

KANSAS LAND TITLE SCHOOL

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COURSE A

COURTS

Materials By:

James A. Leonard
Vice President/Regional Counsel
Fidelity National Title Group

&

Annie Malave
Assistant Vice President/Underwriting Counsel
Fidelity National Title Group

Presentation By:

Annie Malave
Assistant Vice President/Underwriting Counsel
Fidelity National Title Group

OUTLINE

<u>Module No.:</u>	<u>Topic:</u>
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MODULE 1

The Court System in Kansas

When we talk about the court system in Kansas, we are generally talking about three types of courts: Municipal Courts, the state District Court and U. S. District Court for the District of Kansas.

Municipal: Hear and determine cases involving violations of the ordinances of the city.
K.S.A. 12-4104

District Courts: Jurisdiction of the District Court is pretty broad: K.S.A. 20-301 provides that “there shall be in each county a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal, unless otherwise prohibited by law, and shall have such appellate jurisdiction as prescribed by law.

K.S.A. Chapter 60 governs the procedure to be used in the District Court, except for limited actions brought under Chapter 61. Further, Chapter 38 sets forth the procedure in juvenile cases, Chapter 59 is for probate proceedings and Chapter 22 governs criminal actions.

K.S.A. 61-2802 sets forth the types of cases which may be brought under Chapter 61. Chapter 61 may govern actions which:

- i. seek judgment for an unsecured debt which arises out of a contract for the providing of goods, services or money, without limitation as to the amount claimed;
- ii. seek judgment for a secured debt which arises out of a contract for the providing of goods, services or money, where the amount claimed is less than \$25,000;
- iii. seeks judgment where the claim does not arise out of a contract and the amount claimed is less than \$25,000.

Chapter 61 actions CANNOT be brought for (among other things):

- a. actions for specific performance of contracts for real estate;
- b. actions in which title to real estate is sought to be recovered or in which an interest in real estate is sought to be established;
- c. actions to foreclose real estate mortgages or to establish and foreclose mechanic’s liens
- d. divorce, separate maintenance or child custody;

e. other prohibitions: declaratory actions, class actions, injunctions, receiverships, etc.

Within Chapter 61, there is also the Small Claims Procedure Act (61-2701, et seq.). The purpose of the Small Claims Act is to provide a forum for the speedy trial of small claims. The jurisdictional limit is \$4,000. KSA 61-2703.

United States District Court for the District of Kansas: Generally, cases involving federal questions (i.e. actions arising under the Constitution, laws or treaties of the US, 28 U.S.C. 1331; Bankruptcy, 28 U.S.C. 1334; actions against foreign states, 28 U.S.C. 1330; actions brought by the US, 28 U.S.C. 1345; and actions where the amount in controversy is in excess of \$75,000 AND is between citizens of different states (Diversity of citizenship) 28 U.S.C. 1332; and some specific types of cases: maritime cases, patents and trademarks and civil rights.

Appellate Courts:

Federal Courts: US District Court → 10th Circuit Court of Appeals* → US Supreme Court

*10th Circuit covers KS, OK, CO, NM, WY and UT

State Courts: District Courts → Kansas Court of Appeals → Kansas Supreme Court → US Supreme Court

Case Progression:

Litigation is a process with identifiable steps that ends with a final judgment. Some final judgments are appealable and if appealed are not considered final until the appellate court rules.

All cases, regardless of the type (civil, criminal, probate, etc.) follow the same process. They may have different terms and may end with different results (judgment, sentence, restitution, order for distribution, letters, discharge, etc.) but the overall process is similar.

Petition/Complaint: The document that begins the action. This document must identify the parties; identify the chapter that the action is being brought under; must contain a brief statement of facts and a request for relief.

Service: No matter what chapter the matter is brought under, all the documents (petition; motions; hearing dates; orders; discovery requests; judgments etc.) must be served (delivered) to all the parties in the litigation.

There are several methods of service that are authorized by the Kansas statutes (KSA 60-303):

- In Person: Typically achieved by the local Sheriff or personal delivery by the Party
- Certified Mail: Depending on the type of litigation, this may be with or without a return receipt
- Publication (KSA 60-307): Notice of the litigation can be published in a newspaper in the County in which the property of the Defendant is located for a length of time.

Answer/Counterclaim: This is the Defendant's response to the Petition. They respond to each allegation in the Petition. In the Answer, the Defendant can deny the allegations and can assert various affirmative defenses. The Defendant can also assert allegations against the Plaintiff, which are known as Counterclaims. The Plaintiff will then have to respond the Counterclaims with an Answer of their own.

Motions: The parties to the litigation can file Motions when they want the Court to take action or make a decision on a specific issue. Motions must make reference to the statute regulation or other procedural authority upon which the party's request is based. A Motion must contain a statement of facts and legal authority which supports the Party's Motion and the specific relief that the Party is seeking, including whether they want to have oral argument before the Court. There are a wide variety of motions that can be requested, such as discovery motions, motion for summary judgment, motion to dismiss, etc.

Trial/Hearing: The parties can request a Jury Trial or a Bench Trial.

Judgment: A judgment is the final determination of the parties' rights in an action (KSA 60-254). However, the decision of the trial court does not become final until the Appeal period has run.

Appeal: In Kansas, a Notice of Appeal must be filed within 30 days of judgment being entered. (KSA 60-2103).

MODULE 2

Judgment Liens

K.S.A. 60-2202 - Judgment Lien Statute:

K.S.A. 60-2202(a):

“Any judgment rendered in this state by a court of the United States or by a district court of this state in an action commenced under chapter 60 of the Kansas Statutes Annotated shall be a lien on the real estate of the judgment debtor within the county in which the judgment is rendered...the lien shall be effective from the time at which the petition stating the claim against the judgment debtor was filed but not to exceed four months prior to the entry of the judgment. An attested copy of the journal entry of the judgment...may be filed in the office of the clerk of the district court of any other county upon payment of the fee prescribed...and the judgment shall become a lien on the real estate of the debtor within that county from the date of filing of the copy.”

Effective Date of the Lien: Easy way to remember is that the judgment will relate back to either the filing date of the petition or 4 months, whichever date is later.

Out of County Judgments: A judgment rendered in one county will not be a lien against the property of the judgment debtor located in another county unless and until an attested copy of the judgment is filed in the other county, and the appropriate filing fees have been paid. It will then be a lien against the debtor’s property in the other county as of the date of the filing of the copy in that county.

Example: Judgment entered May 1, 2012 in Sedgwick County – lien relates back 4 months to January 1, 2012 as to debtor’s property in Sedgwick County. Debtor also owns property in Miami County. Judgment Creditor files an attested copy of the judgment in Miami County on June 1, 2012. The judgment becomes a lien on the debtor’s Miami county property on June 1, 2012 - no relation back to the date judgment was entered in Sedgwick County or 4 months.

Federal Judgments: The same rules apply.

Example: Judgment entered in the US District Court in Wyandotte County on May 1, 2012 – lien relates back 4 months to January 1, 2012 as to debtor’s property in Wyandotte County. Debtor also owns property in Johnson County. Judgment Creditor files an attested copy of the judgment in Johnson County on June 1, 2012. The judgment becomes a lien on the debtor’s Johnson County property on June 1, 2012 - no relation back to the date judgment was entered in US District Court or 4 months.

Foreign Judgments: A foreign judgment may be enforced in Kansas in two ways. The judgment creditor may either bring an action to enforce the foreign judgment in the district court or he may register the foreign judgment by complying with the Uniform Enforcement of Foreign Judgments Act (“UEFJA”) in KSA 60-3001, *et seq.* If a foreign judgment is properly recorded or registered, it becomes a lien against the judgment debtor's real property situated in the county in which it was recorded or registered as though the judgment had been rendered by a district court of Kansas. A foreign judgment registered in accordance with the UEFJA is considered a Kansas judgment as of the date of the Kansas filing. *Alexander Const. Co. v. Weaver*, 3 Kan. App. 2d 298, 594 P.2d 548 (1979).

Suits against State or Municipal Employees:

A suit against an employee of the state or a municipality for an alleged wrong by the employee while acting within the scope of the employee's employment does not create a lien against the employee's property prior to judgment. A judgment against an employee becomes a lien upon the employee's property at the time of rendition only if it is found that either the employee's negligent or wrongful act or omission occurred when the employee was acting outside the scope of the employee's employment or the employee's conduct which gave rise to the judgment was because of actual fraud or actual malice of the employee. KSA 60-2202(c). **See Module 2 – Attachment.**

Chapter 61 judgments: Note K.S.A 60-2202(a) references only actions commenced under Chapter 60.

K.S.A. 60-2202(b)

“Any judgment rendered by a district court of this state in an action commenced under the code of civil procedure for limited actions shall become a lien on the real property of the judgment debtor when the party in whose favor the judgment was rendered pays the fee prescribed ...and the clerk of the district court enters the judgment in the appearance docket. The lien shall become a lien only upon the debtor's real property that is located in the county in which the filing is made, but a filing may be made in any county in which real property of the judgment debtor is located.”

