fish boats and netts to spread the netts on the adjacent sands and care for the fish and material as has been customary heretofore on the South Shore of the Town lying westerly of these conveyed premises."

The appellate court ruled that the reservation in the Benson Deed could not be construed "as broadly" as the Town contended. Rather, according to the appellate court, the reservation was in the nature of an "easement allowing the public to use the homeowners associations' portion of the beach only for fishing and fishing-related purposes, as contemplated by the plain wording of the reservation." Thus, the appellate court concluded, the reservation did not confer upon the Town lawful governmental or regulatory power to issue permits allowing members of the public to operate and park vehicles on any portion of the beach owned by the homeowners associations.

It should be noted that, on September 14, 2021, New York's highest court, the New York Court of Appeals, denied leave to appeal in this case.

The case is *Seaview at Amagansett, Ltd. v. Trustees of Freeholders and Commonalty of Town of East Hampton*, 191 A.D.3d 717, 142 N.Y.S.3d 162 (2d Dep't 2021), leave to appeal denied, 37 N.Y.3d 909, 2021 WL 4164713 (2021) and leave to appeal denied, 2021 WL 4164745 (N.Y. 2021).

Ninth Circuit Court of Appeals Rejects Easement Action Against United States as Untimely

The U.S. Court of Appeals for the Ninth Circuit has affirmed a decision by the U.S. District Court for the District of Montana dismissing as untimely a lawsuit involving a decades-old easement that was filed against the United States by owners of property near Connor, Montana.

The Case

Larry Wilkins and Jane Stanton owned property near Connor, Montana; Wilkins obtained his property in 1991, and Stanton acquired her property in 2004. Both properties were subject to an easement that their predecessors-in-interest had granted to the United States in 1962. The easement covered Robbins Gulch Road, which crossed their property for approximately one mile.

As early as 1972, maps published by the U.S. Forest Service identified Robbins Gulch Road as an "improved road" with no use restrictions. Forest Service maps from 1981, 1993, and 2005 confirmed the same: the use of Robbins Gulch Road had no restrictions.

However, on May 3, 2006, the Forest Service temporarily closed Robbins Gulch Road to the public with a physical barrier and later placed a sign on the road that read "PUBLIC ACCESS THRU PRIVATE LANDS."

More than 12 years later, on August 23, 2018, Wilkins and Stanton sued the United States under the federal Quiet Title Act (the "QTA"). They sought to confirm that the easement did not permit public use of the road and to enforce the government's obligations to patrol and maintain the road against unrestricted public use.

The U.S. District Court for the District of Montana granted the government's motion to dismiss, finding it lacked jurisdiction because the claims brought by Wilkins and Stanton were time-barred under the QTA.

Wilkins and Stanton appealed to the Ninth Circuit. They argued, among other things, that the district court had erred when it treated their claims as accruing at the same time and found that their claims were untimely. In particular, they contended that their claims—challenging public use of the easement, parking along the easement, and the government's satisfaction of its obligations under the easement - accrued at different times and should have been analyzed on an individual basis.

The Ninth Circuit's Decision

The Ninth Circuit affirmed.

In its decision, the circuit court explained that for purposes of calculating the statute of limitations under the QTA, an "action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." An action accrued when a "reasonable landowner" would have been alerted to an adverse claim, the circuit court said.

The Ninth Circuit then ruled that all of the claims asserted by Wilkins and Stanton—despite being organized as separate causes of action in their complaint—ultimately were premised on the public's alleged unauthorized use of the road. Therefore, the circuit court found, their claims had accrued at the same time, namely, "when a reasonable landowner should have known of the government's position that its easement allowed for public use of the road."

The Ninth Circuit added that the complaint filed by Wilkins and Stanton focused its parking challenge on "public" parking in the easement and was not a distinct claim that accrued separately from the public use claim. Likewise, their "patrol and maintain" claims were premised on patrolling and maintaining the road "against public use" and thus also accrued at the same time as the public use claim, according to the Ninth Circuit. A "reasonable landowner" would have been alerted to all of these claims at the same time, and therefore they accrued simultaneously, the circuit court ruled.

Accordingly, the Ninth Circuit decided that the district court had not erred in treating all of the claims brought by Wilkins and Stanton as accruing at the same time.

The circuit court then addressed the contention asserted by Wilkins and Stanton that the

district court had erred in determining that their claims were time-barred under the QTA's statute of limitations.

The Ninth Circuit explained that the QTA's statute of limitations required Wilkins and Stanton to bring a case within 12 years "of the date upon which [the claims] accrued." Accrual, the circuit court continued, occurred on the date the plaintiffs or their predecessors in interest "knew or should have known of the claim of the United States." In addition, to start the limitations period, the government's claim "must be adverse" to the claim asserted by the plaintiffs.

