8 COMMON TITLE PROBLEMS

AND HOW TO FIX THEM

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INTRODUCTION

Numerous errors can occur in examining title, drafting documents, and preparing for and conducting a real estate closing. An awareness of common title problems can help prevent such errors, which sometimes require significant time and expense to resolve. Even when errors occur, most can be fixed, either by obtaining corrective documents or through some sort of court action. This seminar will identify some of the most common title issues and give practice pointers on how these issues can be avoided or resolved.¹

It should be noted at the outset that many title problems are covered by title insurance. While title insurance coverage is outside the scope of these materials, if you represent an owner or mortgage lender and have discovered a title problem, determine if they have a title insurance policy and whether a claim should be submitted.

I. LEGAL DESCRIPTION ERRORS.

Real estate is most often described in two ways: a platted legal description referencing a lot and block number, or a metes and bounds description setting out boundaries lines using distances and angles between defined points. A platted legal description requires the lot, block, and plat/subdivision name, along with the county and state. Metes and bounds descriptions require the section, range and township number, may include references to the base line, principal meridian, county and state.

Metes and bounds descriptions (also known as government survey legal descriptions) are often lengthier, including a large amount of numbers, directions, and punctuation, and therefore are more likely to contain typographical errors. Some legal description errors are insignificant and do not present a substantive issue. Others may be fatal to the description. Obviously, using the wrong lot number is completely ineffective and may result in total failure of title or an unperfected mortgage. A metes and bounds description missing an entire clause may result in a missing boundary line causing it not to “close” and making it ineffective. Deciding whether an error is not fatal depends on the specific circumstances and often requires a judgment call. For example, a legal description with a lot number but no block number may not be fatal if that plat has only one block. Ultimately, a valid legal description is one that can be located on the ground by a surveyor. A seemingly defective legal description may be valid, but it may take a survey to prove the validity of the legal description.

¹ It should be noted at the outset that when an error is discovered during a title examination the Minnesota Title Standards are a valuable resource in determining whether a title issue can be disregarded or whether action is necessary. While I will refer to the Title Standards at various points, a summation of the standards is the beyond the scope of this seminar. Furthermore, this seminar is not intended as a guide to title examination, as the standards are. The standards are recommended are standards of practice promulgated by real estate lawyers and will not necessarily conform to ultimate decisions of courts on matters on which there is not current decision. Some standards are contrary to statute or court decisions where deemed appropriate by the drafters.
A. Practice Pointers.

1. Attach or retype the description. To avoid typographical errors when drafting a real estate document, consider attaching the legal description from a trustworthy prior title document rather than re-typing the description. If you chose to re-type the description, proofread it by having someone read the original description to you while you follow along with your typed version.

If your document refers to a legal description attachment, be sure and that you include the attachment. It is not uncommon to encounter a mortgage which does not include its legal description supposedly attached “Exhibit A.” If you are the closer or title agent and not the drafter, be sure to determine whether it is your responsibility to add the legal description to the instrument(s).

2. Do not use county tax descriptions. Counties have their own method of indexing real property instruments and keeping track of tax parcels and their boundaries. Often the legal descriptions found on a county’s website or tax statement are incomplete or inaccurate. Do not use these legal descriptions on real estate conveyancing documents. County data, including GIS maps, can be a useful source of information, but it is no substitute for an accurate title examination.

3. Do not assume the first or last deed contains the complete legal description. A drafter or examiner should not simply use the legal description from the deed first placing the mortgagor or grantor in title or the most recent deed to that mortgagor or grantor without examining the broader chain of title. The borrower or grantor may have acquired related or contiguous parcels by separate deeds, possibly because those parcels were previously owned by different parties. This can easily result in a parcel being omitted from a mortgage or deed, a parcel which might contain the house or other improvement. It is also possible that the owner has conveyed away some of the property after first acquiring it, in which case using the legal description from the original vesting deed will result in a mortgage or deed conveying property not owned by the grantor.

Often omitted parcels are garage units associated with a condominium. These parking parcels often have their own legal description and may be separate tax parcels. A mortgage lacking garage units when foreclosed will leave the garage spaces in the name of the borrower. Before the issue is discovered, the borrower may fail to pay the association dues or taxes resulting in a lien or ownership of the garage units by the association, state, or third party bona fide purchaser. At that point, the issue can be very difficult to resolve. Thus, where a condominium or contiguous parcels are involved, it is very important to ensure that all parcels are included in the legal description of the mortgage or deed.
B. **Strategy for Resolution.**

How a legal description error is resolved depends on the error, what kind of document(s) is affected, and other circumstances. The legal description error may result in a completely ineffective description or a description of property which does not exist. The incorrect legal description may cause a cloud on the title to real estate owned by a third party (ex: Lot 1 instead of Lot 2) which must be removed. This is one factor to consider in deciding how to resolve such an error.

1. **Deed or Corrective Mortgage.** If the legal description error is in a deed, you may be able to obtain a new deed (most likely a quit claim deed) from the grantor using the correct legal description. Again, whether this is an effective solution will depend on the circumstances.

   If the error is in a mortgage, a “Corrective Mortgage” may resolve the issue. A corrective mortgage is a copy of the recorded mortgage re-titled as a “Corrective Mortgage” and with an added statement explaining the document and issue being corrected. The document must be re-executed by the borrower.

   Some counties have their own requirements for corrective mortgages. If the original mortgage has been assigned, some counties require the corrective mortgage to be executed by the current holder of the mortgage. Corrective mortgages are not the strongest fix and can be difficult or impossible to get recorded against Torrens property as the county registrar of titles often has higher standards for documents affecting registered property.

   Corrective mortgages may not resolve mortgage priority issues. For example, if a corrective mortgage is being recorded to add a parcel omitted from the original mortgage’s legal description and other liens have been recorded after the original mortgage and before the Corrective Mortgage, those intervening liens may retain priority over the mortgage as to the omitted parcel. In such a case, it may be necessary to obtain a subordination agreement or start a district court action both correcting the legal description error and establishing the priority of the mortgage.

   Another option is to obtain and record an amendment or modification to the mortgage which corrects the legal description through a new agreement between the parties.

2. **Court action for reformation.** If circumstances have changed making it impossible to obtain a corrective document to correct a legal description error, a district court action for reformation may be appropriate. Under the doctrine of reformation, a written instrument can be reformed by a court if the following elements are proved: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written
instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard National Bank*, 294 N.W.2d 730, 734 (Minn.1980) (citing *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn.1977); *Fritz v. Fritz*, 94 Minn. 264, 102 N.W. 705 (1905)); *Manderfeld v. Krovitz*, 539 N.W.2d 802, 805 (Minn. App. 1995).

Mistakes are, by nature, unintended by the parties and thus can often be resolved by such an action. It is rarely difficult to demonstrate a typographical error as a mistake. Often such errors are uncontroversial and can be resolved by a default motion after the defendants fail to answer. However, attempting to add a parcel omitted from a mortgage or some similar error can invite a contest from a mortgagor or grantor and will require more proof of the parties’ intent.