Chapter 61 judgments only become liens on the judgment debtor's real property when the judgment creditor pays the appropriate fee to have the Chapter 61 judgment registered with the District Court as a Chapter 60 judgment. Once this is done, the judgment will be a lien on the debtor's property located within the county, but the creditor may file the judgment in other counties as well. No relation back to the Chapter 61 judgment date or 4 months.

Dormant Judgments/Revivor - K.S.A. 60-2403 and 2404

K.S.A. 60-2202 provides that “The lien shall cease to be a lien on the real property of the judgment debtor at the time provided in Article 24 of this Chapter.”

Dormancy of judgments is governed by KSA 60-2403. The statute was amended, effective July 1, 2015 as follows:

60-2403. (a)(1) *Except as provided in subsection (b)-~~or (d)~~, if a renewal affidavit is not filed or if execution, including any garnishment proceeding, support enforcement proceeding or proceeding in aid of execution, is not issued, within five years from the date of the entry of any judgment in any court of record in this state, including judgments in favor of the state or any municipality in the state, or within five years from the date of any order reviving the judgment or, if five years have intervened between the date of the last renewal affidavit filed or execution proceedings undertaken on the judgment and the time of filing another renewal affidavit or undertaking execution proceedings on it, the judgment, including court costs and fees therein shall become dormant, and shall cease to operate as a lien on the real estate of the judgment debtor. When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the judge to release the judgment of record when requested to do so.*

(2) *A “renewal affidavit” is a statement under oath, signed by the judgment creditor or the judgment creditor’s attorney, filed in the proceedings in which the judgment was entered and stating the remaining balance due and unpaid on the judgment.*

(3) *A “support enforcement proceeding” means any civil proceeding to enforce any judgment for payment of child support or maintenance and includes, but is not limited to, any income withholding proceeding under the income withholding act, K.S.A. 2014 Supp. 23-3101 et seq., and amendments thereto, any contempt proceeding and any civil proceeding under the uniform interstate family support act, K.S.A. 2014 Supp. 23-36,101 et seq., and amendments thereto.*

(b) *Except for those judgments which have become void as of July 1, 2007, no judgment for the support of a child shall be or become dormant for any purpose except as provided in this subsection. Except for those judgments which have become void as of July 1, 2015, no judgment for court costs, fees, fines or restitution shall be or become dormant for any purpose except as provided in this subsection. If a judgment would have become dormant under the conditions set forth in subsection (a), the judgment shall cease to operate as a lien on the real estate of the judgment debtor as of the date the judgment would have become dormant, but the judgment shall not be released of record pursuant to subsection (a).*

(c) The time within which action must be taken to prevent a judgment from becoming dormant does not run during any period in which the enforcement of the judgment by legal process is stayed or prohibited.

~~(d) If a renewal affidavit is not filed or if execution is not issued, within 10 years from the date of the entry of any judgment of restitution in any court of record in this state, the judgment, including court costs and fees therein shall become dormant, and shall cease to operate as a lien on the real estate of the judgment debtor. Except as provided in subsection (b), when a judgment becomes and remains dormant for a period of two years, it shall be the duty of the judge to release the judgment of record when requested to do so.~~

Judgments become dormant five years after their rendition (~~10 years for judgments for restitution~~) if no execution is issued or renewal affidavit is filed during that time. If enforcement is stayed by the debtor's bankruptcy, the period of time the stay was in effect is not counted toward the five years. When a judgment becomes dormant, it is no longer a lien on the debtor's real estate. A judgment may be revived within two years after having become dormant and is thereupon reconstituted as a lien. After it has been dormant for two years, it may no longer be revived. A conveyance by the debtor of his land during dormancy of a judgment is free from the lien of the judgment.

Renewal Affidavit: A statement under oath, signed by the judgment creditor or the judgment creditor's attorney, filed in the proceedings in which the judgment was entered and stating the remaining balance due and unpaid on the judgment.

Reviving a dormant judgment also revives the judgment lien against real estate, but the priority of the lien dates only from the date of the revival.

Child Support Judgments:

Old law:

Child support judgments do not become extinguished unless they have "remained dormant for the period prior to the child's emancipation plus two years." K.S.A. **60-2403(b)(1)**. [Gardner v. Gardner, 1996, 22 Kan.App.2d 314, 916 P.2d 43](#), review denied.

Although child support judgments against father became dormant after five years, they could not be extinguished until two years after child's emancipation. K.S.A. **60-2403(a)(1), (b)(1)**, [60-2404. Matter of Marriage of Williams, 1995, 21 Kan.App.2d 453, 900 P.2d 860](#).

Significant changes in KSA 60-2403 regarding dormancy of child support judgments were made in 2007. General rule is now that a child support judgment may become "dormant" and cease to be a lien after 5 years, however, it may not be extinguished based on passage of time. In other words, it can be "revived" beyond the 2-year window.

Restitution Judgments –

K.S.A. 60-4301 provides that a certified copy of a judgment for restitution entered in a criminal case may be filed in the office of the clerk of the district court as a civil judgment.

Old subsection (d) provided for a 10-year statute of limitations before becoming dormant, and then after 2 years, the judgment became barred. With the new changes to 60-2403, these judgments are now governed by subsection (b), and now have a 5 year limitation period before going dormant. Like Child support judgments, they may not be extinguished based on the passage of time, and may be revived beyond the 2-year window.

Lis Pendens - K.S.A. 60-2201, 60-2202 and 60-2203a

The Lis Pendens statutes, 60-2201, 2202 and 2203a, are used to charge third persons with notice that a suit is pending against the defendant. A pending suit in Kansas creates a certain “cloud” on the subject matter of the suit and also a “cloud” on the real estate of the defendant.

K.S.A. 60-2202: The lien actually becomes operative lis pendens, or prior to the entry of judgment, since a judgment lien will relate back to the date of petition or 4 months from the entry of the judgment.

K.S.A. 60-2201:

60-2201(a) provides that the filing of a petition charges third persons with notice of the case and that the third person cannot acquire interests in the subject matter of the case as against the plaintiff’s claim. In other words, if real property is the subject matter of the suit (i.e. partition, quiet title, mortgage foreclosure, or specific performance of a real estate contract) the defendant cannot successfully sell the property.

K.S.A. 60-2201(b) provides that when the subject of the action is real property situated in two (2) or more counties, the filing of the petition in the district court of one county shall not be held to impart notice to persons acquiring an interest in the real property situated in another county, except from the time the plaintiff in such action shall pay a filing fee of five dollars (\$5) and file for record with the register of deeds of such other county, a verified statement setting forth the nature of the action, the court in which it is pending and a description of the real property sought to be affected thereby. Once final judgment is entered in the action, the plaintiff in such action shall file a copy of such judgment with the register of deeds.

K.S.A. 60-2203a:

When the subject of the action is not real property, K.S.A. 60-2203a allows a plaintiff to give notice of its suit in any other county by filing a verified statement setting forth the parties, the nature of the action, the court in which it is pending and the relief sought, with the clerk of the district court of the other county. This will provide the plaintiff with the same lien rights in that county as if the suit were pending in the county.

MODULE 3

Homestead

Article 15, Section 9 of the Kansas Constitution reads as follows:

"A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, *shall be exempted from forced sale under any process of law*, and shall not be alienated without the joint consent of husband and wife, when that relation exists; *but no property shall be exempt from sales for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon*: Provided, That provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." (Emphasis added.)

The homestead exemption can also be found at K.S.A. 60-2301.

Nonconsensual Liens:

Other than liens for taxes, or for the payment of obligations contracted for the purchase of the homestead premises, or for the erection of improvements on the premises, no other nonconsensual lien, established under state law, even if against both spouses, may be imposed against the homestead.

The homestead exemption may not be asserted against warrants for state sales or income taxes pursuant to statutory provision (KSA 79-3235; 79-3617), presumably under the rationale that they are "taxes" as referred to in the constitutional provision. *Homestead Land Title Co. v. U.S.*, 249 Kan. 569, 819 P.2d. 660 (Kan. 1991). Likewise, a federal tax lien can be enforced against the homestead (*McDaniel v. Jones*, 235 Kan. 93, 679 P.2d 682 (Kan. 1984)).

Federal civil and criminal forfeiture laws can also be invoked against a homestead. This result is mandated by the supremacy clause to the Federal Constitution.

The state criminal forfeiture law is somewhat of a grey area. Former KSA 65-4135 expressly provided for the forfeiture of a homestead upon the conviction of a violation of the uniform controlled substance act. The statute provided that the convicted criminal "shall be presumed to have consented to the forfeiture of the homestead by commission of the violation." In interpreting the statute, the court in *City of Garden City v. Lot Nine, Block Three*, 16 Kan. App. 2d 174, 819 P.2d 1250 (1991), ruled that conviction of the requisite crime was a condition precedent to the forfeiture of the homestead, and, thus, was ineffective to deprive the wife and daughter of the convicted homeowner of their homestead rights. Further, the court found that husband's act of committing the crime was ineffective as to constitute the requisite joint consent.