The Ninth Circuit then decided that the district court had not clearly erred in concluding that the claims brought by Wilkins and Stanton were "untimely." The circuit court noted that the district court based its determination on two sources of evidence: Forest Service maps of the area from 1950 to 2005 that identified no use restrictions on the road, and the government's temporary closure of the road by erecting a sign and barrier in May 2006. In the circuit court's opinion, together with the "historic public use of the road," the historic maps should have alerted a reasonable landowner of the government's view regarding public access of the easement more than 12 years before Wilkins and Stanton filed their lawsuit. The Ninth Circuit concluded that the government's temporary closure of the road in 2006 "was consistent with this understanding."

The case is *Wilkins v. United States*, 2021 WL 4187861 (9th Cir. 2021), for additional opinion, see, 2021 WL 4200563 (9th Cir. 2021).

Virginia Court Rejects Property Owner's Express Easement Claim

A court in Virginia has ruled that deeds, instruments of subdivision, and plats did not create an express easement for one property owner to travel from his property across a neighbor's property and that, as a result, he had no legal right to use his neighbor's property.

The Case

The complainant in this case, Kenneth E. Wavell, Jr., owned land in Amherst County, Virginia, described as Tract 30 in the subdivision of Amherst Plantation, Section 10 ("AP Tract 30"). This land had been conveyed to Wavell by a deed recorded in the Clerk's Office of Amherst County and recorded in document number 180000994. The deed referred to a plat recorded in Plat Book M, at page 114.

Wavell's tract fronted on a road in Amherst Plantation Subdivision. The initial Instrument of Subdivision of Amherst Plantation recorded in Deed Book 639, at page 501, pertaining to Section 10 (including AP Tract 30), stated that the purpose was to "further establish the private road access easement to serve this and future sections of Amherst Plantation."

Kim Lengel owned land described as Lot 8 in the subdivision of Buffalo Hills ("BH Lot 8"). This land had been conveyed to Lengel by a deed recorded in the Clerk's Office of Amherst County in Deed Book 786, at page 510. BH Lot 8 was part of the subdivision of Buffalo Hills recorded in Plat Cabinet 2, at slide 180. The Instrument of Subdivision for Buffalo Hills Subdivision was recorded in Deed Book 659, at page 410. The Amherst Plantation Subdivision (developed in 1992, with 58 lots) and the

Buffalo Hills Subdivision (developed in 1993, with 12 lots) abutted one another.

After Lengel installed a locked gate across her property—that is, BH Lot 8—Wavell contended that the locked gate obstructed access to his property—that is, AP Tract 30—in violation of an express easement that ran through Lengel's land in Buffalo Hills to his land in Amherst Plantation.

The Court's Decision

The court ruled that no express easement existed that permitted Wavell to access Lengel's land.

In its decision, the court explained that the Instrument of Subdivision for Amherst Plantation contained no reference or mention of the Buffalo Hills Subdivision and, similarly, that the Instrument of Subdivision for Buffalo Hills contained no reference or mention of the Amherst Plantation, despite the fact that the Amherst Plantation was already developed.

The court added that although the Instrument of Subdivision for Buffalo Hills provided that "[t]he developer or his appointee reserve the right to grant to others, and additional sections in Buffalo Hills the right to use the roads over and through Buffalo Hills and additional sections, without the necessity of the joinder of any other party," there was no evidence that the developer or the developer's appointee had granted others the right to use the roads over and through the Buffalo Hills Subdivision, by deed or other means. In fact, the court noted, the plat of the Buffalo Hills subdivision provided that, "All roads shown hereon are private and not intended for general public use."

The court then found that if it had been the intention of the developer to grant Amherst Plantation owners the use of the roads in Buffalo Hills, it had not been "not clearly stated." The court noted that the rule in Virginia regarding easements was that "a provision in an instrument claimed to create an easement must be strictly construed with any doubt being resolved against the establishment of the easement" and the court ruled that there was no express easement set forth in the Instruments of Subdivision or in the recorded deeds.

The court next rejected Wavell's argument that an express easement was set forth by the plat for the Buffalo Hills Subdivision, finding that, in Virginia, a plat "cannot serve as an instrument of conveyance."

Finally, the court ruled that the deed to Lengel's property also did not create an easement. The court noted that the deed provided, "This conveyance and warranty and covenants of title herein contained are also made subject to all valid and existing easements, restrictions, rights-of-way, and conditions . . ." The court explained that the language in a deed stating that the conveyance was "subject to all easements . . . of record" has been held to mean merely that any existing rights were excepted from the conveyance. In this case, the court concluded, the language in Lengel's deed was "clearly referring to 'boiler plate' language referencing any easements that may already be in existence as opposed to conveying and creating an easement."

The case is *Wavell v. Lengel*, 2021 WL 4120496 (Va. Cir. Ct Amherst Cty. July 12, 2021).