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Houston, Texas**Perfecting and Defending Your Mineral Title:
Timely Recording of Documents, Pursuing Curative,
and Surviving Title Challenges****Celia C. Flowers
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PROTECTING YOUR MINERAL AND OTHER RELEVANT REALPROPERTY INTERESTS IN TEXAS

How one protects the purchase of real property differs from country to country and state to state. Such protection has been the source of much controversy and litigation since the inception of individual property ownership. And, although the various states in the United States have adopted some method of providing protection, legal conflicts continue to arise. Thus, the body of law surrounding real property ownership remains dynamic, and with the recent oil and gas industry boom, problems with legal title and ownership to mineral rights have become particularly troublesome.

I. THE RECORDING STATUTES

Generally, upon delivery of an instrument transferring a right in real property, the purchaser takes a copy of the instrument to a county office to be recorded into the public land records. The failure to record such an instrument has no effect on the validity of the document as between the buyer and seller. However, if the instrument is not recorded, the buyer may find his or her interest is legally inferior to that of a subsequently acquired interest in the same property held by a third party.

To encourage purchasers of real property to record their deeds, the American Recording Acts (more commonly known today as "recording statutes") were developed. From a policy perspective, these legislative provisions 1) serve to reward the timely recording of a real property interest; and 2) create harsh and adverse consequences for those who fail to record their interest.

In practical terms, the recording statutes provide a means for giving constructive notice of real property ownership. Recordation itself, however, will not cure defects in a conveying instrument, which may be void for lack of delivery, forgery, or fraud. Likewise, a person responsible for the filing a recording instrument is under a duty to examine the instrument to verify that proper entries have been made, or the instrument may fail for other reasons.

Over the years, the individual states have adopted some statutory form for recording real property interests. Currently, there are three types of recording statutes used in the United States:

- A. Notice -- Under a notice statute, a subsequent bona fide purchaser prevails over an earlier purchaser who did not record if the subsequent purchaser has no actual or constructive notice of the prior property transfer at the time of his purchase. Thus, the subsequent bona fide purchaser prevails over the prior interest whether the subsequent purchaser records or not. As far as the subsequent purchaser is concerned, there is no premium on a race to the recorder's office --- priority is determined upon the status of the purchaser at the time the deed or mortgage is acquired.
- B. Race -- Under a race statute, the first to record wins. Thus, priority is established solely by the order in which competing claimants record. And, no conveyance or other instrument is valid as against purchasers (including lien creditors or other parties) for

valuable consideration but from the time of recordation. Accordingly, a subsequent purchaser need not be bona fide and without notice since he or she will prevail if he or she records first.

- C. Race-Notice -- Under a race-notice statute, subsequent purchasers who purchase without notice are protected against prior purchasers who fail to record as long as the subsequent purchaser records first. The race-notice statute combines the essential features of both the notice and race type recording statutes. In essence, for a subsequent party to prevail in a race-notice jurisdiction, he or she must be both a bona fide purchaser for value without notice of the prior interest and record first.

Texas is a notice state.¹ Accordingly, when purchasing real property in Texas, one cannot assume that their interest has priority simply because it was recorded first.² Deeds, mineral leases, assignments, and the like, which are not filed of record, or which, though filed, are not properly acknowledged, bind the parties to the transaction and their heirs. Unrecorded instruments or improperly acknowledged instruments can bind lien creditors with notice as well. Likewise, subsequent purchasers or lenders who have notice, who do not furnish current consideration, or who do not acquire their interest in good faith, will be bound by an unrecorded or improperly acknowledged real property instrument.³

Nonetheless, the Texas legislature has enacted various recording statutes that either “allow” for recording, or “require” recording under certain circumstances. For instance, Texas Property Code Section 12.001 states that any instrument concerning real property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law.⁴ Furthermore, Texas Property Code Section 11.001 requires an instrument relating to real property be eligible for recording and must be recorded in the county in which a part of the land is located in order for the recording to be effective.⁵

In addition, Texas Property Code Section 13.001 (the "must" recording statute) provides that conveyances of real estate and mortgages will be void as to creditors and as to subsequent purchasers for valuable consideration without notice unless acknowledged, sworn to, or proved according to law and filed for record.⁶ There are numerous instruments that must be filed of record in order to be effective against subsequent purchases, lenders, or lien creditors, including:

¹ TEX. PROP. CODE §13.001 (a): A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

(b)The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

(c)This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business & Commerce Code.

² *Id.*

³ TEX. PROP. CODE §13.001; *Watkins v. Edwards*, 23 Tex. 443 (1859); *Drake v. McGalin*, 626 S.W. 2d 786 (Tex. App.---Beaumont 1981, no writ).

⁴ TEX. PROP. CODE §12.001.

⁵ TEX. PROP. CODE §11.001.

⁶ TEX. PROP. CODE §13.001.