A court order can offer a higher level of security to a future title examiner than a corrective document. It is also likely to be more effective than a corrective mortgage in a lien avoidance action by a bankruptcy trustee. That said, sophisticated and careful examiners of title can determine whether errors were made in a reformation or quiet title action which render the order ineffective.

A title insurance underwriter is a good person to check with when determining whether your proposed resolution will be effective. They can tell you whether they would be willing to insure the title after you have corrected the title problem in the manner you propose. Whether the property will be insured is the practical test for whether your plan for resolution is a good one.

**II. ENCROACHMENTS AND LOCATION OF IMPROVEMENTS.**

Even with a correct legal description, the improvements intended to be conveyed by a real estate instrument may not be located within the property so-described. These issues arise more often than one might think.

Often in a mortgage transaction, a “plat drawing” will be prepared by someone who visits the property and makes some effort to determine whether the improvements are within the boundaries of the legal description. A “plat drawing” has nothing to do with platting and is not prepared only in the case of platted property. It is important to remember that it is not a survey (and usually includes a disclaimer stating as such). I have encountered a number of cases where a plat drawing was prepared but, nonetheless, it was later discovered that the improvements are located partially or completely off of the property depicted in the drawing. This is a more common occurrence with metes and bounds descriptions, probably because the improvements were not constructed as part of a platted development and because locating boundaries of such descriptions is often more difficult. Metes and bounds descriptions are more common in rural areas where boundaries may be
incorrectly assumed to be particular locations.

Many counties maintain geographic information systems (GIS) which overlay boundaries onto aerial photographs. These systems may give you a general sense of the improvements and boundaries and therefore may alert you to a potential encroachment issue. However, they cannot be relied upon in place of survey.

The same is true with appraisals, which are sometimes relied on as evidence that the improvements are within the property description. Appraisers are not surveyors and the appraisal exists only to assign value to land and improvements. The appraiser is more likely to be appraising whatever improvements he/she is instructed to appraise, rather than strictly those lying within the boundary lines (which he/she is not equipped or trained to locate).

A. Practice Pointers.

1. **Get a survey.** There is no substitute for a survey prepared by a good surveyor. While plat drawings are less expensive and time consuming, they simply do not conclusively show the location of improvements. As discussed below, determining later that the improvements are not within the description on a deed or mortgage (or worse, a foreclosure) can be very difficult to resolve. The property owner may have had a survey prepared in the past. If the plat drawing or GIS maps show improvements that are close to the boundary line, this further suggests that a survey is necessary to confirm that there is not an encroachment.

   Not all surveyors are created equal. Even a survey is no guarantee. Try to locate a surveyor who is reputable and experienced. Finding a surveyor who is local may also be helpful, but familiarity with the area is not a substitute for skill and care.

B. Strategy for Resolution.

1. **Move the improvement.** If the improvement is moveable, and particularly if the owner does not have a good claim to land beneath the improvement, the best strategy may simply be to move the improvement. Often an encroaching structure may be only a small shed or gravel driveway. In such cases, moving the improvement may be more cost effective than attempting to acquire the right to the land beneath it. It may also help preserve the relationship between neighbors by avoiding a court action or demand for an easement or conveyance of the property on which the structure rests.

2. **Obtain an easement.** If the neighbor does not want to convey the property on which the improvement rests to owner of the improvement, but is willing to resolve the issue, an easement may be the best solution. An
easement agreement can be drafted to allow the encroaching structure to remain on the property, and even for maintenance and changes to that improvement, but to terminate once the structure is removed. If there is a mortgage on the easement grantor’s property, a consent and subordination should be obtained from that lender. If the mortgage lender for the improvement owner is to obtain the easement rights through a foreclosure, then those easement rights should be added to that mortgage.

3. **Convey the encroachment property.** If the neighbor whose land is encroached upon is willing to convey the property on which the improvement rests to the owner of the improvement, that owner can execute a deed doing so. Obtaining this property may require payment to the grantor. It will almost always require a survey and a new a legal description for the encroachment property. The new legal description will have to take into account the setback requirements. The grantee may want a new legal description for his/her entire property including the encroachment area.

Such a conveyance will likely result in a subdivision of the grantor’s property. Municipalities and counties have various subdivision requirements which will need to be complied with. This can add significant cost and may even prevent such a conveyance. It should be pointed out that an encroaching structure may very well be violating an existing setback zoning ordinance and consulting the county may alert them to this problem. The parties should confirm that the conveyance will not change the size of their lots so significantly that their lots no longer conform with county or municipal ordinances.

If there is a mortgage on the grantor’s property, the parties will need to obtain a release of that mortgage from the property being conveyed. The terms of the grantor’s mortgage may require any money paid for the encroachment land be paid to the mortgagee as a reduction of the mortgage loan debt. If the grantee’s mortgagee intended to obtain a mortgage over the improvement, that mortgage should be amended to include the newly acquired property. If the grantee’s mortgage is not amended, that mortgage lender may have claims against the borrower including reformation (based on intent to encumber the improvement) or claims under the terms of the mortgage.

4. **File a quiet title action.** A final option is to file a court action. If the encroachment has existed for many years, the improvement owner may have a claim for adverse possession. In order to gain ownership over someone else’s land by adverse possession the party seeking the ownership must prove, by clear and convincing evidence, possession of the disputed property which is actual, open, hostile, exclusive, and continuous for a period of at least 15 years. *Ehle v. Prosser*, 293 Minn.
A claim to adverse possession may be defeated if the owner of the improvement was given permission (license) to keep the improvement on the property. Thus, where the parties know of the encroachment and the owner of the improvement has been given permission to keep his improvement on the neighbor’s land, an adverse possession claim is not hostile and likely will not be successful.

Another claim may be practical location of boundaries. Practical location can be established in three ways: (1) The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations; (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof, and afterwards acquiesced in; or (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached upon it, and subjected himself to expense in regard to the land, which he would not have done had the line been in dispute. Engquist v. Wirtjes, 243 Minn. 502, 68 N.W.2d 412 (1955). This claim is similar to adverse possession and may be viable if there is evidence that the parties agreed to boundary line which places the improvement within the improvement owner’s property. Other claims against a neighbor may include prescriptive easement (similar to adverse possession), estoppel, or reformation of instrument(s) (if there is evidence showing the legal description/boundary was intended to be in place which would resolve the encroachment).

The lender may initiate its own action, should it discover the encroachment. In that action, it may assert claims in place of its borrower. In addition to a situation where an improvement lies on a neighbor’s property, in a case where a borrower mortgages less than all of the property he/she owns, an improvement may encroach off of the mortgaged property on to unencumbered property. In addition to the above-described claims, it may assert reformation of its mortgage (and possibly other documents), equitable subrogation (if the mortgage funds paid off a mortgage encumbering the encroachment), and equitable lien.

