TOP UNDERWRITING MYTHS

Presented By

Paul D. Pruitt
Associate Regional Counsel
Fidelity National Title Group
3520 Bee Caves Rd., Suite 250
Austin, Texas 78768
Phone: 512.823.2814
Email: PPruitt@fnf.com

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Paul D. Pruitt

Vice President, Associate Regional Counsel
Southwest Region
Fidelity National Title Group, Inc.
3520 Bee Caves Rd., Suite 250
Austin, Texas 78746
Telephone: 512.823-2814
Facsimile: 512.306.0989
Email: ppruitt@fnf.com

EDUCATION

J.D., ***cum laude***, South Texas College of Law, Houston, Texas – 1988
Order of the Lytae

B.A., Baylor University, Waco Texas – 1986
Rho Epsilon – Real Estate Service Fraternity
Sigma Chi – Social Service Fraternity

EMPLOYMENT HISTORY

Vice President, Fidelity National Title Group, Inc., Austin, Texas
Assoc. Regional Counsel, 2016 to Present; Texas State Counsel, 2014 to 2016; Underwriting Counsel, 2012 to 2014; Litigation Counsel, 2001 to 2011
Managing Attorney, Pruitt & Associates, P.C., Tyler, Texas – 1992 to 2001
Associate Attorney, Grubb & DiCecco, Houston, Texas – 1989 to 1992

PROFESSIONAL AFFILIATIONS

Member, State Bar of Texas – 1989
Real Estate Probate and Trust Law Section
Council, 2014 through Present; Assignment of Rents Act Committee, 2011 through 2013; Title Insurance Committee, Chair 2015 through Present; Member, 1989 through Present
Real Estate Forms Committee of the State Bar of Texas – 1999 to Present
Sustaining Life Fellow, Texas Bar Foundation – 2014
Board Certified – Commercial & Residential Real Estate Law, Texas Board of Legal Specialization – 1996
Broker, Texas Real Estate Commission – 1987 to 2013
Certified Mediator, National Mediation Academy – 2001
Member, College of the State Bar of Texas – 2001
Member, Texas College of Real Estate Attorneys – 2003

PUBLICATIONS & PRESENTATIONS

"***Issues for Mechanic's Liens",*** 2016 Advanced Real Estate Strategies Course, State Bar of Texas—Dec. 2016
"***Title Insurance Case Update",*** 2016 Mortgage Lending Institute, University of Texas—Oct. 2016
"***Top Issues Presented to Title Insurance Underwriters",*** 2016 Advanced Real Estate Drafting Course, State Bar of Texas–March 2016
"***Title Myths Debunked"***, 2016 Fidelity National Title Group Magnificent Escrow Training—March 2016
"***Leasing Forms – Texas Real Estate Forms Manual",*** 2015 Commercial Real Estate Leasing Course, State Bar on Texas—Oct. 2015

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TOP UNDERWRITING MYTHS

"It ain't what you don't know that gets you in trouble. It's what you know for sure that just ain't so."
*-**Mark Twain-***

"The great enemy of truth is very often not the lies-deliberate, contrived and dishonest-but the myth-persistent, persuasive and unrealistic."
- John F. Kennedy-

INTRODUCTION

The purpose of this paper is to review several title myths or misconceptions often encountered in the closing and insuring of a real estate transaction in Texas. The information presented herein represents the unsolicited options of the author only and is in no way the official underwriting opinion of FNTG, nor any of its title insurers, and certainly does not represent the underwriting position of other underwriters in the title insurance industry.

MYTH 1: Separate property becomes community property if the property becomes a homestead.

A. Introduction

The classification of property as separate property (SP) or community property (CP) is not changed or affected by the homestead status of the property.

B. Six Marital Property Rules to Remember

There are six important marital property rules to remember in Texas:

1. Texas is a CP state. Property possessed/acquired by either spouse during the marriage is presumed to be CP. [§3.003, Texas Family Code (TFC)].

2. CP is property other than SP, acquired by either spouse during the marriage. [§3.002, TFC].

3. SP is: (i) property owned by spouse before marriage; and (ii) property acquired by the spouse during the marriage by gift or inheritance. [§3.001, TFC].

4. Texas follows the "inception of title" rule. Whether property is SP or CP is determined at the earliest moment in which the claimant may claim title. Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested. Strong v. Garrett, 224 S.W. 2d 471 (Tex. 1949).

5. During the marriage, property is presumed to be subject to the sole management control and disposition of the spouse if it is held in that spouse's name. A third party is entitled to rely upon that spouse's authority to deal with the property if the person dealing with the spouse is not a party to a fraud upon the other spouse and does not

have actual or constructive notice of the spouse's lack of authority to deal with the property. [§3.104, TFC].