The statute allowing for forfeiture of the homestead was ruled unconstitutional in *State ex rel. Braun v. A Tract of Land*, 251 Kan. 685, 840 P.2d 453 (Kan. 1992), in which the court held that the Legislature in enacting the statute was without authority to create a new exception to the constitutional homestead exemption.

After the repeal of the statute in 1994, the Legislature enacted K.S.A. 60-4105. This section provides for the forfeiture of an interest in a homestead, to the extent the homestead was acquired with proceeds from the conduct giving rise forfeiture. At present, no appellate decision has ruled on its application or constitutionality.

When the homestead exemption is being relied on to waive a judgment against the owner, you should follow the standard which is established under Section 13.3 of the Title Standards of the Kansas Bar Association, which says:

If the owner and family are, and have been for some time, in possession of the premises claiming them as a home, or if a surviving spouse continues in the occupancy of the premises as a home, and has claimed no other place of residence, a proper affidavit or affidavits of the owner and a disinterested third party setting forth the facts to show the homestead character of the premises, filed for record and shown on the abstract should be accepted. If the owner is not in possession of the premises, a release of the judgment lien should be procured from the judgment creditor as to the homestead property and filed of record. If such a release cannot be procured in the last instance, the homestead rights must be determined by court action.

It is particularly important that the affidavit of a disinterested party be obtained. In this case the incentive of the seller to make a false affidavit is just too great. In lieu of the third-party affidavit, however, you may accept a copy of the telephone bill (land line only, not cell phone) for the current or immediately preceding month showing telephone service in the name of the homestead claimant at the address claimed as homestead. No other utility bill will suffice. The telephone bill may be considered of equal probative value as the third party affidavit.

Pay attention to the size of the premises. The homestead exemption applies only to property is less than one (1) acre within the limits of an incorporated city or less than one hundred sixty (160) acres of farmland.

Quick Summary:

To the extent of 1 acre in a city or 160 acres outside a city, the homestead exemption may be asserted against judgments, personal property tax liens, employment security tax liens, and state criminal forfeiture actions. It may not be asserted against state sales tax, state income taxes, mechanic's liens, federal tax liens or federal civil and criminal forfeiture laws.

MODULE 4

State Tax Liens

Upon the filing of a tax warrant with the clerk of the District Court, the warrant becomes a lien as if it were a judgment against the taxpayer under KSA Chapter 60.

State Tax Liens differ from Judgment liens in certain key respects:

- 1) the homestead exemption is not available as against some state tax liens; and
- 2) they do not become dormant as judgments do.

Dormancy:

It has been held by the Kansas Supreme Court that the legislature failed to state that it intended the dormancy statute applicable to judgments (KSA 60-2403) to also apply to tax liens. *Riggan v. Director of Revenue*, 203 Kan. 129, 453 P.2d 52 (1969). Therefore, state tax liens may not be waived because of lapse of time, but are liens until satisfied, or until the taxes are uncollectible under some statute other than the judgment dormancy statute.

Income Tax Warrants – become dormant if execution is not issued within 10 years ([KSA 79-3235](#)). The lien may be revived in the same manner as dormant judgments.

Personal Property Tax Warrants – become dormant if execution is not issued within 5 years ([KSA 79-2101](#)). The lien may be revived in the same manner as dormant judgments.

Employment Security Tax – There is also a separate provision for filing an employment security tax lien notice with the register of deeds in any county, which is indexed in the financing statement record, with the name of the person against whom the lien is claimed listed as debtor. (KSA 44-717[e]). There is no basis for assuming that these liens become dormant in the manner of financing statements, however, and the statute provides that “such liens shall be and remain in full force and effect until satisfied.”

Sales Tax Warrants - become dormant if execution is not issued within 10 years ([KSA 79-3617](#)). The lien may be revived in the same manner as dormant judgments.

Before the amendment of section 79-3617 in 1989, there was no statute of limitations on sales tax liens. As such, there is a bona fide question whether the 10-year dormancy period applies to pre-existing sales tax liens.

MODULE 5

Federal Tax Liens

Homestead Exemption may not be asserted against a federal tax lien.

Duration of Lien: A federal tax lien is effective for a period of ten years from the date of assessment, unless it is refiled during the one-year period ending thirty days after the expiration of ten years from the date of assessment or, in the one-year period ending with the expiration of ten years after the close of the preceding required refiling period.

Even though ten years and thirty days may have elapsed since the filing of a federal tax lien, it is still not prudent to waive it, since the lien period is extended if the land was the subject matter of a suit to which the United States was a party during the period, or if the United States made a levy on the land during the period. Since these events might not be disclosed by a title search, most underwriters will apply a longer period before considering a federal tax lien barred by limitations. In addition to the age of the notice, other factors to consider are the amount of the lien, the probability of attempted enforcement, and whether the record search discloses previous extensions or other activity.

Voluntary termination of a tax lien by the IRS

A tax lien may be terminated by reason of the United States issuing any of the following, which (except for the document described at “e”) then must be filed for record:

- a. Certificate of Release - issued if the tax has been paid has become legally unenforceable or a satisfactory bond has been furnished to insure payment of the tax;
- b. Certificate of Discharge - issued as to a specific parcel of land if other land is adequate to pay the tax, a part payment of the tax is made in return for the discharge, the interest in the land is discharged by reason of the land being valueless, or to permit sale if the tax lien is being transferred, in effect, to the proceeds of the sale;
- c. Certificate of Subordination - issued if monies are paid to the United States, or if the interest to which subordination is being made will have the effect of increasing the security or collectability of the lien. The issuance of a certificate of subordination, however, does not eliminate the necessity for showing the tax lien in the policy even though you may be prepared to insure specifically that the tax lien is inferior to the mortgage described in Schedule A;
- d. Certificate of Non-Attachment – issued to clarify confusion as to the identity of the person affected by the lien.
- e. Conditional Commitment to Discharge Certain Property from Federal Tax Lien – a commitment to issue a certificate of discharge described in “b” above. This letter

describes the property, and states that the investigation by the IRS indicates that the government's lien is valueless. It requires the addressee to furnish a copy of the recorded deed divesting the taxpayer from title, and the signed closing statement. The documentation must be furnished within 30 days of the date of the letter, or the commitment is void. (This letter need not be filed for record.) **See Module 5 - Attachment**

Termination of a tax lien by enforcement of a senior lien

The lien may be eliminated by a final, non-appealable decree of a court of competent jurisdiction in a suit to quiet title, a partition suit, a condemnation suit or a suit in the nature of an interpleader, if the United States has been made a party defendant and has been properly served.

It may be also eliminated by the enforcement of a superior lien either through judicial foreclosure and sale or execution sale. The United States must be made a party defendant if the Notice of Tax Lien has been filed of record more than 30 days prior to the date of the filing of the Complaint, and be properly served.

The United States has the right to redeem within 120 days from the date of the sale unless a longer period of redemption is specified by the applicable state law in which event the United States has the right to redeem for such longer period. There is a trap for the unwary here. It has been held that the Government's redemption right cannot be extinguished by tender of the amount of the lien with interest. Once the sale under the superior lien has occurred, the redemption right can only be terminated by the voluntary action of the IRS or by lapse of time. If it is economically feasible for it to do so, the redemption right will likely be exercised, and any interest intervening between the foreclosure of the senior lien and the redemption will be cut out. *Olympic Federal Savings and Loan Association v. Regan*, U.S. Court of Appeals, 648 F. 2d 1218 (9th Cir. 1981).

MODULE 6

Judgments in Favor of the United States

Homestead Exemption may not be asserted against a judgment in favor of the USA.

Creation of Lien: Pursuant to Title 28 U.S.C. § 3201, judgments in civil actions in favor of the United States create a lien on all real property of a judgment debtor upon the filing of a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed. In Kansas, the filing is with the register of deeds (KSA 79-2614).

Duration: The duration of the lien is 20 years, and it may be renewed for one additional 20-year period. The refiled lien relates back to the original filing date if it is filed before the expiration of the original 20-year period, and the court approves the renewal of the lien.

Release: A judgment lien is released by the filing of a satisfaction of judgment or release of lien in the same manner as the judgment is filed to obtain the lien.

A lien may also be terminated by foreclosure of a senior lien. Under Title 28 U.S.C.A. § 2410(a), Congress gives its consent for the United States to be sued in certain cases, including suits in state courts to foreclose liens. This section provides requirements on detail required in the pleading to identify the lien of the United States, and the manner of making service on the United States.

A judgment or decree in such an action has the same effect on the lien of the United States as under state law. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States has one year from the date of sale to redeem, as contrasted with the 120 day redemption period for a federal tax lien.