III. NON-JOINDER OF SPOUSE.

Minnesota law requires that both spouses join in a conveyance of homestead property. Minn. Stat. § 507.02. This requirement applies to mortgages as well as deeds and other conveyances. Both spouses must sign a conveyance even where the property is the

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2 I have encountered a number of encroachment issues where there is understood to be some requirement that only five acres and certain improvements be appraised and, perhaps, mortgaged. Regardless of the origins of this requirement, a new legal description is not always developed for these five acres. In addition to encroachment problems, this can generate other issues if the mortgage goes into foreclosure.
homestead of only one spouse, even just the spouse who has signed the conveyance. See Wells Fargo Home Mortg., Inc. v. Newton, 646 N.W.2d 888 (Minn.App. 2002); Renneke v. Shandorf, 371 N.W.2d 12 (Minn.App. 1985). For this issue, the stakes are high: failure to obtain the signature of both spouses on a conveyance renders that conveyance void.

There is an exception for purchase money mortgages. See Minn. Stat. § 507.02, 507.03. The statute defines “purchase money mortgage” as a mortgage in which any part of the proceeds were used toward the purchase price. Minn. Stat. § 507.03. Where the mortgage itself states “This is a purchase-money mortgage,” that is prima facie evidence of that fact. Id. However, this exception can cause confusion by making a closer or drafter believe that a spouse’s signature is never necessary on a purchase money mortgage. That is not the case and will be discussed at length in the following section on non-joinder of title owners.

Although this requirement applies to deeds as well, the failure to obtain a spouse’s signature on a conveyance often arises where there is a refinance mortgage loan applied for by only one of the spouses (usually because the other spouse has poor credit). In such a situation, only one spouse is personally liable for the loan itself and therefore only that spouse signs the note. However, regardless of whether only one spouse is personally liable for the loan, both spouses must sign the mortgage. If the spouse’s signature is not obtained, the mortgage may be void for lack of that spouse’s signature.

Title Standard No. 7 states that “After a conveyance has been of record for 15 years, failure of a spouse to join therein shall not be an objection, unless an action in regard thereto is commenced and notice of the same filed during the 15 year period.” Title Standards Nos. 8 through 12 address marital status.

A. Practice Pointers.

1. Determine, as best you can, whether the person is married. Minnesota has a searchable online database for marriages entered into in this state (Minnesota Official Marriage System, https://moms.mn.gov/). However, a grantor or mortgagor may have gotten married in another state or country. Many states do not maintain such databases and determining information on a marriage from a different country is even more difficult. Most states provide a searchable online database of recent court cases, which may tell you whether a party has been divorced. Asking the grantor/mortgagor for their marriage certificate may be wise if the person’s marital status is unclear.

While there is limited ability to verify the borrower’s representation, taking the person’s word can be risky. Many persons who have been separated for long periods of time do not consider themselves married and
may fill out a mortgage application as such.\(^3\) The mere fact that the spouses are separated or that it would be very difficult to obtain the signature of the spouse is not an exception to the statutory requirement. *See Wells Fargo Home Mortg., Inc. v. Newton*, 646 N.W.2d 888 (Minn.App. 2002) (husband and wife estranged for 20 years, property still her homestead for purposes of the statute); Minn. Stat. § 510.01; *Renneke v. Shandorf*, 371 N.W.2d 12 (Minn.App. 1985) (where debtor resides at property, it is determined by implication to be the homestead of his family).

As stated above, borrowers often believe that having their spouse sign a mortgage will make that spouse personally liable for the loan. Thus, where only one spouse applied for the loan and is signing the note, some explanation may be necessary in order to obtain the other spouse’s signature. This may present issues for a closer who should be cautious not to provide legal advice or explain the meaning of documents at the closing table so as not to make representations which might incur liability.

2. **Obtain a waiver of the non-signing spouse’s interest.** The waiver must include explicit language waiving the spouse’s homestead interest. *Marine Credit Union v. Detlefson-Delano*, 813 N.W.2d 429 (Minn. 2012). A quit claim deed or some other instrument which does not clearly set out the waiver will not be sufficient. *See id.* The marital homestead interest is not a title interest to be conveyed by a deed and thus a quit claim deed is not the appropriate document. *See id.* Although it may be useful evidence in an action seeking to estop the spouse from denying the validity of the mortgage, a waiver of his/her homestead interest, a consent to mortgage, or a corrective mortgage signed by the omitted spouse after the execution of the mortgage will not make the mortgage compliant with § 507.02. *See id; Inglett v. Volkswagen Bank USA*, 2009 WL 1587258 (Minn.App. 2008) (unpublished). Thus, the waiver should be executed before or contemporaneously with the conveyance. If executed before, it would be best if the waiver described the future conveyance for which the spouse is waiving his/her rights.

**B. Strategy for Resolution.**

1. **Declaratory judgment action.** In the event a mortgage on homestead property does not include signature of a spouse and is not a purchase money mortgage, a declaratory judgment action may be one of your only options. There are various claims that can be asserted in such an action, but perhaps the most effective and with the most relevant case law is estoppel. A married person at the time of execution of a mortgage is

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\(^3\) Others think they are married and are not, but there is little risk, at least as to this issue, in having obtained a signature from an unnecessary person.

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estopped from asserting the protections of Minn. Stat. § 507.02 to void a conveyance made solely by their spouse where: (a) The non-signing spouse consents to and has prior knowledge of the transaction, (b) the non-signing spouse retains the benefits of the transaction, and (c) the party seeking to invoke estoppel has sufficiently changed its position to invoke the equities of estoppel. See Karnitz v. Wells Fargo Bank, N.A., 572 F.3d 572, 574-75 (8th Cir. 2009) (citing Dvorak v. Maring, 285 N.W.2d 675, 677-78 (Minn. 1979)).

The fact that a non-signing spouse knew their spouse was obtaining the mortgage may be shown through documents signed by the non-signing spouse at or before closing. A deposition may also reveal discussions between the spouses showing the non-signing spouse knew of the transaction. Regardless of whether they signed anything, the non-signing spouse may have attended the closing. The non-signing spouse may have retained the benefits of the transaction by having their debts paid off with the mortgage funds or by the mortgage paying off a prior mortgage allowing the spouse to continue to reside at the property. As to the third element, if the mortgage lender dispersed the mortgage funds, it obviously did so in reliance on the validity of the security instrument.