6. Whether the property is the SP of either spouse or CP, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse. [§5.001, TFC].

   Purchase Money Exception: If the insured deed of trust is a purchase money lien and the deed contains a vendor's lien, with the approval of the particular underwriter, the joinder of the spouse of an owner may not be required. See Skelton v. Washington Mutual Bank, 61 S.W. 3d 36 (Tex. Ct. App., 7th Dist.-Amarillo 2001).

MYTH 2: An adopted child does not inherit from his biological parent if the parent has relinquished parental rights.

A. Introduction

The inheritance rights of an adopted child is not affected if the natural parents have relinquished their parental rights to the child.

B. Rules to Remember

For purposes of inheritance vis-à-vis adopted children, the important rules to remember are the following:

1. An adopted child is regarded as the child of the adoptive parent or parents, and the adopted child and the adopted child's descendants inherit from and through the adoptive parent or parents. [§201.054 (a), Texas Estates Code ("TEC")];

2. The adoptive parent or parents and their kindred inherit from and through the adopted child as if the adopted child were the natural child of the adoptive parent or parents. [§201.054 (a), TEC];

3. The natural parent or parents of an adopted child and the kindred of the natural parent or parents may not inherit from or through the adopted child, but the adopted child inherits from and through the child's natural parent or parents. [§201.054 (b), TEC].

MYTH 3: Upon the death of the decedent, title is vested in the heirs or devisees of the decedent free and clear of involuntary liens.

A. Vesting of Title

Upon the death of the decedent, title does not vest in the "estate" of the decedent. Instead, title vests in: (i) the devisees under a lawful Will; or (ii) the heirs at law if the decedent dies intestate; subject to administration (payment of debts). [§101.001 & 101.051, TEC].

B. Attachment of Involuntary Liens

Involuntary liens against the devisees or heirs will attach to real property inherited by the devisees or heirs. See for example, Gregg v. First National Bank, 26 S.W.2d 179, 181 (Tex. Comm'n App. 1930, judgm't adopted), holding that an abstract of judgment against an heir/devisee attaches to the vested interest in real property during the administration of the estate

C. Sale of Property to Pay Debts of the Estate

If the personal representative of the estate is selling the property to pay estate debts, the heir/devisee's interest in the property is divested, and an abstract of judgment against the heir/devisee does not attach. Blinn v. McDonald, 46 S.W. 787 (Tex. 1898); Woodward v. Jaster, 933 S.W. 2d 777 (Tex. App. –Austin, 1996, n.r.e.).

MYTH 4: If an heir or devisee executes a Disclaimer of Interest, the property automatically passes to the other heirs or devisees of the decedent.

A. Introduction

Under prior law, an heir or devisee could execute a disclaimer of interest in inherited property within nine (9) months of the decedent's death. Under prior law, disclaimers of interest were governed by Chapter 122 of the Texas Estates Code.

In 2015, the 84th Texas Legislature enacted the Texas Uniform Disclaimer of Property Interest Act, which became effective September 1, 2015. The Act now appears as Chapter 240 of the Texas Property Code ("TPC)".

B. Effect of a Disclaimer of Interest-To Whom Does the Disclaimed Property Go?

1. If the Will or other instrument creating the interest says where it goes in the event of a disclaimer, the interest goes where the instrument says it goes; [§240.051 (d), TPC];

2. If the instrument does not say where the disclaimed property goes, then it passes as if the disclaimant had died immediately before the decedent's death. [§240.051 € (2), TPC].

MYTH 5: If the insured property is located in a city that has a mineral ordinance, the general mineral exception is not necessary in the policy.

A. Introduction

Many cities have adopted a mineral ordinance that either (i) prohibits oil and gas drilling within the city limits; or (ii) prohibits oil and gas drilling within a certain distance of improvements located within the city limits.

The existence of a mineral ordinance is irrelevant and has no bearing as to whether or not the commitment/policy should contain the general P-5.1 mineral exception. However, the existence of a mineral ordinance may have a bearing on an insurer's willingness to provide the mineral coverage afforded by the T-19 series of endorsements (damages to land/improvements caused by mineral exploration and extraction).

B. Mineral Coverage in General

As to title insurance, there are two types of "mineral coverage". The first type of coverage is insuring ownership of the mineral estate. The second type of coverage is insuring against damages to the land or improvements caused by mineral exploration and extraction.

First coverage-Insuring Ownership of Minerals

Most underwriters do not the intent to insure ownership of minerals, and in general, the title insurers will not issue a policy where the only insured estate is a mineral estate. Of course, ownership of the mineral estate would be insured indirectly by a title policy if the policy does not include any mineral exceptions and does not contain the general P-5.1 general mineral exception in Schedule B.