Lien for criminal fines

One type of U.S. lien that has recently come into focus because of increased enforcement effort is the lien granted for criminal fines and restitution orders. The United States is entitled to enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Title 18 U.S.C.A. § 3613(a). The liability to pay a fine terminates at the latest of (a) 20 years from the entry of judgment; (b) 20 years after the release from imprisonment of the person fined, or (c) upon the death of the individual fined. Title 18 U.S.C.A. § 3613(b).

A fine or an order of restitution is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is extinguished according to the preceding paragraph. Title 18 U.S.C.A. § 3613(c).

MODULE 7

Divorce

A dissolution of marriage can affect title to real estate in two ways: it can change the way in which title is held, and it can create a judgment lien on the debtor spouse's real estate.

Changing the way title is held:

A court that has both *in personam* jurisdiction over the parties and *in rem* jurisdiction over the land can change the way title to the land is held.

All states provide in their domestic relations or family codes that the property of married persons is either marital or nonmarital, and that a court, in dissolving the marriage, must set aside to each party his or her nonmarital property and divide equitably the marital property. Nonmarital property usually includes property owned by a spouse before the marriage or inherited property. It is not safe to draw your own conclusion as to whether property is nonmarital, however. Apparent nonmarital property can be converted to marital by the expenditure of marital funds to improve it, or by an act of gift from one spouse to the other that may not appear on the record. You must, therefore, refer to the decree, or property settlement agreement that is incorporated into it, to determine the status of the land as marital or nonmarital.

If the property is marital, the court may award it to either spouse, regardless of how title is held. The decree can actually operate as a transfer of the title if it purports to do so. A frequent mistake of lawyers is to require that the relinquishing spouse transfer his or her interest to the recipient spouse by quitclaim deed, and the deed is never executed. If the decree requires a deed to effectuate its property division, then there must be a deed. If the decree awards the land to one spouse with no deed requirement, the recordation of the decree suffices to vest title in the recipient spouse.

Liens created by dissolution decrees:

A money judgment in favor of one party to a marriage dissolution against the other is a lien on the debtor party's real property just like any other money judgment.

A. Alimony Judgments

Alimony (also referred to as "maintenance") may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. The question often arises to what extent a judgment for alimony is a lien on the debtor's real property. The answer depends upon the manner in which the judgment is expressed in the journal entry of judgment.

A judgment for alimony in a lump sum, even though payable in installments, is a lien for its whole amount. A judgment for periodic payments of alimony is a lien only to the extent of delinquent payments.

If the judgment is for a lump sum, it is a lien on the debtor's real estate in the county to the same extent as any other judgment rendered under KSA Chapter 60.

If the judgment is for periodic payments only, it is a lien only to the extent any payments are delinquent. If it can be determined that no payments are delinquent at the time the debtor transfers his land, the transfer is free of the lien.

The fact that a judgment is payable in installments does not prevent it from being one for a lump sum. Thus, a judgment for \$100,000, payable \$10,000 per year for 10 years, is a judgment for \$100,000, and a lien for that amount. The same would be true if the judgment were merely for \$10,000 per year for 10 years. The gross amount is ascertainable by a simple arithmetic computation. Timely payment of the installments only prevents the creditor from levying on the judgment, and does not extinguish the lien.

The addition of contingencies to the judgment, however, does prevent it from being a lump sum judgment. Thus, a judgment for \$100,000, payable \$10,000 per year until petitioner dies or remarries, is not a judgment for a lump sum, as the realization of the contingency will extinguish the liability for installments not yet due. Such a judgment is a lien only to the extent of installments due and unpaid.

Unpaid alimony may not be enforced against the debtor's homestead.

B. Child Support

It has long been the law in Kansas that where, in a divorce action, an award is decreed for periodic payments of child support, the award itself is not such a judgment as will constitute a lien upon the debtor parent's real estate in the absence of a specific provision to such effect, but the installments become final judgments on the dates they become due and unpaid, and may be enforced in the same manner as other judgments. *Brieger v. Brieger*, 197 Kan. 756, 421 P.2d 1 (Kan. 1966). Similarly, they had become dormant in

the manner of other judgments, so that installments that became due more than 5 years ago are no longer liens. See Module 2, above, on this point.

Unpaid child support may not be enforced against the debtor's homestead.

KSA 60-2202 (d), provides for the filing of a foreign support order in the state to establish a lien on the debtor's property located within the county. The statute requires at least 30 days' prior written notice be provided to the obligor and that the obligor is provided an opportunity for hearing.

C. Property Equalization Judgments

Another type of judgment often encountered in dissolution decrees is a monetary award to equalize property division. Perhaps the major marital asset is a family business or farm. It might be awarded to one spouse with the other spouse having an equalization award representing half the value. The recipient ex-spouse may be ordered to pay the award in installments over a period of years. Such judgments are liens for their full amounts. The real property of the recipient spouse cannot be transferred free of the judgment merely because no installment is delinquent. The lien can only be extinguished by a release from the creditor ex-spouse.

D. Award of Equity in the Marital Home

Another common situation is for the family home to be awarded to one party, with a provision that the share of equity of the other party be paid within a certain number of years. The recipient party wants to refinance. The equity award in favor of the relinquishing party is a lien, and must be released, or it will have priority over the refinancing lender's mortgage.

To summarize, these deferred obligations for fixed amounts are liens for their full amount. The deferral provision means only that the creditor party cannot execute on the judgment so long as the installment payments are timely made.

Sale to a third party by recently-divorced parties:

It often happens that a sale of marital real estate, usually the marital home, occurs during the pendency of the dissolution case, or shortly after its conclusion. In most of these cases, the sale is pursuant to a court order or a negotiated settlement. In these cases, when both parties are executing a single warranty deed to the purchaser, you do not need to be concerned with the provisions of the decree or property settlement agreement as far as issuance of title insurance is concerned. Since both parties that have standing to invoke the provisions of the decree or settlement agreement are warranting title to the insured, there is no risk that they could assert any post-conveyance rights based on the decree or settlement agreement. There is a potential problem for the settlement agent, however. It is extremely important that both parties are in agreement on the disbursement of settlement funds.

Foreign Decrees of Dissolution:

As to real property located in another state, the court cannot affect title to it. An order or decree purporting to do so would not be entitled to full faith and credit in the state where the real property is located. What the court can do, however, if it has jurisdiction over the parties, is to order that one party convey his or her interest to the other, and use its contempt power to enforce the order. If the party is not before the court or cannot be located to enforce the order, however, there is no alternative to bringing a proceeding in the state where the real property is located. Such an action could take several forms. It might be characterized as an action to divide property or to partition it, or if the petitioning party has a money judgment against the other party, that judgment might be registered in the state where the real property is located, and the real estate reached through execution sale under the foreign judgment.

Although a court in another state or country does not have the power to effect a transfer of an ownership interest in real property unaided by any act of the party whose ownership interest is affected, if the parties, however, have entered into a property settlement and the property settlement in itself is sufficient to transfer the interest of one spouse if a valid decree of dissolution is entered, the combination of the settlement and decree may be sufficient for your purpose. They must be recorded in the county in which the real property is located

If real property is located in the same state, but in another county than the one entering the decree of dissolution, it is necessary only to record a certified copy of the decree in the county where the real property is located, as the district court or circuit court has statewide jurisdiction.

MODULE 8

Marital Rights

Marital Rights: Rights of a spouse that are an encumbrance upon the title--not an estate or an ownership interest—of the separately owned property of a married person. The right is found in the KS probate code:

“Except as provided further, the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing The surviving spouse shall not be entitled to any interest under the provisions of this section in any real estate of which such decedent in such decedent's lifetime made a conveyance, when such spouse at the time of the conveyance was not a resident of this state and never had been during the existence of the marriage relation....” KSA 59-505.

Homestead:

Article 15, Section 9 of the Kansas Constitution reads as follows:

"A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and *shall not be alienated without the joint consent of husband and wife, when that relation exists*; but no property shall be exempt from sales for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: Provided, *That provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife.*" (Emphasis added.)

Spousal Joinder – General Rules:

BOTH SPOUSES MUST BE NAMED AS GRANTORS OR MORTGAGORS AND SIGN THE DEED OR MORTGAGE:

- When both are in title, **OR**
- When the property is their homestead

THE NON-OWNER SPOUSE IS NOT REQUIRED TO SIGN ANYTHING:

- When the land is being purchased **AND** the other spouse is the only one that will be in title. In these cases, the rights of the non-joining spouse are junior to the rights of the purchase money mortgagee.

- When the non-owner spouse does not, and never has, resided in the State. Proof of nonresidence is required, and the best evidence of it is a declaration in writing from the nonresident spouse.

If a spouse is not joining under one of the above scenarios, the mortgagor spouse should be identified as a married person, or the instrument should be silent on marital status. In either case, information should appear in the mortgage that places it in the category of instruments where spousal joinder is not required, such as a statement that “This is a purchase money mortgage,” or “Mortgagor states that his spouse, Jane Doe, has never resided in the state of Kansas.” Failure to include such a statement is not vital, however.