“[T]he signing spouse, is estopped from challenging the validity of his mortgage because (1) he procured the conveyance through an intentional or negligent misrepresentation of fact, (2) the lender relied on the misrepresentation to its detriment, and (3) he retained the benefits.” CitiMortgage, Inc. v. Roback, 2013 WL 6725824, 3 (Minn.App. 2013) (unpublished) (quoting HSBC Mortgage Services, Inc. v. Graikowski, 812 N.W.2d 845, 848–49 (Minn.App. 2012), review denied (June 19, 2012)). Cases applying the equitable estoppel doctrine in the “specific context of the homestead signature requirement of § 507.02 have found . . . a culpability requirement satisfied by the nonsigning spouse’s prior knowledge and agreement of the conveyance coupled with the retention of the benefits of the conveyance.” Id. (citing Karnitz, 573 F.3d at 576). Thus, where a borrower represented that he was unmarried, he is estopped from denying the validity of the mortgage based on the lack of his/her spouse’s signature.

If you are able to demonstrate that the omission of the spouse was a mistake and that the parties to the mortgage intended the non-signing spouse to be included as a mortgagor, you may have a claim for reformation of the mortgage to include both spouses. There may also be a evidence supporting a claim that the spouse waived their homestead (such as an executed waiver of homestead rights or consent to mortgage, ineffective in its own right but tending to show that spouse’s intent to waive his/her rights under § 507.02). Other alternative claims may include unjust enrichment, equitable lien, equitable subrogation (where the
potentially void mortgage paid off a valid mortgage).

An amendment adding the spouse is not an effective way to resolve this issue. The mortgage is purportedly void and there is no way to amend a void instrument.

If the property was not the homestead of either spouse at the time the mortgage was executed, obtain an order declaring as such and that the spouse’s signature is not required because § 507.02 is inapplicable. The pertinent statute, Minn. Stat. § 510.01, defines “homestead” as the house owned and occupied by a debtor as the debtor's dwelling place, together with the land upon which it is situated…” “Occupancy” of kind needed under Minnesota homestead exemption statute § 510.01, requires a determination of legal, not merely factual, right of occupancy and possession; Minnesota law requires legal right to occupancy and possession of parcel of real estate for which homestead exemption is claimed. In re Stenzel, 259 B.R. 141 (2001), reversed 301 F.3d 945, rehearing and rehearing en banc denied, vacated and remanded. A conveyance by a husband or wife without the spouse joining is void as to the homestead though it may be valid as to other property included therein. Graham v. National Sur. Co., 244 F. 914, (8th Cir. 1917).

IV. NON-JOINDER OF TITLE OWNERS.

A mortgage only encumbers the interest held by those who sign it. As mentioned above, the failure to have a spouse of a mortgagor in a purchase money mortgage will not invalidate that mortgage under Minn. Stat. § 507.02. However, where both spouses are title owners of the property, a mortgage executed by one of them will only cover the signing spouse’s ownership interest in the property.

There may be other owners who are sometimes omitted from mortgages, leaving their interests unencumbered. In the case of a refinance mortgage, the borrower(s) may have granted deed(s) changing the ownership of the property. Married persons who own property in only their name sometimes transfer the property into the name of both spouses. Borrowers may also transfer property to a business entity or vice versa. If the drafter of the mortgage only reviews the original deed vesting the borrowers in title, he/she may omit parties who should sign the mortgage.

In addition to the above-described scenarios, the borrowers may have executed a contract for deed. If so, the contract for deed purchaser should be included in the mortgage (assuming the lender is actually willing to accept a mortgage under those circumstances). If not, the mortgage encumbers only a seller’s interest and if the purchaser pays off the contract for deed, he may be entitled to a deed and ownership not encumbered by the mortgage.
A. Practice Pointers.

1. Ensure that the vesting deed to married persons and the mortgage agree. Do not assume that because the mortgage is a purchase money mortgage the signature of a non-borrower spouse is unnecessary. This is only the case where only one spouse is going into title on the vesting deed. Thus, it is very important to make sure the deed and mortgage agree: one spouse as the deed grantee and one spouse signing the mortgage, or both spouses going into title and both signing the mortgage. If only one spouse is liable on the loan but the borrower and his/her spouse want to go into title together, then both spouses must sign the mortgage to ensure both of their ownership interests are encumbered.

2. Carefully review title to ensure all owners sign mortgage. Title examiners should review the chain of title carefully to make sure the borrower(s) are still the current and sole owner(s) of the property. Intervening grantees of any sort must be addressed. One solution is to have that party sign the mortgage. However, some instances (contract for deed or conveyance to business entity) may jeopardize the transaction depending on the lender’s willingness to accept a mortgage on property owned by parties it was previously unaware of, whether these parties are willing to sign a mortgage, and thus whether the borrower can provide a sufficient security.

B. Strategy for Resolution.

1. Amend the mortgage. If an owner is omitted from the mortgage, often the solution is to add that party to the mortgage by an amendment. This will obviously require the cooperation of the omitted party, who may not be willing to mortgage his/her interest. Obtaining an amendment can cause priority problems if there is an intervening lien against the omitted party. For example, if an omitted spouse has a judgment entered against her (in the county of the property) and then executes an amendment to the mortgage, the judgment lien holder may argue that it has priority over the mortgage as to that spouse’s interest. The same may be true a second mortgage or other lien arising after execution of the original mortgage.

2. Court action. If a conveyance omits a title owner, spouse or otherwise, and that owner is unwilling to execute an instrument to correct the issue, a court action may be necessary. Ratification (also called “estoppel by ratification”) is the appropriate cause of action where the non-signing party took actions showing it somehow approved or sanctioned the conveyance.

A mortgage is a conveyance that can be ratified, and “[r]atification occurs when a person with ‘full knowledge of all the material facts, confirms, approves, or sanctions, by affirmative act or acquiescence, the originally unauthorized act of another.’” Wells Fargo Home Mortgage, Inc. v.
Ratification will be found where a person “receives and retains the proceeds or benefits” of the unauthorized act. *Wells Fargo Home Mortgage, Inc. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. Ct. App. 2003). If a person acquiesces to a transaction and receives and retains the benefits of the transaction, as through ratification, his own conduct creates an estoppel that prevents him from denying the validity of the transaction. *See Fuller v. Johnson*, 139 Minn. 110, 114, 165 N.W. 874, 875 (1917) (explaining that “by receiving and retaining the benefits of a transaction, with full knowledge of the facts when the party may accept or reject without serious inconvenience, an estoppel is created,” and holding that wife whose name was signed on a property conveyance by her husband was estopped from denying the validity of the conveyance where she acquiesced in the transaction, never protested the conveyance, and retained the benefits of the transaction). In a case argued by our firm, the Court of Appeals recently affirmed the application of ratification to a borrower’s spouse who went into title but did not sign the purchase money mortgage. *Wildung v. Bank of New York Mellon*, 2014 WL 1758305 (Minn. Ct. App. May 5, 2014). In that case, the court upheld a summary judgment decision that the spouse ratified the mortgage transaction and was estopped from denying that her interest was subject to the mortgage. *Id.*

If there is evidence that the omitted owner was intended to be a grantor or mortgage on the conveyance, then reformation to include that owner on the conveyance may be an appropriate claim. However, even if a mortgage can be reformed, intervening lienholders whose liens included the signature of that omitted owner may claim priority of their liens as to that owner’s interest. In such a case, you may need to obtain a subordination agreement (or other corrective instrument) or demonstrate that the intervening lienholder had notice that the omitted owner’s interest was intended to be encumbered by your conveyance.