Second Coverage-Damage to The land/Improvements

The second type of coverage is provided by the issuance of one of the T-19 series of endorsements (T-19, T-19.1, T-19.2, or T-19.3).

C. General Mineral Exception

In accordance with Procedural Rule P-5.1, an underwriter may insert into a policy an exception or exclusion for minerals as provided below:

On Schedule A, Item 2:

"subject to, and the Company does not insure title to, and excepts from the description of the Land, cold, lignite, oil, gas and other minerals in, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto."

On Schedule B

"All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records with a listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interests that are not listed."

D. Underwriter Position:

As noted above, it is not the intent of underwriters to insure ownership of minerals. Therefore, the underwriting position of most title insurers is as follows:

- The policy must contain the P-5.1 general mineral exception unless the examiner has conducted a complete search of title back to the sovereignty for all mineral conveyances, reservations, leases and other documents related to mineral interests appearing in the chain of title;

- However, if in the course of search and examination of title, the examiner discovers a single instrument that clearly reserves or conveys 100% of the mineral estate, the search may stop at that point and the examiner will not need to continue searching back to the sovereignty; the instrument reserving or conveying 100% of the mineral estate must be shown as an exception in the commitment and title policy;

- Any documents relating to mineral interests (i.e., royalty, delay rentals, executive rights, bonus, unit designation, leases, reservation of minerals, etc.) discovered in the title search should also be shown as exceptions in the commitment/policy.

MYTH 6: After the purchase of real property, there is a twelve (12) month waiting period before the owner may obtain a Texas Home Equity Loan (HEL).

A. Introduction

HELs became effective on January 1, 1998, as a result of an amendment to the Texas Constitution. Until then, the only way an owner could "capture" the equity in his homestead was to sell it to a third-party. A HEL is often referred to as "an extension of credit under §50 (a), Article XVI, Texas Constitution". A HEL is an extension of credit made to a person who has substantial "equity" in the homestead that is made without recourse for personal liability, and must be closed at the office of a title company, lender, or attorney at law.

The constitutional amendment authorizing HELs sets forth a myriad of requirements (over 30) that must be satisfied by the lender making the HEL. The failure of the lender to satisfy these requirements may result in the HEL not constituting a valid lien against the homestead.

There is no requirement in the HEL constitutional amendment that requires an owner to own his homestead for 12 months before he may obtain a HEL.

B. What the twelve (12) Month Waiting Period Relates To

The only twelve (12) month waiting period provided for in the HEL constitutional amendment is the requirement that a HEL transaction cannot close before the first anniversary of the closing date of any prior HEL on the same homestead property. [§50 (a) (6) (M) (iii), XVI Texas Constitution].

MYTH 7: A Will is automatically probated upon the death of the decedent and there is no need to go to court to get an order admitting the Will to probate.

A. Introduction

Upon the death of the decedent, title vests in: (i) the devisees under the lawful last will and testament (Will); or (ii) the heirs at law if the decedent dies intestate; subject to administration (payment of debts). [§101.001 & 101.051, TEC].

B. Effect of probating a Will/Consequences of not Probating Will

The purpose of probate is to establish the status/legitimacy of instrument purported to be the last Will of the decedent. If a Will is not probated in accordance with the prescribed legal requirements, a Will is of no legal effect. [74 TEX. JUR. 3d §288].

MYTH 8: A surviving spouse always inherits the one half (½) community property interest of a decedent spouse if the decedent dies intestate, and that has always been the law of Texas.

A. Introduction

One of the most common myths/misconceptions in the title industry is the assumption that a surviving spouse always inherits the ½ community property interest of a deceased spouse who has died intestate. When a deceased spouse dies intestate, the inheritance of the decedent's ½ community property interest is determined by: (i) the date of the decedent's death; and (ii) §201.03 of the Texas Estates Code.

B. Law prior to September 1, 1993

Prior to September 1, 1993, a surviving spouse did not inherit the ½ community property interest of a deceased spouse if the decedent died intestate. Instead, the ½ community property interest of the decedent spouse passed to all of the children (children of the current marriage and children of any prior marriage/relationship of the deceased spouse) of the deceased spouse in equal shares. [§45 (a), Texas Probate Code].

C. Law subsequent to September 1, 1993

After September 1, 1993, a surviving spouse will inherit the ½ community property interest of a deceased intestate spouse if: (i) no child or other descendent of the deceased spouse survives the deceased spouse; or (ii) all of the surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. [§ 201.003, Texas Estates Code].