Common Law Marriage:

The three elements of common law marriage are: (1) capacity of the parties to marry; (2) present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.

Same-Sex Marriage

Obergefell v. Hodges, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015) - All states are now required to both license and recognize marriage between members of the same sex.

The same underwriting rules, requirements and exceptions for married persons, such as spousal joinder, marital rights, homestead, probate, tenancy, etc. should be applied to ALL married persons.

As to showing marital status in the deed or mortgage: On a purchase money mortgage, marital status doesn't have to be shown since a PMM will have priority over a non-vested spouse. Example, if Dave took title in his own name, Dave would be the only borrower named and the only person to sign the PMM. Stating Dave's marital status is not necessary. Likewise, if Dave and Jim took title. Dave and Jim would be named as borrower and would execute the PMM. No marital status would be required as it is irrelevant as to whether Dave and Jim are married to each other or are each married to different persons.

On subsequent mortgages or later conveyance deeds, the marital interest of non-vested spouses becomes an issue. Even if there are no such spouses, the absence of marital status on the mortgage or deed creates a marketability issue as to the possibility that the grantor was, in fact, married to a non-vested spouse. For now, on same-sex marriages, we are recommending that the grantors in these instruments be shown in one of the following manners:

- 1) Dave and Jim, who acquired title by deed dated _____, in which such persons are described as holding title in the following manner: [e.g., "Dave and Jim, who are married to each other, as joint tenants"], and who state that they are married to no other person.
- 2) Dave, a married man, and Jim, his spouse.

- 3) Dave and Jim, who state that they are married to no other person.
- 4) Dave and Jim, as married to each other under the state laws of {Iowa}.
- 5) Dave and Jim, a married couple.

FNF Position - The following guideline is suggested for running the names of prospective owners or borrowers:

Unless there is actual or constructive knowledge that two individuals of the same sex who are in title are married to each other, only the name of each individual must be run for judgments. If there is actual or constructive knowledge that the same sex individuals are married to each other, each individual's name must be run using the individual's surname and the surname of the individual's spouse.

For example, assume that John Smith and James Doe are in title. If you have no actual or constructive knowledge that John and James are married to each other, then only the names of John Smith and James Doe must be run for judgments. However, if you have actual or constructive knowledge, such as the indication on other instruments in the chain that they are married to each other, then the names of John Smith, James Smith, James Doe and John Doe must be searched. This would be no different than running the name of a wife, who uses a name other than the last name of her husband, under her husband's last name, as well.

Ante-Nuptial and Post-Nuptial Agreements:

We are frequently asked to waive the requirement for the signature of the non-owner spouse on a deed or mortgage instrument, based upon an ante-nuptial agreement which obviates the need for such signature. In most instances, we are unwilling to rely upon an ante-nuptial or post-nuptial agreement in which the spouse has relinquished or waived marital rights as a substitute for the spouse's joining in an instrument of conveyance, or executing a transaction-specific waiver of marital rights. In the absence of such a manifestation of consent, specific exception should be shown for that outstanding spousal interest.

We are not taking the position that the agreement is invalid. These agreements have been upheld in many court decisions. However, they have been set aside many times as well. In a sense, we're being asked to bet that this will be a successful marriage, because the attack often comes when the parties split up. One spouse attempts to set up the ante-nuptial agreement as a defense to property division claimed by the other spouse. The other spouse will often claim the ante-nuptial agreement was procured by fraud – by the failure of the first spouse to make full disclosure of his or her property interests. They are often attacked merely to gain leverage in negotiations, with the knowledge that this will invoke title insurance coverage on previously-sold real estate. In reviewing the appellate decisions in which these agreements are litigated, it can be readily seen that courts have

no hesitancy to look behind the agreement to see if there was any fraud or overreaching by one of the spouses. A tabulation of these cases will show that ante-nuptial agreements are set aside about as often as they are enforced.

MODULE 9

Purchase Money Mortgages

Priority over pre-existing liens:

Few interests enjoy greater favor in the law than that of the purchase money mortgagee. Without the contribution of the purchase money, the asset would not even exist, and the law therefore gives this creditor a priority paramount to practically every other interest, including pre-existing judgment creditors of the mortgagor, and the inchoate marital interest of his spouse.

In Kansas a purchase-money lender is afforded priority by KSA 58-2305, which says: “A mortgage given by a purchaser to secure the payment of purchase money shall have preference over a prior judgment against such purchaser.”

Exception - Federal Non-Revenue Liens:

When we think of federal liens, we think of there being basically two categories: revenue/tax liens and non-revenue liens. See training Modules 5 and 6. As to federal revenue or federal tax liens, the Internal Revenue Service has acknowledged that its pre-existing tax lien against the borrower is subordinate to the lien of a purchase money mortgage. The federal government’s recognition of purchase money mortgage priority, however, is **ONLY** with respect to federal revenue/tax liens.

As to Federal Non-Revenue liens, 28 USC §3201(b), the lien “*shall have priority over any other lien or encumbrance which is perfected later in time.*” (Emphasis added). Any lien recorded prior to a Federal Non-Revenue lien would of course be superior, however, the wording of the statute may indicate it is superior to a subsequently created purchase money mortgage.

FNF Position – It has been our experience that the US takes the position that once recorded, the federal Non-revenue lien is superior to a subsequently created purchase money mortgage. Therefore, **you should not agree to eliminate in examination or at closing a federal non-revenue lien on the basis that you are insuring purchase money.**

Spousal Joinder:

As discussed in Marital Rights, it is permissible to insure the lien of a purchase money mortgage without the joinder of the owner’s spouse (assuming, of course, that the spouse has no actual ownership interest in the property, but only inchoate marital rights).

Joinder by spouses should nevertheless be encouraged because of problems in identifying which mortgages are purchase money, which are part purchase money, and which are not purchase money at all. For a mortgage to be a purchase money mortgage, all the proceeds thereof must be disbursed to the seller of the property. If any funds are allocated to any other purpose, such as for construction, then the mortgage is not a purchase money mortgage, at least *pro tanto*. No such mortgage should ever be insured without an

inquiry into the state of facts, and satisfaction on the part of the closer that the proceeds were entirely paid to the seller as part or the entire purchase price.

Mortgage securing both purchase and construction money

Where there are pending suits and judgments against a builder, we have at times been requested to issue a loan policy to a construction lender, where the loan proceeds will be used to finance the purchase of a residential building lot by the builder and to erect a dwelling thereon, without exception to or by insuring against the lien of the pending suits and judgments. The question in these cases is whether such a mortgage would be considered a “purchase-money mortgage” in its entirety.

Clearly, if the builder already owns the lot, or if parts of the proceeds of the mortgage are not intended to pay for the lot, it is not a “purchase-money mortgage.” *American National Bank v. Gorham*, 153 Kan. 145. On the other hand, a mortgage covering the purchase of the lot and the construction price of the improvements is considered a purchase money mortgage in its entirety. *Resolution Trust Corp. v. Bopp*, 18 Kan. App. 2d 271, 850 P.2d 939 (1993).

MODULE 10

Foreclosures

(Judicial, Mortgage and Real Estate Tax)

1. Judicial foreclosures (execution sales)

Execution sales are sales by a governmental official (sheriff, marshal or similar official) that are held to enforce a judgment or federal lien.

Proper parties:

a. Plaintiff will be the holder of the judgment or other lien.

b. Defendant will be the holder of any interest in the subject property.

These will include the property owners, mortgage holder, and any other lienholders.

Types of liens:

Execution sales will involve a variety of liens, including judgments, federal tax liens, state tax warrants. The sale proceeding does not require a separate judicial hearing to determine the validity of the underlying lien or enforceability. These issues will be resolved before the execution process.

Process:

Writ of execution (KSA 60-2401)

A general execution is a direction to an officer to seize any nonexempt property of a judgment debtor and cause it to be sold in satisfaction of the judgment.

A special execution or order of sale is a direction to an officer to effect some action with regard to specified property as the court determines necessary in adjudicating the rights of parties to an action.

Executions and orders of sale are issued by the clerk and signed by a judge. The orders are directed to the appropriate officers of the counties where such executions and orders are to be levied.

Service of process. Executions must be served by personal service and not by certified mail return receipt requested. If personal service cannot be obtained, other forms of service of process, such as publication, are authorized by statute.

Sheriff's return. The sheriff or other officer to whom any execution or order of sale is directed shall return it to the issuing court within 60 days from the date the order was issued.

Manner of levy. A general execution is levied upon any real or personal nonexempt property of the judgment debtor. The order of attachment is delivered to the sheriff of the county, and will command such sheriff to attach the property of the defendant or as much as will be satisfy the plaintiff's claim. Oil and gas leaseholds, for the purposes of this article, shall be treated as real property. Special executions or orders of sale shall be levied and executed as the court determines.