V. PAYING OFF LINE OF CREDIT MORTGAGES.

When conducting a refinance mortgage transaction, one common issue which can have very significant consequences results from failing to properly pay off and extinguish prior home equity line of credit mortgages. Line of credit mortgages allow a borrower to

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4 When researching the non-joinder issues, bear in mind that some courts use language making it easy to confuse whether a mortgage is “valid” or “void” (under § 507.02) and whether a valid mortgage encumbers all the title owners’ interests in the property (i.e., a purchase money mortgage failing within the exception for § 507.02). In describing the latter scenario, rather than use “encumbered” or some similar term, some will say “void against the party’s interest.” Because omitting an owner from a mortgage is easy to confuse with omitting a spouse under § 507.02, it is best to talk in terms of whether the mortgage lien encumbers a particular ownership interest rather than using the term “void” when validity under § 507.02 is not at issue.
repeatedly borrower funds and pay down the loan balance up to a certain limit with the debt secured by a mortgage. Minn. Stat. § 508.555 specifically authorizes such mortgages.

When paying off a typical mortgage, a closer will obtain a payoff statement from that lender and simply remit payment sufficient to pay off the balance of the loan, after which the lender must issue a satisfaction for the mortgage securing that loan. However, with a line of credit mortgage, the balance can be reduced to zero and the loan account can remain open with future draws creating indebtedness still secured by the mortgage. To obtain a satisfaction of such a mortgage, the borrower must provide notice to the lender specifically and explicitly requesting that the account be closed and a satisfaction of the mortgage be issued. Closers sometimes fail to obtain a letter or document from the borrowers with this notice or fail to send it with the payoff.

If the account is not closed after the line of credit balance is paid down to zero with the refinance mortgage funds, the borrowers can make additional draws on this account and those funds will be secured by the line of credit mortgage which was recorded first and therefore has priority over the refinance mortgage. Some line of credit lenders will now automatically freeze line of credit accounts where they get payoff 1) from a title company or lender (rather than the borrower) and/or 2) which reduces the balance to zero. However, lenders are not required to have such a practice and you should not rely on such safeguards.

A. Practice Pointers.

1. Get an instruction from the borrower, send it, and keep the proof. Most closers have a form that they commonly use, often in letter format, that the borrowers sign indicating to their line of credit lender that: 1) the line of credit account should be closed, and 2) the mortgage should be satisfied. This letter should specify whether the line of credit lender should send its satisfaction for recording or return the satisfaction to the closer for recording.

   Even if such a “close the account” letter is sent, disputes sometimes arise as to whether the line of credit actually received this notice. Thus, it is important to send the letter and payoff together by a trustworthy means (overnight or courier) and retain some record that the payoff and letter were sent (ex: FedEx stamp/receipt). This may prove to be very valuable at a later date should a dispute arise.

   The loan agreement between the borrower and line of credit lender should be reviewed for any payoff procedure set out by the lender so as to avoid any unnecessary problems.

2. Confirm the correct payoff amount. Sometimes an account will not be closed because the payoff amount was incorrect. There is a particularly high risk of an incorrect payoff amount for a line of credit mortgage.
because the borrower can make draws at any time. Thus, an updated payoff statement should be obtained as close to the closing time as possible. In addition, while it should not replace a paper trail from the line of credit lender, verifying the amount over the phone just before closing may be a good idea. For such mortgages, any per diem calculation should be done carefully and double-checked. You may also want to verify after the payoff that the account was closed and that a satisfaction will be issued.

B. Strategy for Resolution.

1. Obtain a subordination or release. The line of credit may be willing, perhaps at a price, to provide a subordination of its mortgage. It is also possible that the balance is not significant and can be paid off to obtain a satisfaction. However, this will be difficult if a close account instruction was never obtained from the borrower and the borrowers are presently uncooperative. It is possible, but unlikely (particularly if the intended first mortgage is in default), that the borrowers will pay down the balance or have already.

The line of credit lender should be reminded that even if there is a balance, releasing its mortgage is only losing the security; that lender can still pursue a personal judgment against the borrower. Minn. Stat. § 47.208 requires satisfactions to be issued and assesses penalties for failing to do so, which can provide some leverage:

Subdivision 1. Delivery required. Upon written request, a good and valid satisfaction of mortgage in recordable form shall be delivered to any party paying the full and final balance of a mortgage indebtedness that is secured by Minnesota real estate; such delivery shall be in hand or by certified mail postmarked within 45 days of the receipt of the written request to the holder of any interest of record in said mortgage and within 45 days of the payment of all sums due thereon.

Subd. 2. Penalty. If a lender fails to comply with the requirements of subdivision 1, the lender may be held liable to the party paying the balance of the mortgage debt, for a civil penalty of up to $500, in addition to any actual damages caused by the violation.

2. File an action. If the account was not closed but should have been because an instruction was sent and the balance reduced to zero, and the line of credit lender refuses to release its mortgage, you may need to file an action to assert the priority of the intended first mortgage and/or obtain a determination that the line of credit mortgage is satisfied.

An unpublished case addressing this scenario held that where a line of
credit mortgagee receives both payment reducing a line of credit account balance to zero and an instruction to close the account and satisfy its mortgage but fails to satisfy that mortgage, that mortgage is deemed satisfied from the point at which it should have been satisfied and the mortgage is no longer enforceable after that date. See M&I Marshall Ilsley Bank v. DuPont, 2008 WL 4394733 (Minn.Ct.App. 2008) (unpublished). Proving that mortgage was properly paid off is a fact-intensive endeavor and can be difficult if the closer did not make an adequate record of their efforts.

If you cannot prove that the line of credit mortgage should have been satisfied, a refinance mortgage lender may assert equitable subrogation based on its payoff and release.

VI. Torrens Issues.5

Minnesota has two property record systems: abstract and Torrens. Torrens property is also known as “registered” property. Abstract property can be made part of the Torrens system by completing a “registration” action. Torrens property has a certificate of title issued in the name of its owner which includes the legal description for the property and recitals. Instruments affecting title to the property are listed on the certificate as “memorials” with some exceptions (rights of appeal, federal tax liens, federal judgment liens in favor of the United States, short-term leases and rights of parties in possession of the land under an unregistered deed or contract for deed from the owner). The Registrar of Titles handles the recording of these documents and the Examiner of Titles for each county oversees the system generally as well as providing approval for the recording of certain documents and acting in a judicial-type role for registration actions and proceedings subsequent to initial registration (described below).