MYTH 9: If the owner is a single person, he/she is always limited to no more than one hundred (100) acres as a rural homestead.

A. Introduction

This myth represents a misconception due to an often overlooked nuance of Texas homestead law. Under certain factual situations, a single adult person may be able to

claim a family homestead which would entitle the claimant to a larger homestead allotment in the case of a rural homestead.

B. Homestead 101

a. Urban Homestead

If used for purposes of an urban home or as both an urban home and a business, any lot or contiguous lots (including improvements) up to ten (10) acres located in a city, town or village may constitute an urban homestead of the claimant, whether a single adult person, or the head of a family. [§41.002, Texas Property Code].

b. Rural Homestead

If used for the purposes of a rural home, any tract or tracts of land (including improvements) up to 200 acres for a family, and up to one hundred (100) acres for a single adult person, not located in a city, town or village may constitute a rural homestead of the claimant. [§41.002, Texas Property Code].

Note that the amount of the rural homestead allotment (200 acres or 100 acres) is different for a family and an adult person.

C. What Constitutes a Family? "Family" is not defined by the Constitution or by statute. Texas case law provides that a family consists of:

- A group of people having the social status of the family living subject to one domestic government;
- The head of the family must be legally or morally obligated to support at least one other family member; and
- There must be a corresponding dependence by the other family member for this support.

See Duran v. Henderson, 71 S.W. 3d 833 (Tex. App.-Texarkana 2002, pet. denied); NCB Texas National Bank v. Carpenter 849 S.W. 2d 875 (Tex. App.-Ford Worth 1993, no writ); Matter of Hill, 972 F. 2d 116 (5th Cir. 1992).

The requisite familial relationship may be between siblings, adult children and their parents, or grandparents and grandchildren. Matter of Hill, supra.

We know from prior case law that the courts will bend over backwards to support a homestead assertion by a claimant. Therefore, in determining whether or not the insured

land may constitute a homestead, consideration must be taken into the possibility that the claimant may have a "family" homestead.

MYTH 10: If an abstract of judgment is just for personal debt (like a credit card), an abstract of judgment does not affect real property.

A. Introduction

The statutes creating a judgment lien do not place any limitations on the type of debt that may result in the entry of a monetary judgment against a defendant.

B. Creation and Attachment of an Abstract of Judgment Lien

Upon the application of a person (or that person's attorney, agent or assignee) in whose favor a judgment is rendered, the judge of the court in which the judgment is rendered shall prepare, certify and deliver to the applicant an abstract of judgment. [§52.002, TPC]. The required contents of an abstract of judgment include but are not limited to the amount for which the judgment was rendered and the balance due. [§52.003, TPC].

Unless a judgment is dormant, a first or subsequent abstract of judgment, when it is recorded and indexed in accordance with Chapter 52 of the Texas Property Code, constitutes a lien on and attaches to any real property of the defendant, except real property exempt from seizure or for sale (i.e., homestead). [§52.001, Texas Property Code].

MYTH 11: Underwriters will not insure a title based upon an affidavit of heirship unless the decedent has been dead for least one (1) year.

A. Introduction

When the owner of real property or his predecessor in title property has died intestate, it has become a common practice in the industry for title companies to insure a title based upon the recording of an affidavit of heirship that establishes who the heirs of the decedent are under the intestacy laws of Texas.

Interestingly, there is no direct statutory authority for an affidavit of heirship outside of §203.001, Texas Estates Code (formerly §52 of the Texas Probate Code), which deals with use of affidavits as evidence in lawsuits. Regardless, it become common practice to utilize such affidavits of heirship as a basis for insuring a land title. However, underwriters vary on their underwriting guidelines for insuring title based upon an affidavit of heirship. Some underwriters for example, require the decedent to have been dead for certain time period before accepting an affidavit of heirship.

B. Positions of Underwriters:

1. No Waiting Period: Some underwriters do not impose a minimal time period following the decedent's death before it will insure a title based upon an affidavit of heirship.

   However, these underwriters will, likely, require specific approval of transactions within some designated period of time, often 1 year, before relying upon an affidavit of heirship when the decedent has been dead for less than that period designated by the particular underwriter.

2. Waiting Period: Other underwriters do impose an arbitrary waiting period before insuring title based upon an affidavit of heirship. This designated waiting period varies depending on the underwriter and may be as few as 1 year or as many as 4 years.

MYTH 12: A title arising out of an ad valorem tax foreclosure may be insured after the expiration of the owner's/taxpayer's right of redemption.

