

FILED

FEB 25 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 84044-0

SUPREME COURT OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A., a national association,

Petitioner,

v.

KENNETH TREIGER,
a married person as to his separate estate,

Respondent,

J'AMY LYN OWENS, an unmarried person, SHULKIN, HUTTON, INC.,
P.S. a Washington professional service corporation;
and EDMUND JOHN WOOD,

Defendants.

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STATE OF WASHINGTON
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AMICUS CURIAE MEMORANDUM OF WASHINGTON LAND
TITLE ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF AMICUS CURIAE

The WLTA is a non-profit corporation formed in 1905. Its members include national title insurance underwriters, independent local agents throughout the State of Washington and professionals in related fields, such as the practice of law. The WLTA's purpose is to promote high quality land title evidencing and title insurance services. This industry organization advocates sound and ethical business practices, provides educational opportunities in numerous areas of title evidencing and insurance, and facilitates effective communication within the industry and with the public. The comparable national organization, to which many if not most of the WLTA members belong, is the American Land Title Association.

The Washington Land Title Association ("WLTA"), supports the Petition for Review filed by the plaintiff and respondent below, Bank of America (the "Bank"), which seeks review of the decision of the Court of Appeals, Division I, filed on November 16, 2009, in that court's case number 61671-4-1.

II. ARGUMENT IN SUPPORT OF GRANTING REVIEW

The WLTA participates as an industry in the appellate process only when a matter is of significance to the overall stability of land titles in the State of Washington. This is such a case.

The WLTA urges the Supreme Court to grant review under RAP 13.4(b)(4), because the Petition for Review presents issues that are of substantial importance not only to WLTA members but to the public at large, which are important for the Supreme Court to resolve.

The WLTA's concern about the Court of Appeals' decision is the holding that an order without a judgment summary and not entered in the execution docket is nevertheless effective and creates an enforceable lien on real property. (Number 5 of the Issues Presented for Review in Section IV of the Bank's Petition for Review). The Court of Appeals reversed the trial court's conclusion that only those orders with a judgment summary that were entered on the Execution Docket attached as liens to the real property of Respondent Kenneth Treiger's ex-wife. *See* CP 290-94. In reversing the trial court, the Court of Appeals concluded, at page 13 of its Opinion, that the mere delivery of an order to the superior court clerk created a lien, even when the order did not contain the required judgment summary and the clerk never entered it in the execution docket. In reaching this decision, the Court of Appeals eliminates the expressed requirement of RCW 4.64.030(3) that "[t]he clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section."

If the Court of Appeals' ruling is allowed to stand, it will weigh heavily on the public's ability to conduct real estate transactions because member title companies will not have a reliable, inclusive public record to search for judgment liens that affect title to real property. Before the Court of Appeals' decision, the execution docket served as the reliable, stable and consistent public record that title companies searched for judgments that created liens on real property. After the ruling, the reliability no longer exists. In the future, a title insurer may be required to inquire with every court clerk to find every order and then determine whether or not it is a judgment. Without a reliable public record, a title insurer cannot evaluate the risk it is asked to accept when insuring title to real property, and this inability will have an immediate effect on the overall willingness of the insurer to agree to accept an unknown risk and the premiums that will be charged to buyers, sellers and lenders if that risk is accepted.

Although recording an order provides constructive notice to third parties, the Court of Appeals acknowledged that recording is a gratuitous act, not required to create a lien on real property. Instead, according to the Court of Appeals, the mere delivery of an order to the court clerk creates the lien, even if the order does not contain the required judgment summary and is never entered on the execution docket. The Court of

Appeals failed to recognize the difference between recording an instrument to provide constructive notice to third parties, and the legal effect of complying with the statutory requirements to create an effective judgment lien interest. The WLTA's concern is the inability to search consistently, efficiently and reliably for orders that have been delivered to the superior court clerk but do not have a judgment summary, have not been entered on the execution docket and not been recorded. Under the Court of Appeals' opinion these errant orders are effective judgments that create liens on real property by operation of law.

Title insurance companies admittedly are in the business of assessing and accepting (or refusing to accept) risks associated with titles to real property. Identifying risk in a real property transaction is an important public benefit, because few people can afford to buy homes or other types of real property without borrowing money for at least a portion of the purchase price. Lenders are not willing to make loans unless their interests are insured against defects, liens, encumbrances or other adverse matters (and some lenders also insist that the owner obtain title insurance as well). If a title company accepts a particular risk associated with a land title, it charges a standard premium based on rates filed with the Office of the Insurance Commissioner. Premium rates are filed based upon the dollar amount of insurance stated in the title policy, which includes

consideration of the resources necessary to produce the policy and the risk associated with a particular form of coverage. Each title underwriter must make individual decisions about a particular risk associated with any given pending transaction. The greater the risk, the less willing title insurers are to accept that risk and issue a title insurance policy; and the more difficult it becomes for a prospective purchaser or lender to obtain the requisite coverage and complete the real estate transaction.

Uncertainties and shortcomings in the public records relating to land titles increases the risks and costs associated with obtaining title insurance coverage. Not only are these costs reflected in the premiums charged for title insurance policies, but unnecessary or unreasonable risks may make certain coverages unavailable at all. That could prevent certain real estate markets from functioning. If title insurers must now consider that any order floating around the court house could create a valid lien on real property, it will have substantial implications for how title companies evaluate risk in the markets they facilitate.

It is not exaggerating to say that, ultimately, the legal, political, business and practical issues this case presents have significant implications for how readily homes (as well as other kinds of real property) can be bought, sold, and financed around our state every day. Title insurance underwriters must be able to rely on a stable and inclusive

public record to search for interests in real property, or they will decline to accept certain risks. And, unless the title insurance process works well, an already reluctant financial sector will be even more hesitant to provide the loans necessary to reverse the real estate trends of the last few years. Such processes lie at the heart of our economy. It is not an overstatement to say that without the members of the WLTA doing what they do every day, delivering the services that are challenged by this case, a recovery in the real estate market will be slower and more prolonged.

The WLTA agrees with the trial court and the Bank that under the plain language of RCW 4.64.030 only those orders with a judgment summary, that are entered in the execution docket are effective as liens against real property. The proper application of the statute ensures that the public record will be inclusive, consistent and reliable when title insurance underwriters or any member of the public search for judgments.

III. CONCLUSION

The WTLA urges the Supreme Court to accept review in this case to resolve the issues of substantial public interest described above by reversing the Court of Appeals on this issue and reestablish the requirements prescribed by the legislature in RCW 4.64.030 for perfecting a judgment lien which will ensure the creation and maintenance of a reliable, inclusive public record.

RESPECTFULLY SUBMITTED this 16 day of February, 2010.

WILLIAMS, KASTNER & GIBBS PLLC

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on February 16, 2010, I arranged for service of the foregoing document, "Amicus Curiae Memorandum of Washington Land Title Association in Support of Petition for Review" to the court and counsel for the parties to this action as follows:

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Dated this 16th day of February, 2010, at Seattle, Washington.

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