The Torrens system was designed to provide owners with a single document evidencing their ownership and what instruments affect it, as opposed to the abstract system where the entire chain of title must be examined in order to determine the state of title. Because the county manages this system and must determine whether to issue a new certificate of title and what memorials to place on it, there is a higher level of scrutiny placed on the documents submitted for recording against Torrens property. In my experience, there is therefore a higher incidence of rejection of documents by the Registrar of Titles than the County Recorder (even if the two are essentially the same personnel). The rejection of documents causes a delay in recording which can result in numerous title issues.

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5 One very helpful resource which I have referenced in drafting this section is “Understanding the Torrens Land Registration System,” materials from a presentation given by Wayne D. Anderson, current Ramsey County Examiner of Titles, and Kimball Foster, then Hennepin County Examiner of Titles, at the 2010 Real Estate Institute (November 12-13, 2010).
A.  Practice Pointers.

1. Determine whether the property is Torrens. More property is abstract than Torrens. If the documents in your title work are consistently recorded with the County Recorder rather than the Registrar of Deeds, then the property is almost certainly abstract. If a certificate of title number is listed on a title commitment, as part of a legal description, or elsewhere on a real estate instrument, then at least part of the property is likely Torrens. However, do not assume that the entirety of the property is Torrens as many properties or contiguous parcels are partially Torrens and partially abstract. The county’s online tax information may also indicate whether the property is Torrens or abstract.

2. Ensure compliance with recording requirements for documents submitted for recording against Torrens property. While obviously every document should be prepared and executed properly, a higher standard of vigilance should be taken when preparing documents to be recorded in Torrens. Know the recording requirements and follow them closely. Some registrars and examiners of title provide helpful information on recording requirements and obtaining approval from the examiner before submission to the registrar. The White Pages (issued as a companion to the Minnesota Title Standards) also provide a very useful guide on recording requirements. When in doubt, contact the registrar or examiner for guidance. If provided with a draft document(s), the examiner may be willing to tell you whether it will be accepted for recording.

B.  Strategy for Resolution.

1. File a Claim of Unregistered Interest. Where documents cannot be recorded against Torrens property, an important first step may be to file a Claim of Unregistered Interest. This is essentially an affidavit authorized by statute to provide notice of an otherwise unrecorded interest. The procedure and content is set out in Minn. Stat. § 508.70. While this document may impart some constructive notice, the issue will almost always require a more complete resolution.

2. Obtain an Examiner’s Directive. Some issues can be resolved by an “examiner’s directive” issued by the examiner directing the registrar to make a particular correction or change. For example where a simple spelling mistake in a deed results in the same error on the certificate of title, a notarized statement by the owner will allow the examiner to issue a directed correcting this error. Various statutes authorize issuance of

6 Documents requiring prior approval by the examiner before recording are typically conveyances not made by the record owner. Examples include personal representative’s deed (§508.69), decree of distribution (§508.69), conservator’s deed (§508.69), marriage decree or summary real estate disposition judgment used to transfer title (§508.59), trustee’s deed (§508.62), deed by attorney-in-fact (required by some county registrars but not by statute).
examiner’s directives for a number of purposes: mortgage foreclosure by action (§ 508.58, Subd. 2), tax title more than 10 years old (§ 508.67, Subd. 2), condemnations (§ 508.73), adding vacated streets and alleys (§ 508.73, Subd. 2), condominiums (§ 508.351), correction or deletion of certain rights shown on certificate (§ 508.71, Subd. 3).

3. Conduct a proceeding subsequent. A court proceeding to address a title issue for property already registered is called a “proceeding subsequent to initial registration.” A number of different issues require a proceeding subsequent: including obtaining a new certificate of title after a mortgage foreclosure by advertisement, removing a contract for deed from the Certificate of Title after contract for deed cancellation, and obtaining a new certificate within 10 years after real estate tax forfeiture to the state. A proceeding subsequent may also be necessary in order to remove easements, restrictions or other encumbrances from a certificate of title. Where original documents were rejected or otherwise went unrecorded and have since been lost, a proceeding subsequent can be used to allow photocopies to be recorded.

A detailed discussion of the procedure for these types of actions is beyond the scope of these materials. Much of the proceeding subsequent procedure is determined by the examiner of titles and varies widely from county to county. Hennepin County provides a number of forms and helpful instructions. Consulting with the county examiner is recommended if you are unfamiliar with their procedure.

Generally, a Petition (instead of a Summons and Complaint) is filed with the district court. The petition can be recorded against the certificate of title and functions similar to a Notice of Lis Pendens for a district court action. Next, the examiner of titles issues a “Report of Examiner” setting out what evidence must be presented at the order to show cause hearing in order to obtain the relief sought. The examiner’s report also sets out which parties must be served with an order to show cause. The petitioner drafts the order to show cause and submits it to the court or examiner to have signed by a judge, after which it is served on the parties who must receive notice of the proceeding. The procedure for determining a hearing date varies with each county.

The Petitioner submits the necessary evidence, typically by affidavit prior to the hearing, along with a proposed order and evidence of proper service. If the evidentiary requirements are satisfied and everything is in order, the examiner will approve the proposed order and have it signed by a judge, after which it is recorded with the registrar so that the registrar can carry out whatever it is directed to do by the order. Thus, the proposed order and prayer for relief in the petition must not only set out legal relief sought (“the mortgage is reformed to…”) but how that relief must be reflected in the land records (“the registrar is directed to show by a memorial on
Certificate No. 123456 that the mortgage has been reformed to…”.

If a party appears at the Order to Show Cause hearing and/or answers the Petition, the matter is considered a contested case and is, in most counties, transferred to a judge of district court. However, again depending on the county, the examiner of titles may continue to play a role in the proceeding.

Occasionally, you will encounter an issue that affects both Torrens and abstract property. In such a case, I recommend consulting with the examiner of titles to see if they will allow you to address all of the property in a single proceeding, which will likely be a proceeding subsequent.

VII. MANUFACTURED HOMES.

A number of issues can result from the failure to address the title of manufactured homes. Manufactured homes begin as personal property, rather than improvements which are transferred with the underlying real estate. Their ownership is governed by the state’s Department of Public Safety, Driver and Vehicle Services (DVS) in a manner very similar to motor vehicles. The manufacturer issues a certificate of origin (sometimes called a “statement of origin”) which is submitted to DVS in order to obtain a certificate of title7 for the manufactured home in the owner’s name. If the property is being conveyed and the manufactured home is to remain personal property, title to the home must be passed by a separate conveyance using the certificate of title (again, as a car title would be transferred). Title to the home will not pass automatically by a deed for the property. This can present issues as the owner may not be able to locate the certificate and/or those involved in the transaction assume the ownership of the manufactured home will transfer.