A. Introduction

The right of redemption is just one of two time periods that affect the ability of an underwriter to insure a title arising out of an ad valorem tax foreclosure sale. Following an ad valorem tax foreclosure sale: (i) the former owner/taxpayer has a statutory right of redemption [§34.21, Texas Tax Code] and (ii) there is a statutory limitations period to contest/challenge the validity of the tax sale [§33.54, Texas Tax Code]. As discussed below, the two time periods do not coincide in all respects.

As a general rule, most underwriters will not insure a title arising out of an ad valorem tax foreclosure sale until the expiration of the statutory time period to challenge the validity of the tax sale.

B. Right of Redemption

The right of redemption time period is predicated upon the classification of the property.

- The right of redemption is two (2) years from the date the sheriff's/constable's deed is recorded if, at the time the tax suit is filed, the property is:
  - The residence homestead of the owner; ○ Designated for agricultural use; or
  - The property was or included a mineral interest
    [§34.21 (c), Texas Tax Code];
- For all other properties, the right of redemption is 180 (180) days from the date the sheriff's/constable's deed is recorded. [§34.21 (e), Texas Tax Code].

C. Limitations Period for Challenging the Validity of a Tax Sale

The limitations period for challenging the validity of the tax sale is also predicated upon the classification of the property.

- The limitations period is two (2) years from the date the sheriff's/constable's deed is recorded if, at the time the tax suit is filed, the property is:
  - The residence homestead of the owner; or
  - Designated for agricultural use;
    [§33.54 (a) (2), Texas Tax Code];

- For all other properties, the right of redemption is one (1) year from the date the sheriff's/constable's deed is recorded. [§33.54 (a) (1), Texas Tax Code].

MYTH 13: If the owner of the property is a trust, the owner cannot obtain a home equity loan or a reverse mortgage.

A. Introduction

A trust is not a person or an entity. A "trust" is:

- A right of property, real or personal, held by one party for the benefit of another;
- Any arrangement whereby property is transferred with intention that it be administered by a trustee for another's benefit.

There is no specific prohibition in the Texas Constitution against a trust obtaining a home equity loan or a reverse mortgage. However, lenders may decline to make a home equity loan or a reverse mortgage if title is vested in a trust, and may require the trustee to convey the property to the settlors or beneficiaries of the trust.

Most trusts encountered in a home equity loan or reverse mortgage transaction are estate planning trusts created by a husband and wife.

B. Underwriting Issues:

1. The trust instrument must be reviewed to determine:

- Settlor (s);
- Trustee (s);
- Beneficiary (ies);
- Whether the trust is revocable or irrevocable at the time of the insured transaction (note that many revocable living trusts become irrevocable upon the death of the first spouse);
- Power to convey if lender requires the borrower to take the record title out of the trust; and
- Power to borrow and encumber if the trust will remain in record title.

2. If the trust is revocable, and provided the trustee (s) has/have the power to encumber, require the execution of all documents, including but not limited to the deed of trust, by the: (i) trustee (s); and (ii) settlor (s) and their respective spouses.

3. If the trust is revocable, and provided a trustee (s) has/have the power to encumber, require the execution of all documents, including but not limited to the deed of trust, by the: (i) trustee (s); (ii) settlor (s); and (iii) beneficiary (ies) and their respective spouses.

MYTH 14: A power of attorney may not be utilized on a home equity loan or a reverse mortgage.

A. Introduction

There is no prohibition in the Texas Constitution against the use of a power of attorney (POA) in a home equity loan or reverse mortgage transaction, and many underwriters will agree to insure a HEL or reverse mortgage transaction where a POA is utilized upon compliance with that underwriter's specific underwriting guidelines.

B. POAs in General

a. Concerns With the use of a POA

Transactions involving a POA are risky for the underwriter for the following reasons:

- Often there is no contact with the principal;
- If the principal is deceased, the POA does not survive the principal's death;
- If the principal is subject to a guardianship proceeding, the POA does not survive the opening of the guardianship proceeding;
- Proceeds are often diverted to the agent/attorney in fact;
- POAs are statistically the most forged document in the title insurance industry;
- It is usually a relative or trusted friend who misuses a POA.

b. Underwriting Issues Regarding POAs

Simply stated, the general guidelines are the following:

- Possession of the original executed and acknowledged POA must be obtained and the original POA must be recorded within 30 days of the execution of the real property instrument (i.e., deed/deed of trust) by the agent on behalf of the principal;
- The POA is not expired on its own terms;

- The POA contains express language authorizing the agent to act for the principal in the insured transaction (sell/convey or mortgage the insured property) Underwriting Note: Many underwriters will accept a statutory durable POA in which the agent is given real estate transaction powers;

- The insured transaction is not a home equity loan or reverse mortgage transaction;

- There appears to be a legitimate reason why the principal cannot attend closing;

