



## Priority Issues in a Chain of Title and the Latest Colorado Supreme Court Decision

The chain of title may be defined as a time line beginning with the first recorded document (usually a receiver's certificate or patent) and ending with the most current and recently recorded document in the proper clerk and recorder's office in the county in which the subject property is located.

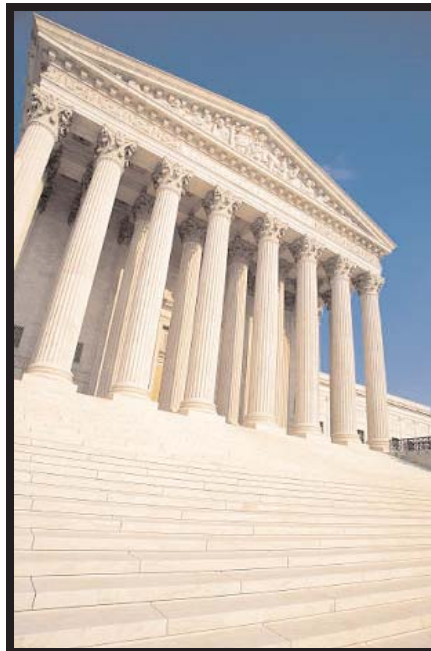
Therefore, every entry in a chain of title has relative position to earlier and later recorded entries. This is especially important to the lender as interest rates usually are based on the lender's risk position in a chain of title. It is also important for ownership rights to be established possibly determining who would have paramount title. For instance, a lender, if not paid can foreclose and wipe out junior liens recorded later in the chain of title when proper notice is given to junior interests and those same junior interests do not exercise their cure or redemption rights. This logic within the recording statutes bases priority of each lien on its relative recorded position. That is why Colorado is a "race notice to the courthouse" State...it is a race to the county building and he who gets to the clerk and recorder first and records a lien has a senior position to someone who records a minute later.

This concept of recordation sequencing is usually

very simple to understand...the recording date simply determines one lien's priority over another lien recorded later. But what makes priority issues more involved is when our legislature passes laws and the courts interpret those laws providing certain lien holders special privileges within a chain of title.

Examples of this would be the following:

1. The *ad valorem* real property tax by law is the number one priority lien on all real property in Colorado
2. An unpaid HOA lien (at least the six unpaid months prior to the start of a foreclosure) and the costs of enforcement take on "super lien" capacity and its priority position in a chain of title is only subject to the *ad valorem tax*
3. A mechanic's lien priority position in a chain of title reverts back in time based upon when work was first performed by the first contractor by law



From a case law perspective, in December 2005 the Colorado Supreme Court (Hicks v.

Londre...Case No. 04SC741) affirmed an appellate court decision as it relates to priority issues of earlier recorded judgments and a later recorded purchase money deed of trust. The court of appeals decision

## MARCH 2006 NEWSLETTER

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gave priority to a later recorded purchase money deed of trust over a judgment creditor previously perfecting its judgment lien by recording a transcript of judgment. The Appeals Court did this based on the doctrine of equitable subrogation regardless of the fact that the lender had constructive notice of the earlier recorded judgment lien by virtue of Colorado's recording act at C.R.S. 38-35-108. This holding gave priority to the subsequently recorded purchase money deed of trust to the extent of the amount of its loan that went towards the payment of the judgment debtor's prior mortgages.

Another case law example of a lien priority switch over the recording sequence would be Whalen v. Shepler. Here the judgment creditors of a husband sought an equitable lien on the wife's property based on a claim of fraudulent transfer by the husband to the wife attempting to convey out the husband's interest in title before the judgments were



recorded. The court gave the judgment creditors an equitable lien position and further decided that the senior priority of those equitable liens would go not to the first recorded judgment lienor but to the first who recorded the notice of lis pendens (commencement of action) on the wife's property.

In light of Colorado case law, Security Title will not perform a name search on a buyer acquiring an interest in real property and executing a purchase money loan. The purchase money loan will take priority over earlier recorded judgments against the buyer. However, when Security Title insures a second loan, (*i.e.*, an "owner carry back"), a name search must be performed because the second lender does not have the benefit of the latest Supreme Court ruling. Therefore, a title insurer would perform a name search on the buyer if asked to insure the second to be in fact in a second lien position.