If the property is to be mortgaged, Minnesota statute requires that the title to the manufactured home be “surrendered.” This is the process that should be used when the parties intend the manufactured home to be a permanent part of the underlying real estate. Surrendering the manufactured home requires submitting the original certificate of title to DVS along with a “Notice of Surrender” and a fee. Minn. Stat. § 168A.141, Subd. 1 states that upon surrendering the certificate of title for manufactured home to DVS, DVS will issue a notice of surrender to be recorded in the county land records and “the manufactured home is deemed to be an improvement to real property.”

The title to a manufactured home shall be surrendered when “a manufactured home is affixed, as defined in section 273.125, subdivision 8, paragraph (b), to real property, and financed by the giving of a mortgage on the real property.” Minn. Stat. § 273.125, Subd. 8 states that a manufactured home must be assessed as an improvement to real property

7 The manufactured home certificate of title is not to be confused with the certificate of title for real property registered as part of the Torrens system.
where: (1) the owner of the unit holds title to the land on which it is situated; (2) the unit is affixed to the land by a permanent foundation or is installed at its location in accordance with the Manufactured Home Building Code in sections 327.31 to 327.34, and rules adopted under those sections, or is affixed to the land like other real property in the taxing district; and (3) the unit is connected to public utilities, has a well and septic tank system, or is serviced by water and sewer facilities comparable to other real property in the taxing district.

If the property has been mortgaged but the manufactured home title has not been surrendered, there is a question as to whether proper title to the manufactured home can be obtained through a foreclosure of that mortgage. In some cases, the mortgage has already been foreclosed without the prior surrender of the manufactured home title. Here, the home is ostensibly still the personal property of the owner and could arguably be removed from the property. The same issues present themselves where the property is conveyed by deed with the intent that the home will be included in the conveyance of the real estate, but there has not been a surrender of the manufactured home title.

A. Practice Pointers.

1. **Ensure that manufactured home title is surrendered.** As set out above, the certificate of title must be submitted for surrender to DVS along with a Notice of Surrender which, when returned by DVS, must be recorded in the land records. If no certificate of title has been issued, the manufacturer’s statement of origin must be submitted so that a certificate of title can be issued and thereafter surrendered. DVS can search their records using the manufactured home’s vehicle identification number to determine whether a certificate of title was ever issued.

Surrendering the title may be a relatively simple task if the borrower/owner is in possession of the manufactured home certificate of title and the home has been affixed. However, often owners cannot find the original certificate of title. In such a case, the owner must complete an Application for Duplicate Title in order to obtain a new certificate to be surrendered. It is also not uncommon that the manufactured home title is still in the name of a previous owner, not the borrower.

If there is a security interest appearing on the manufactured home’s certificate of title, an original notarized release will need to be obtained and submitted to DVS with the certificate of title when surrendered. This may present an issue if the manufactured home owner has not paid off that debt. If the debt has been paid, often an owner may have been mailed the original release but then lost it, requiring a duplicate release to be obtained.

Usually these preliminary steps before surrender (submitting a lien release, obtaining a duplicate certificate, having a certificate issued from a statement of origin, etc.) can be performed simultaneously by submitting
all the necessary documents to DVS at once along with the necessary fees.

B. Strategy for Resolution.

1. Surrender the title. Even if the certificate of title was not surrendered at the proper time, if the certificate of title or statement of origin can be located and/or the borrower is cooperative in obtaining a duplicate certificate of title, the title can still be surrendered. However, if a manufactured home issue is discovered during foreclosure, obtaining the certificate of title from the owner may be difficult as the borrower has little incentive to cooperate.

The borrower has sometimes completed an affidavit stating the home is or will be affixed to the property and that they will cooperate in getting the manufactured home surrendered. This can be used as minor leverage in obtaining cooperation from the borrower, but may be more useful in a court action as evidence of the parties’ intent. Sometimes the affidavit or a manufactured home rider will purport to grant the mortgage lender the power to do whatever is necessary in the borrower’s name to have the manufactured home title surrendered. However, this may not allow a mortgage lender to obtain a duplicate and surrender it without the cooperation of the borrower/owner. For that, a court order is usually required.

2. File a declaratory judgment action. Sometimes the only way to resolve a manufactured home issue is by filing a district court action. This is usually necessary when the certificate of title or statement of origin cannot be located and the owner is uncooperative. When starting an action in the name of a mortgage lender, the owners of the home under the certificate of title must be named, along with the mortgage borrowers, and DVS. If it is unclear who the title owner of the home is, multiple owners in the chain of title may need to be named. Any evidence showing the intent of the parties to either surrender the title or treat the manufactured home as part of the real estate should be pled (such as the existence of an affidavit or manufactured home rider).

The complaint should also include information as to the certificate of title, if one was issued, and that the manufactured home is affixed to the property within the meaning of the statute. The order obtained should direct DVS to accept an application for title (if no title was issued) or accept an application for duplicate title (if the original certificate cannot be located), issue a new certificate of title, cancel and surrender it, and execute a Notice of Surrender. You may also want to add a paragraph stating that upon recording of the Notice of Surrender, the home shall be deemed an improvement to the property and subject to the lien of the mortgage (or, if the mortgage has been foreclosed, that the foreclosing lender is the owner of the home as an improvement to the property).
there is a lien on the certificate and a release cannot be obtained, that lienholder can be named in the action with a request that the lien be deemed satisfied (if there is evidence to support such a claim).

VIII. UNRELEASED LIENS, STRAY INTERESTS, NAMES, TENANCY, AND OTHER MISCELLANEOUS ISSUES.

An exhaustive list of title problems, even common ones, is beyond the scope of these materials. However, the following are other common title problems along with potential strategies for resolution.

A. Miscellaneous Title Problems.

1. Prior unreleased mortgages. There may be unreleased prior mortgages against the property discovered when a lender is preparing to foreclose. In addition to the line of credit mortgage scenario described above, you may encounter an old mortgage that was paid off but not satisfied of record. In such cases, it may be possible to obtain a satisfaction. However, the upheaval in the mortgage lending industry has made it more likely that the mortgagee has either closed or merged into another entity which may have inadequate records as to the interests it acquired. It may be necessary to start a court action to declare the mortgage satisfied.

Title Standard No. 25 states that an examiner may disregard an unsatisfied mortgage when 15 years have elapsed since the maturity date of the debt or, if the maturity date cannot be determined from the mortgage, when 15 years have elapsed from the date of the mortgage.

A delay in recording a first mortgage may cause a subsequent mortgage to be recorded first and ostensibly have priority. If the mortgage debt is outstanding, equitable subrogation may apply. Obviously, there is the option of simply paying the lender for a release or a subordination of its lien.

2. Unfulfilled or outstanding contracts for deeds. Much like unreleased mortgages, sometimes a contract for deed is paid in full but the seller never executed or recorded a deed to the buyer. In such a case, you may be able to obtain a replacement deed from the seller. If the seller is deceased or uncooperative, a quiet title action may be necessary.