- Confirmation prior to closing that the principal: (i) is alive; (ii) is not incapacitated; and (iii) is not subject to a guardianship proceeding;

- There is no actual knowledge or suspicion that the POA is a forgery, or that a fraud is being perpetuated;

- There is no actual knowledge or suspicion that the POA has been revoked or rescinded by the principal;

C. Use of a POA in a HEL transaction

Prior to 2013, it was common practice in the title industry to rely upon a POA for one or more of the parties to a home equity loan transaction. In Finance Commission of Texas v. Norwood, 418 S.W. 3d 566 (Tex. 2013), the Texas Supreme Court imposed substantial limits on the use of a POA in a home equity loan transaction. The court held that a POA is a closing instrument must therefore be executed at the office of a title company, attorney, or lender.

The guidelines of many underwriters look to for accepting a POA in the home equity loan transaction are the following:

- The POA must be executed in the Texas office of the direct operation or agent closing the transaction or at the Texas office of the lender, an attorney at law, or another title company;

- If the POA is executed at the Texas office of a lender, an attorney-at-law, or another title company, the underwriter is likely to require a certification of that fact from: (i) the owner/borrower who is the principal under the POA, or the agent, and (ii) the attorney, loan officer or escrow officer as applicable; and

- The POA must be a Texas statutory durable POA in the form provided for under §751.01 et seq. of the Texas Estates Code; the POA must include a “Special Instructions” portion that specifically provides that the POA is intended for the purpose of execution of all documents necessary to consummate the specific home equity loan transaction being closed.

D. Use of a POA in a reverse mortgage transaction

As a general rule, many underwriters will accept a POA in a reverse mortgage transaction with the following caveat: One of the requirements of the Texas Constitution regarding a reverse mortgages that the owner or owner's spouse must be sixty-two (62) years of age or older. If a POA is used and the principal is the one who is sixty-two (62) years of age or older, most underwriters will require confirmation of that fact. Many underwriters will not rely upon the agent presenting a driver's license of the principal unless the principal is also present.

MYTH 15: The property is not homestead unless the property owner has obtained a homestead exemption for ad valorem tax purposes.

A. Introduction

As noted below, there are two primary advantages of a homestead. The existence of a homestead exemption for ad valorem tax purposes is irrelevant and has no bearing as to whether or not a property is a homestead for purposes of protection against general creditors.

B. Advantages of a Homestead

There are two primary advantages for a person who establishes a Texas homestead:

1. Protection From General Creditors

The primary advantage of a Texas homestead is that the homestead is exempt from all liens except those that are constitutionally permitted. [Tex. Const. art. XVI §50; §41.001, TPC]. This means the homestead is exempted from a forced sale by general creditors.

2. Exemption For Ad Valorem Tax Purposes

The second advantage of a Texas homestead is the availability of a homestead exemption that reduces the amount of local ad valorem taxes owed by the owner. [§11.13, Texas Tax Code].

C. Obtaining the Homestead Exemption

1. Exemption For Ad Valorem Tax Purposes

To obtain a homestead exemption for ad valorem tax purposes the owner must file an exemption application with the tax appraisal district within the time period set forth in the Texas Tax Code. [§11.43, Texas Tax Code].

2. Protection From General Creditors

A formal written homestead designation is not required to establish a Texas homestead as to protection against general creditors. To establish a homestead for protection against general creditors a person must:

- Intend that the property be the homestead and: (i) show overt acts of usage and occupancy; Wilcox v. Marriot, the 103 S.W. 3d 469 (Tex. App.-San Antonio, no writ); Sanchez v. Telles, 960 S.W. 2d 762 (Tex. App.-El Paso 1997, pet. denied); or (ii) engage in preparatory acts toward the actual occupancy within a reasonable and definite time. Gregory v. Sunbelt Savings, FSB, 835 S.W. 2d 155 (Tex. App.-Dallas 1992, writ denied; and

- Own the real property or have a present possessory estate (leasehold, tenant at will, equitable interest, etc.) in the real property. Inwood North Homeowners' Association v. Harris, 736 S.W. 2d 632 (Tex. 1987).

MYTH 16: Underwriters will always rely upon a homestead designation and disclaimer.

A. Introduction

This Myth is based upon a misconception of homestead law. The law regarding a homestead destination and disclaimer is summarized below.

B. Homestead 101 Regarding a Homestead Designation and Disclaimer

1. Claimant Owns More Than the Homestead Allowed Allotment

If a claimant owns more than the allowed homestead allotment, the claimant may execute and record a voluntary designation of the property claimed as homestead, and third parties and creditors whose rights are created subsequent to the designation may rely upon the designation. [§41.005, TPC].