Sale of real property under execution. (KSA 60-2410)

Publication notice required. Execution sale of real property requires that the sheriff give public notice of the time and place of sale once each week for three consecutive weeks prior to the day of sale, by publication in the county in which the judgment was rendered and in the county in which the land is located. The last publication must be not less than seven days nor more than 14 days prior to the day of sale.

The execution sale shall be held at the courthouse located in the county seat of the county in which the judgment was rendered.

Certificate of purchase/sheriff's deed. After the sheriff's sale, if the real estate is not subject to redemption, the sheriff shall execute a deed to the purchaser. If the real estate is subject to redemption, the sheriff shall execute to the purchaser a certificate of purchase containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to that date. The certificate should state that, unless redemption of such real estate is made according to law, the purchaser or the purchaser's heirs or assigns will be entitled to a deed to the property.

Reversal of judgment after sale of land. If any judgment for which the land is sold is later reversed, the reversal will not defeat or affect the title of the purchaser. However, the judgment creditor will be required to make restitution to the foreclosed owner for the sales price at the sheriff's sale, with lawful interest from the day of sale.

2. Mortgage foreclosures

Mortgage foreclosures are the most common foreclosure proceedings that we see regarding real estate. Even though our foreclosures are conducted in a judicial setting, it is sometimes easy to forget that the process is a lawsuit and must comply with the normal rules of civil procedure.

Proper parties:

a. Plaintiff will be the lender seeking foreclosure. This may be a lender in any priority position.

b. Defendants will be owner of the property at the time the petition is filed, the borrower on the underlying mortgage, as well as the holder of any other interest in the property.

Description of property: The property to be foreclosed must be described by legal description in the foreclosure petition. The property description should be the same as contained in the recorded mortgage.

Description of mortgage: The mortgage lien to be foreclosed must be properly identified by its recording information (book, page, date of filing). The petition should contain a copy of the mortgage as an exhibit.

Mortgage registration tax: Under KSA 79-3107, a mortgage lien is not entitled to be filed of record until mortgage registration tax has been paid. The mortgage instrument “shall not be received in evidence in any suit, action or proceeding,” unless mortgage tax has been paid, and no judgment, decree or order for the enforcement of the mortgage lien may be entered by a court.

Service of process: Personal service is preferred, particularly if the lender wishes to obtain a deficiency judgment against the borrower. Because the mortgage foreclosure portion of the proceeding is against the property (i.e., “in rem”), service by publication may be authorized by the court to eliminate the claims of owners or lienholders who are not personally liable on the underlying note.

Servicemembers Civil Relief Act: The Soldiers’ and Sailors’ Civil Relief Act of 1940 has been replaced by the Servicemembers Civil Relief Act, effective December 19, 2003. The Act provides for extended redemption rights and defenses to the foreclosure action.

The Act does not prevent the mortgage from being foreclosed completely. The Act is intended to protect members of the armed services from default judgments (because the service member may be out of the country and unable to receive notice of the pending foreclosure). In a mortgage foreclosure covered by the Act, the plaintiff must file with the court an affidavit stating whether the defendant is in military service or if the lender is unable to determine whether the owner/borrower is in the service. The Act provides for a stay in the foreclosure case for 90 days if the borrower is in the military. Servicemembers may request an additional stay of up to 90 days after being discharged from service.

Effect of decree:

The foreclosure judgment should contain all of the essential findings that we expect to see in any judgment filed by the court. The decree should state that service was made on all defendants and that service of process was sufficient to establish the court’s jurisdiction. The decree should state the amount of indebtedness due on the promissory note, the note is secured by the mortgage, the mortgage was filed of record, and the legal description of the property securing the mortgage lien. If there are multiple liens affecting the property, the decree should establish the relative priorities of the liens, and the decree should spell out all redemption rights as determined by the court.

The foreclosure judgment will then award judgment against the defendant owner and in favor of the foreclosing lender in the amount of the balance remaining due on the note, plus any applicable costs and interest. The decree will establish that, if the judgment is not paid within ten days of entry, an order of sale shall be issued to the sheriff.

All parties named in the foreclosure action will have their interests adjudicated by the court. Their interests will either be barred or their lien priority established. KSA 60-2414(k) provides that the property may not be sold a second time for inferior liens filed after the foreclosure petition was filed, so it is not necessary to amend the petition for liens or claims filed after the petition date.

Sheriff's sale: After the expiration of the ten day waiting period after entry of judgment, the judgment creditor may request the issuance of an order of sale, directing the sheriff to advertise and sell the property under KSA 60-2410. Notice of the sale is published once a week for three consecutive weeks, with the last publication no less than seven days nor more than 14 days prior to the scheduled sale. See further details under Execution Sales above.

Redemption (KSA 60-2414):

The right of a landowner to redeem from a forced sale is a precious right under Kansas law. The Kansas Supreme Court has stated that, "nothing is more sacred in Kansas law than the provision made to protect the judgment debtor in his exclusive right to the possession, emblements, rents and profits of his property sold in foreclosure during the redemption period." (*Kansas City Life Ins. Co. v. Bellairs*, 156 Kan. 100, 131 P.2d 892 (1942))

Redemption rights are created by statute, although the basis for the right has evolved through common law. In Kansas, the right to redeem may not be waived except in certain circumstances. The right of redemption may be exempt in bankruptcy if the underlying property is exempt. The right may be assigned, and it includes the right of possession of the property and the right to collect rents and profits.

There are generally three classes of redemption rights, the owner of the property (or the owner's assignee), junior creditors, and rights of federal government and agencies.

a. Owner's redemption. Generally, under 60-2414, the owner of property will have twelve months from the sheriff's sale to redeem. However, the twelve month period of time has become a rarity, particularly in mortgage foreclosures. Under 60-2414(m), the owner's period of redemption is reduced to three months if less than 1/3 of the original indebtedness has been paid at the time of foreclosure. However, if the court finds that the total outstanding amount of all mortgages and/or liens is less than 1/3 of the market value of the property, the court shall order a redemption period of twelve months. Also, if the court finds that the owner has involuntarily lost his/her source of income after

the sheriff's sale and prior to the expiration of the three-month redemption period, the court may extend the redemption period an additional three months.

If the redemption period is established as twelve months, the first three months are exclusively the defendant owner's, and no one else may redeem during this time. However, if a shorten redemption period (six months or less) is ordered, the right of redemption is exclusive to the owner for the first two months after sale.

b. Junior creditors. Once the owner's exclusive period of redemption has expired, creditors, whose claims become a lien prior to the expiration of the redemption period, have their right to redeem the property from the sheriff's sale. Only the first creditor to redeem may do so, and must pay the amount of the successful sheriff's sale bid, plus interest, costs and expenses of the certificate holder, and taxes to the date of redemption. Once a creditor has redeemed, no other creditors may attempt to redeem the property. The owner (or assignee of the owner) retains his/her right until the redemption period expires.

c. USA – IRS and other agencies. Under the supremacy clause of the U.S. Constitution, State law cannot limit the rights of the federal government and its agencies. The redemption rights of the federal government and its agencies are established by federal law and are not limited by State law. The Internal Revenue Service is allowed 120 days after the sheriff's sale to redeem property. Other branches and agencies of the federal government are allowed up to one year to redeem.

Anti-equiteering (KSA 58-2342)

Owners of property that is the subject of foreclosure have often been the target of individuals who, for a nominal amount of money, seek to acquire the owner's right of redemption after foreclosure. Many times the amount paid to the owner bears little resemblance to the value of the owner's equity in the property. Kansas has adopted a method of protecting these owners under KSA 58-2342.

Under the statute, an assignment or transfer of redemption rights for the owner's residence is subject to specific requirements:

- The transfer must be in writing, and all terms, conditions and agreements must be set out in detail.
- The agreement must be dated and signed by all parties.
- Copies of the signed agreement and disclosure statement must be provided to the owner.

The agreement is subject to rescission by the owner within five business days after signing. If the owner chooses to rescind the assignment of redemption rights, the rescission must in writing, signed by the owner (or any one owner if there are multiple owners), and mailed to the buyer by certified mail. The right of rescission may not be waived, sold or abrogated in any way.

An agreement to assign redemption rights must contain a disclosure statement signed by all parties to the agreement. The language of the disclosure must be substantially in this form:

NOTICE. READ ALL OF THIS DISCLOSURE STATEMENT CAREFULLY BEFORE SIGNING IT. YOU HAVE A RIGHT TO CONSULT WITH AN ATTORNEY OR ANOTHER PERSON BEFORE SIGNING IT. YOU ARE SELLING OR GIVING UP IMPORTANT RIGHTS.

I, (owner's name), as the owner of (legal description of the property being foreclosed) commonly known as (address of such property), have entered into an agreement with (buyer's name) for the sale of the above-mentioned property which is my residence. I realize I have the following rights:

(1) Should this property be in foreclosure on any mortgage, I am entitled to a period of redemption following the sale in foreclosure proceedings during which period I have the right to redeem the residence. This period could be from six months to 12 months, depending on the amount of the mortgage, the unpaid balance thereof and value of the residence.