There may be contracts for deeds which were never cancelled. The buyer may be willing to issue a deed eliminating his/her purchaser’s interest. However, these are often more difficult to deal with and a court action may be necessary if the seller is unwilling to go through the cancellation process or if there have been conveyances by the seller subsequent to the contract for deed. Like foreclosure by advertisement, a proceeding subsequent is required following contract for deed cancellations on Torrens property.

8 Common Title Problems and How to Fix Them
Title Standards Nos. 26 and 27 address unfulfilled and old contracts for deeds as well as contract for deed cancellation.

3. **Foreclosure errors.** A complete discussion of this topic is far beyond the scope of this presentation. What level of compliance (strict v. substantial) is required for various requirements is an open question as a result of a number of recent appellate decisions, most notably *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013) and subsequent cases relying on it. There are curative statutes for various foreclosure errors. Minn. Stat. §§ 582.25, 582.26, 582.27. Title Standards Nos. 38 and 38A address irregularities in foreclosures.

Minnesota does recognize a claim for “unforeclosure” where certain elements are met. A mortgage foreclosure can be set aside by the court upon consideration of four equities: “(1) A blameless plaintiff fallen into serious error * * *, which promises a disastrous result, wholly unintended by any of the parties to the transaction * * ; (2) absence of negligence of the person seeking relief; (3) defendants with knowledge of the mistake attempting to secure by inequitable conduct an unconscionable advantage of plaintiff and to enrich themselves unjustly at his expense; [and] (4) the ability of the court to restore the status quo as to all of the interests involved.” *Pole v. Trudeau*, 516 N.W.2d 217, 221 (Minn.App. 1994).


You may determine that a judgment lien need not be dealt with because of the homestead exemption. See Minn. Stat. § 510.01. If the lien must be addressed, it can be paid off entirely or you may be able to negotiate a release from the property (the debtor may own other more valuable property, making the judgment holder more likely to release its judgment). There may also be arguments to be made as to the priority or attachment that could be raised in a court action.

5. **Mechanic’s liens.** Mechanic’s liens, sometimes known as construction liens, are liens filed by contractors and suppliers against property owners who have gone unpaid. Mechanic’s liens are governed by Minnesota Statutes §§ 514.01 through 514.17. A mechanic’s lien presents an issue for an owner and, because such liens take priority from the date work was
first performed, there are often priority disputes with a construction mortgage lender. While a discussion of such liens is beyond the scope of this seminar, the statutes contain various requirements which must be complied with by the lien claimant. The claimant may never file a foreclosure action within the requisite time period. See Minn. Stat. § 514.11. If a release of the lien cannot be obtained or negotiated, non-compliance with the statutes can be asserted as a defense to the lien.

6. **Association liens.** Unreleased mortgages or prior mortgages intended to be junior can create priority issues between a mortgage and an condominium association lien. Minn. Stat. § 515B.3-116(b), part of the Minnesota Common Interest Ownership Act (MCIOA), states that an association lien is prior to all other liens and encumbrances on a unit except liens and encumbrances recorded before the declaration and any first mortgage.

Associations are entitled to the benefits of Minnesota’s recording act, Minn. Stat. § 507.34, and can rely on the record to determine what mortgage is the “first mortgage” to which its lien is automatically junior. *Washington Mutual Bank, F.A. v. Elfelt*, 756 N.W.2d 501 (Minn.App. 2008). If a prior lien is left unreleased, the association may claim that this lien is the “first mortgage” and the mortgage intended to be a first mortgage is junior to the association lien. As addressed in *Elfelt*, even if the relative priority between these two liens is reversed via the recording act, that may not place the intended mortgage ahead of the association. In such a case, it may be necessary to pay off the association, obtain a subordination agreement, or start an action asserting some theory as to the priority of the intended first mortgage.

7. **Marital liens.** Divorce decrees may create marital liens. Divorce decrees are sometimes recorded against property, usually to a ffect a conveyance between the divorcing spouses. Often, there is little or no court supervision as to the payoff of the marital lien after the decree is entered, and the party awarded the lien may not remember or know to execute a release of the lien upon payoff. A divorced person may be embittered toward their former spouse and unwilling to execute a release. If a release cannot be obtained, it may be necessary to reopen the divorce or start an action to determine that the lien is satisfied, but the latter may be difficult and expensive to prove and both are likely to revive an old conflict between divorced parties.

8. **Name issues.** It is obviously important to verify the spelling of parties names when drafting real estate documents. Omitting “Jr.” or “Sr.” can generate confusion, especially for property that will stay in the same family. Typically these issues can be resolved by some corrective instrument or by a reformation in a court action. Numerous issues can result from the variations in the names of corporate entities. Title
9. **Tenancy issues.** Where grantees are not described as joint tenants, tenancy in common is presumed. Sometimes one of two or more grantees dies and it is discovered upon that owner’s death that the property was not owned in joint tenancy. In such a case, the decedent’s interest in the property has ostensibly passed to his/her heirs. If the requisite intent can be proven, a court action to reform the deed to the decedent and his/her co-owners to state that they are joint tenants will avoid a probate action. If such an action is not successful or feasible, the property may need to conveyed through probate court.

10. **Trusts.** Sometimes mortgage borrowers own property in the name of a trust. Their mortgage lender may require them to convey the property back to themselves as individuals before executing a mortgage. Sometimes this step is missed and property owned as trustees is mortgaged individually. In such a case, the trustees can execute an instrument making their interest subject to the mortgage. The trustee’s could also execute a deed back to themselves as individuals after the mortgage has been executed. However, in this may raise the question of whether the mortgage encumbers this after-acquired (which may depend on the language in the mortgage).

11. **Lack of access.** Access is a topic worthy of its own seminar. Any title examination should include a determination of whether a public road or valid access easement is contiguous with the subject property. Title examination will not reveal whether there is actual road access to a property, only legal access. It is not uncommon for an easement to have been properly created but have the road located outside the easement area. Most access issues are very case-specific. A survey may be needed to accurately locate the easement and the road, or to determine a logical location for an access easement.

There may be improvements obstructing on access easement in which case the easement holder may have the right to demolish the improvements to make use of the easement. In such cases, the easement may need to be relocated or confined. The owner of the servient property may seek a reformation of the easement.

If an access easement was or will be executed, it is important to ensure that that easement was or will not be wiped out by a foreclosure on the servient estate. Easements which are executed between owners where those owners have previously recorded mortgages must be joined by the mortgage lenders. This can be time-consuming and difficult and may require a survey, appraisal, and payment to the mortgage lender. Nonetheless, lenders with mortgages on the property benefitted by the easement will want to amend their mortgage to add the easement to their
lien so that it will have a right of access in the case of a foreclosure.

Various theories can be presented in a court action to establish access. Most common are adverse possession, prescriptive easement, and easement by necessity and/or implication. Vacation of public streets, unrecorded easements, licenses, platting issues, and other factors can play a role in creating or resolving access problems and determining what claims to assert in district court.