2. Claimant Owns Less Than the Homestead Allowed Allotment

If the owner owns less than the allowed homestead allotment, an owner is not estopped to claim homestead as to land disclaimed as homestead in a previously executed homestead designation/disclaimer. In Re Skinner, 74 B.R. 571 (Bankruptcy N.D. Tex. 1987).

3. Constitutional Amendment

Effective January 1, 1998, the Texas Constitution was amended to provide as follows:

"A purchaser or lender for value without actual knowledge may conclusively rely upon an affidavit that designates other property as the homestead of the affiant and that states the property to be conveyed or encumbered is not the homestead of the affiant." [Texas Constitution §50 (d), Article XVI].

Underwriting Note: It is unclear whether or not the above constitutional amendment would overrule prior case law and result in a voluntary homestead designation/disclaimer as being binding upon a creditor where the homestead claimant owns less than the homestead allowed allotment.

Additionally, note that to get the protection afforded by the constitutional amendment, a homestead designation and disclaimer is required. Note also that the limitation of "without actual knowledge" in the constitutional amendment requires one to exercise due diligence to confirm that the representations in the designation/disclaimer appear to be true.

MYTH 17: If there are two purchase money loans (deeds of trust), Rate Rule R-5 for the Owner's Policy and the first Loan Policy, and Rate Rule R-7 applies for the second Loan Policy.

A. Introduction

When Loan Policies covering first and subordinate liens are issued simultaneously, title personnel often apply the wrong rate rule in the calculation of the applicable premiums.

B. Which Rate Rule is applicable?

a. Rate Rule R-7

Rate Rule R-7 only applies when no Owner's Policy is being issued simultaneously with the multiple Loan Policies.

Under R-7, the premium for the first lien policy shall be basic premium rate based upon the amount of the combined liens. The premium for the second lien policy shall be $5.00.

b. Rate Rule R-5

Rate Rule R-5 applies when an Owner's Policy is being issued simultaneously with multiple Loan Policies.

Under R-5, the premium would be contacted as follows:

- The premium for the Owner's Policy would be calculated based upon the basic premium rate;
- If the aggregate amount of the multiple Loan Policies do not exceed the amount of the Owner Policy, the premium for each Loan Policy shall be $100.00;
- If the aggregate amount of the multiple Loan Policy exceeds the amount of the Owner's Policy, the premium for the Loan Policies shall be the [basic

premium rate (based upon the combined amount of both liens) plus $100.00 for each Loan Policy] less the [basic premium rate for the Owner's Policy].

MYTH 18: The title insurance regulations prohibit the deletion of the general "parties in possession exception unless the title company performs an inspection of the property.

A. Introduction

This myth is based upon a misconception or misreading of the procedural rule that governs the general "parties in possession" exception. The procedural rule (P-3) addresses the inclusion of the general "parties in possession" exception in the policy rather than the deletion of the general exception.

The general "parties in possession" exception is governed by Procedural Rule P-3. P-3 provides that a title policy may not contain the general "parties in possession" exception unless the Insured "executes a written instrument stating that the Insured waives inspection of the property and that the Insured is satisfied to accept the policy subject to such general exception".

B. Underwriting Issues: As a general rule, many underwriters will agree to remove the general "parties in possession" exception-based upon:

- And inspection of the property that reveals no evidence of any "parties in possession "or "tenants in possession under unrecorded leases"; or

- A satisfactory affidavit/indemnity that represents that there are no parties in possession or tenants in possession under unrecorded leases.

MYTH 19: A quitclaim deed is not sufficient to convey title to the property, and no title company will never accept a quitclaim deed.

A. Introduction-Deeds 101

To better understand the effect of a quitclaim deed on a real estate title, a basic understanding of deeds is required. A deed is a written instrument by which an owner transfers ownership of his land to another. The deeds most often utilized in a real estate transaction are described below:

1. General Warranty Deed

The most widely used deed is the general warranty deed. In fact, most contracts (residential) generally require that the seller/grantor convey the land to the grantee via a general warranty deed. As the general warranty deed uses the words "grant or convey", the law implies that the grantee gets two (2) warranties from the grantor.

[§5.023, Texas Property Code].

a. Covenant of seizin

Under this covenant, the grantor warrants the prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee. [§5.023 (a) (1), Texas Property Code].

b. Covenant against encumbrances

Under this covenant, the grantor warrants that at the time of the execution of the conveyance the land is free from encumbrances. [§5.023 (a) (2), Texas Property Code].

Additionally, when the general warranty deed is utilized, the grantor warrants not only that the title is free from encumbrances, but also that he is well seized of the premises and that this covenant is through his entire chain of title. In other words, the grantor warrants that the conveyed property is free of any encumbrances created by the grantor or any predecessor in title.