(2) During the period of redemption I have the right to remain in my residence or rent it to others.

(3) I have the right to sell my rights to my residence.

(4) If I have paid mortgage guaranty insurance premiums, I may have other rights under the terms of the insurance agreement or under applicable state or federal law.

(5) I ALSO HAVE THE RIGHT TO RESCIND ANY SALES AGREEMENT OR DEED WITH THE BUYER WITHIN FIVE BUSINESS DAYS, AS DEFINED BY K.S.A. [45-217](#), AND AMENDMENTS THERETO, AFTER THE SIGNING OF THE AGREEMENT OR DEED. I CANNOT AGREE TO GIVE UP OR SELL THIS RIGHT IN ANY WAY.

(6) Everything that is being promised to me or given to me for the purchase of my rights must be in the agreement signed by us. This includes the amount being paid me and any agreement concerning what efforts will be made by the buyer to bring the mortgage payments up to date and any promises concerning what will be done with any proceeds from the renting or selling of the property. Anything not in the written agreement might not be enforceable.

(7) IF I SELL MY RIGHTS AND THE RESIDENCE IS FORECLOSED UPON, I MAY STILL BE RESPONSIBLE FOR ANY AMOUNTS STILL OWED ON THE RESIDENCE IF ITS SALE DOES NOT RAISE ENOUGH TO COVER THE ENTIRE MORTGAGE AND THE FORECLOSURE COSTS. IF THE RESIDENCE IS FORECLOSED UPON, IT IS LIKELY THAT THIS

WILL BE REPORTED TO THOSE WHO KEEP CREDIT HISTORIES AND THIS MIGHT INJURE MY CREDIT RATING.

(8) I realize this is a serious matter and that I may wish to consult with an attorney to make sure my important rights in my residence are being protected before signing any agreement.

(9) This provision is not intended to deprive the homeowner of any other right under the law.

OWNER-SELLER

OWNER-SELLER

I ACKNOWLEDGE THAT THE OWNER-SELLER'S RECISSION OF THE AGREEMENT IF MADE PURSUANT TO PARAGRAPH (5) ABOVE, MAY BE MAILED WITHIN FIVE BUSINESS DAYS TO ME BY CERTIFIED MAIL AT THE FOLLOWING ADDRESS:

(BUYER'S ADDRESS)

BUYER

Failure to comply with the pertinent provisions of this statute shall render the transfer or assignment voidable at the election of the property owner.

A transfer or assignment made as a deed in lieu of foreclosure to the foreclosing lender, with all rights of deficiency waived, or to a third party who then resides in and uses the property as the party's residence, is not subject to the requirements of the statute.

3. Federal foreclosure act

In 1995, HUD established its final regulations to implement the Single-Family Mortgage Foreclosure Act (12 U.S.C. Sec. 3751 et seq.) The purpose of the act is to provide HUD with a uniform mortgage foreclosure procedure that will eliminate the impact of disparate State foreclosure laws and reduce HUD's cost of collection on HUD loans.

The Act may only be used to foreclose a single-family mortgage held by the Secretary of HUD, covering a one-to-four residence. Use of the act is not mandatory on HUD; the agency may choose, in its discretion, to foreclose under the Act or under State law.

The Act provides that a foreclosure commissioner will institute the foreclosure under the Act. The commissioner is designated in writing by the Field Assistant General Counsel of HUD. The designation shall also state the name and address of the commissioner. The foreclosure commissioner shall be a resident of the State where the property is located. The commissioner may be a natural person or a business entity authorized to do business in the State.

In order for the commissioner to proceed with a foreclosure, there must be a default in the conditions in the underlying mortgage, and any pending State-level foreclosure proceeding must be dismissed or terminated before the commencement of the HUD foreclosure.

The foreclosure commissioner begins the foreclosure by serving a “Notice of Default and Foreclosure Sale.” The Notice must contain:

- The name, address and telephone number of the commissioner
- The date on which the Notice was issued
- The names of the current mortgage (the Secretary of HUD), the original mortgagee and the original mortgagor
- The street address or description of the location of the property and the legal description
- The date and recording data of the mortgage to be foreclosed
- Identification of the default under the mortgage
- The date, time and place of the proposed foreclosure sale
- A statement that the foreclosure is being conducted pursuant to the federal Act
- The costs of the foreclosure to be paid by the purchaser at sale
- Bidding and payment requirements of the sale
- Any other terms of the sale.

The notice of foreclosure is served by recording the notice with the Register of Deeds not less than 21 days prior to the date set for the foreclosure sale, and mailing notice to:

- The current record owner of the property
- The original mortgagor and any mortgagors who may be personally liable under the mortgage
- All dwellings on the property; notice may also be posted at the property
- All lienholders of record, both superior and junior liens to the underlying mortgage

The notice is also published in a newspaper of general circulation in the county where the property is located, once a week for three successive weeks before the date of the foreclosure sale.

The names of the parties with recorded interest in the land are determined as of a date 45 days prior to the scheduled foreclosure sale.

4. Tax foreclosures (KSA 79-2301 et seq.)

All real estate on which the taxes shall not have been paid on or before May 10 in each year is subject to sale for the unpaid taxes.

Process:

Under statute, of each year, the county treasurer is required between July 1 and July 10 to prepare a list of all real estate subject to sale. The list must describe the real estate in the same manner as described of record in the office of the county clerk or the register of deeds of the county in which the real estate is located. The county treasurer will also prepare a notice stating that the county treasurer will sell the real estate described in the list to the county for the amount of the delinquent taxes and legal charges due on the real estate. The sale will be on or after the first Tuesday of September following publication of the notice under K.S.A. 79-2303.

The list prepared by the county treasurer will show the names of the owners of the real estate, as shown of record in the office of the county clerk or the register of deeds, the legal description and address, if available, of each tract or parcel of land and the total of the amount of unpaid taxes upon each tract or parcel.

If any county treasurer at any time discovers that any tract or lot of real estate has not been put on the list of delinquent taxes and not sold for any preceding year, the treasurer is required to place the omitted tract or lot on the list of delinquent taxes for the current year, and sell the tract or lot as under normal procedures.

Legal Description in tax proceedings:

Under KSA 79-2316, it is sufficient for the county treasurer to describe real estate in all proceedings “by initial letter, abbreviations and figures, to designate the township, range, section or parts of section, and also the number of lots and blocks.” By statute, any description that indicates the real estate intended to be sold “with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance,” is sufficient for tax sale.

Redemption from tax sale (KSA 79-2401a):

The only right of redemption from tax sale is contained in 79-2401a. Under the statute, the county must hold the real estate for two years from the date of the tax sale. The right of redemption is held by “any owner or holder of the record title, the owner's or holder's heirs, devisees, executors, administrators, assigns or any mortgagee or the owner's or holder's assigns.” Any of these parties may redeem the real estate “at any time” within two years after the tax sale by paying to the county treasurer the amount of the purchase price at tax sale, plus interest, and all delinquent taxes, special assessments and interest that has accrued from the sale date to the date of redemption, plus cost and expenses of the sale.

An abandoned building and land that is sold for taxes must be held by the county for only one year after the tax sale. Under the statute, an "abandoned building" means a building or structure which, for a period of at least one year, has been unoccupied and not maintained.

Homestead property is treated differently under 79-2401a. Homestead property must be held by the county for a period of three years from the date of sale and may be partially redeemed by paying to the county treasurer the amount of taxes for which the real estate was sold for one or more years, beginning with the first year for which the real estate was carried on the tax-sale book of the county plus interest at the rate prescribed by K.S.A. 79-2004, and amendments thereto, on the amount from the date the same was carried on the Sale book. Upon payment and partial redemption, the time when a tax foreclosure sale may be commenced shall be extended by the number of years paid in the partial redemption.

(d) If at the expiration of the redemption period, the real estate has not been redeemed, the real estate shall be disposed of by foreclosure and sale in the manner provided by K.S.A. [79-2801](#) et seq., and amendments thereto.

Any real estate has been sold for taxes and remains unredeemed on September 1 of the second year after the sale will be the subject of a foreclosure action by the county attorney or county counselor in the name of the board of county commissioners, against the owners or supposed owners of the real estate and all persons having or claiming to have any interest therein.

The petition shall contain:

- a description of each tract, lot or piece of real estate including, if located in a first or second class city, the street number or location.
- state the amount of taxes, charges, interest and penalties chargeable to each tract, lot or piece of real estate
- state the name of the owner, supposed owner and party having or claiming to have any interest therein or thereto and
- give the year the real estate was sold for delinquent taxes.

MODULE 11

Mechanic's Liens

Construction lenders and home buyers are afforded good protection against mechanics' liens by Kansas law, so long as they comply with the statutory requirements. There are different procedures that apply to contractors and subcontractors; to residential and nonresidential property; and with residential construction, whether it is a new home or improvements to an existing home. These distinctions, and important provisions of the Kansas mechanics' lien statutes are discussed below.