2. Special Warranty Deed

The special warranty deed has essentially the same language as a general warranty deed except that the covenant/warranty against encumbrances is limited to all persons claiming the title "by, through, or under him (grantor), but not otherwise." In other words, the grantor only warrants that the land is free from encumbrances created by the grantor or encumbrances created during the grantor's ownership of the land. The grantor does not warrant that the land is free from encumbrances created by any predecessor in title.

3. Deed Without Warranty

A deed without warranty is a deed that operates as a conveyance of the land, but the grantor does not provide any covenant of warranty. Although there is little case law regarding the legal effect of a deed without warranty, it is generally believed that a deed without warranty will provide the buyer with the benefit of the "after acquired title doctrine" and the "bona fide purchaser for value doctrine".

4. Quitclaim Deed

a. A quitclaim deed is a deed where the grantor only conveys the right, title, and interest of the grantor and does not provide any covenant of warranty. It does not purport to convey the land itself, but only whatever interest the grantor may have in the land. In determining the nature of a conveyance, the instrument as a whole will be considered, and if it purports to convey the land itself, rather than a chance or right of title thereto, it will be deemed a conveyance of land rather than a mere

quitclaim. Roswurm v. Sinclair Prairie Oil Co., 181 S.W. 2d 736 (Tex, Civ. App., Fort Worth 944, writ ref'd w.o.m.).

Historically, quitclaim deeds have had a valuable use in clearing up clouds on title. Notwithstanding the disadvantages of a quitclaim deed (see discussion below), a quitclaim deed is a valid deed and the grantee will obtain whatever right, title and interest that the grantor happens to have in the land.

b. Disadvantages of a Quitclaim Deed

There are five disadvantages of a quitclaim deed from a legal and title insurance perspective:

- The deed does not provide any covenant of warranty to the grantee;
- The deed does not convey "after acquired title"-that is title acquired after the date of the execution and delivery of the quitclaim deed;
- A quitclaim deed gives notice to the grantee that the title to the property may not be clear, resulting in the grantee not being held to be "bona fide purchaser for value";
- An adverse possessor cannot rely upon a quitclaim deed as a basis for claiming title to property under the Texas five (5) year adverse possession limitations statute [§16.025, Texas Civ. Prac. & Rem. Code, Porter v Wilson, 389 S.W. 2d 650 (Tex. 1965)];
- The deed is one of the most often forged conveyance instruments in the title industry;

B. Underwriting Issues Regarding a Quitclaim Deed:

Title companies favor warranty deeds as they give them subrogation rights against the seller/grantor and allows the buyer the benefit of the "after acquired title doctrine" and the "bona fide purchaser for value doctrine".

The underwriting issues regarding a quitclaim deed are as follows:

- As a general rule, a quitclaim deed will not be accepted as the primary conveyance instrument in the insured transaction;
- A quitclaim deed that appears in the prior chain of title will generally be accepted as a valid conveyance if:
    - The grantor of the quitclaim deed appears to be the owner of record of the land at the time of the execution of the quitclaim deed; and

- There is no evidence to indicate that the prior quitclaim deed was a forgery or the subject of a fraud; and

- There is no evidence of any "off record title defects";

- On a case-by-case basis, some underwriters may accept a quitclaim deed in the insured transaction for purposes of removing a cloud upon the title.

Underwriting Note: On a case-by-case basis, where an underwriter agrees to insure a transaction where the primary conveyance instrument in the transaction is a deed that provides no warranties to the grantee, that underwriter is likely to require a deed without warranty rather than a quitclaim deed.

MYTH 20: MERS may not be shown as the insured in a Loan Policy under any circumstance.

A. Introduction

Mortgage Electronic Registration Systems, Inc. (MERS) has been in existence since the late 1990's as a clearinghouse for the securitized lending business. When a deed of trust is registered with MERS, under what circumstances, if any, may MERS be shown as a named Insured in a Loan Policy?

B. Underwriting Issues:

Most, if not all, underwriters prohibit naming MERS as the sole Insured in any Loan Policy. The following forms are the only approved ways to name the Insured on Schedule A when the deed of trust is held of record by MERS as nominee, either by a specific assignment, declaration, or otherwise in the insured deed of trust:

- "[Name of Lender], and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12 (c) of the Conditions"

- "[Name of Lender], and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12 (c) of the Conditions, appearing of record as Mortgage Electronic Registration Systems, Inc., as nominee" or

- "[Name of Lender] and Mortgage Electronic Registration Systems, Inc., solely as nominee for the Lender, and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12 (c) of the Conditions"