Who can claim a lien:

For the purpose of this article, we will use "contractor" as one who contracts directly with an owner; and "subcontractor" as one who contracts with another contractor. (No distinction is made in this article – or in the law – between one who furnishes services, labor, equipment, materials or supplies. Everyone is a contractor or subcontractor.) An unpaid contractor is entitled to a lien on the property under KSA 60-1101; an unpaid subcontractor is entitled to a lien under 60-1103.

What is lienable:

Labor, equipment, material or supplies furnished at the site of the property subject to the lien, and for the cost of transporting the same. 60-1101

Perfection of a lien – contractor:

A contractor claiming a mechanic's lien must file a verified statement with the clerk of the district court of the county, within four months on residential property, or five months on other property, after the last date labor, material, equipment or supplies, used or consumed was furnished. The statement must show:

- (1) The name of the owner,
- (2) the name and address sufficient for service of process of the claimant,
- (3) a description of the property,
- (4) a reasonably itemized statement and the amount of the claim, or if the amount of the claim is evidenced by a written instrument, or if a promissory note has been given for the same, a copy may be attached to the claim in lieu of the itemized statement.

If the property on which the lien is claimed is other than one- or two-family residential property, a lien may be claimed if it is filed within five months after the last furnishing, if the claimant has filed a notice of extension within four months since the last furnishing of labor, equipment, materials or supplies to the job site. This notice must be filed with the clerk's office and mailed by certified and regular mail to the owner. KSA 60-1102.

Perfection of a lien – subcontractor:

A subcontractor lien statement must contain the information required in a contractor lien statement, plus state the name of the contractor or subcontractor with whom the subcontractor had a contract, and must be filed within three months after the last date of furnishing by the claimant.

If the property on which the lien is claimed is other than one- or two-family residential property, a lien may be claimed if it is filed within five months after the last furnishing, if the claimant has filed a notice of extension within three months since the last furnishing of labor, equipment, materials or supplies to the job site. This notice must be filed with the clerk's office and mailed by certified and regular mail to the owner. KSA 60-1103.

If a warning statement is required to be given pursuant to K.S.A. 60-1103a (discussed below), an affidavit of the claimant must be attached to the lien statement stating that the warning statement was properly given. If a notice of intent to perform was required pursuant to K.S.A. 60-1103b (also discussed below), it must have been filed as provided by that section.

Special rules for residential property:

The law contains protection for homeowners that are having improvements done to their homes, as well as buyers of new homes, against the hidden risk of unfiled mechanics' liens.

To obtain a lien on an existing home that is occupied or will be occupied by the owner, a subcontractor must give the owner (or one of the owners) a warning statement in the form specified by KSA 60-1103a, notifying the owner of the possibility of a mechanic's lien being filed if the subcontractor is not paid.

If the home is a new home being constructed by a builder for sale to an owner that will occupy it, KSA 60-1103b requires a subcontractor to file a notice of intent to perform before the deed to the purchaser is recorded, in order for the subcontractor to claim a lien. Note that the subcontractor could claim a lien either as a contractor under KSA 60-1101 or a subcontractor under KSA 60-1103. It makes no difference as far as the necessity of filing a notice of intent to perform however. The notice is required under either filing status. *Owen Lumber Co. v. Chartrand*, 270 Kan. 215 (Kan. S. Ct. 2000). A subcontractor is required to release the notice of intent to perform when his claim is satisfied, although the notice has a shelf life of only 18 months, and is invalid after that time.

Remember, that "residential" is defined as a one- or two-family structure, not 1-to-4 family, as it is for most purposes.

Enforcement of a lien:

An action to foreclose a mechanic's lien must be brought within one year from the time of filing the lien statement, but if a promissory note has been attached to the lien statement in lieu of an itemized statement, the action must be commenced within one year from the maturity of the note. Where action has been brought to enforce a lien the lien statement may be amended by leave of the judge in furtherance of justice, except to increase the amount claimed. 60-1105.

If a lien has been filed and the claimant has not filed an action to foreclose it, the owner of the land may file a petition in the district court against the claimant, seeking an adjudication of the lien. If any claimant fails to establish his lien, the court may tax costs against him.

Priority of liens:

The lien is preferred to all other liens that are subsequent to the commencement of the furnishing of labor, equipment, material or supplies by the claimant at the site of the property subject to the lien. When two or more such contracts are entered into applicable to the same improvement, the liens of all claimants are similarly preferred to the date of the earliest unsatisfied lien of any of them. If an earlier unsatisfied lien is discharged, the commencement date for all claimants becomes the date of the next earliest unsatisfied lien. 60-1101.

The Court of Appeals has held that lien priority dates from the first unsatisfied lienable work, which would include off-site services, such as planning and design. In response to that ruling the legislature amended 60-1101 to provide that the first furnishing that is the basis for the lien must be "at the site". The title and lending groups advocated that lien rights be measured by the first *visible* on-site work, since much case law states that visible work going on at the site is what gives lenders and others notice of the lien rights. The legislature chose not to include that word, however, seemingly delegating the last word on the subject to the courts. It will therefore be necessary to require proof of payment of all who furnished services before the mortgage recordation date. The "no-start survey", traditionally the basis for extending coverage, is no longer going to work by itself.

Statutory bond to secure payment of claims:

The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue, conditioned for the payment of all potential claims. The bond can be in a sum not less than the contract price, in which case it will discharge any liens filed under the contract; or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of the claimed amount. Any bond must have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When a bond is approved and filed, no lien for the labor, equipment, material or supplies under contract, or claim described or

referred to in the bond can attach, and if when the bond is filed liens have already been filed, they are discharged by operation of law. KSA 60-1110.

MODULE 12

Supersedeas Bonds

KSA 60-2103 provides that appeals may be taken within 30 days from the entry of the judgment.

Upon the filing of an appeal and the posting of a supersedeas bond, a judgment debtor may obtain a stay, pending the appeal, of the execution of a money judgment against the debtor's real property. If the debtor wishes to convey or encumber that real property, a title insurer may be asked to rely on the supersedeas bond to issue a policy insuring against loss arising from the judgment, on the theory that the bonding company will pay the judgment if the debtor loses the appeal and fails to pay.

This is obviously a question that you will want to consult with your underwriter.

The lien of the judgment:

The bond does not eliminate or suspend the lien of the judgment. The bond only prevents execution of the judgment during the appeal. Freeman, *Law of Judgments*, §995 (1925).

If we do rely upon the bond, we still must set up a Schedule B exception for the judgment. Coverage is by endorsement insuring against loss arising from enforcement or attempted enforcement of the judgment.

Subrogation rights of bond surety:

Since the judgment lien is not eliminated by the bond, another problem arises. If the surety makes a payment under the bond, the surety may be subrogated to the rights of the judgment creditor and may be entitled to execute the judgment against the property. Therefore, the underwriter may only be willing to rely upon the bond if the surety has taken other security, such as cash, from the principal/debtor, and waives its subrogation rights with respect to the subject real estate.

Judgments determining title:

A supersedeas bond can also be significant to a title insurer when a vestee's title has been confirmed or established by a court order that is being appealed. The prevailing party in a quiet title action may convey the property during an appeal by the losing party unless the losing party supersedes the trial court order. Insurance under these circumstances is very risky. Such insurance should not be extended at least until the appeal period expires. Of course, as with any quiet title order, it must be verified that the order is a final, appealable order, before calculating the appeal period.

If a vestee's title has been divested by a decree in a quiet title action, an appeal with a supersedeas bond is not sufficient to insure a sale or mortgage by the vestee.

Some considerations in evaluating a supersedeas bond:

Following are some of the factors the Underwriting Department considers in evaluating a bond and the surrounding circumstances:

- The amount of the bond—the amount of the judgment plus interest likely to accrue during the appeal, attorney fees, costs and expenses likely to be awarded during the appeal and, in some cases, damages for delay.
- The appeal must have been filed within the required time period.
- The bond must have been filed with the trial court. A trial court order approving the bond must also be obtained in some states.
- Any motion objecting to the bond.
- The effect of a possible court order approving, conditioning, or modifying the bond.
- The subrogation problem mentioned above. The bond should not allow the surety to execute against the property.

Title insurer as obligee:

Since the obligation is basically the same as on a supersedeas bond, it has sometimes been possible to obtain a concurrent bond that names the title insurer as obligee. If possible to achieve, this is by far the most favorable avenue for allowing title insurance over a judgment on appeal.

MODULE 13

The Commercial Real Estate Broker Lien Act

KSA 58-30a01, *et. seq.*

Commercial Real Estate Only: The act applies only to “commercial real estate” which is defined to exclude residential and agricultural land. It is sufficient that the land be zoned residential, whether it is improved or not. KSA 58-30a02.

Broker’s Lien: Brokers are granted a lien on commercial real estate for the performance of services requiring a real estate broker’s license, as agreed upon by the broker and the owner. The real estate must be listed with the broker under a written agreement signed by the owner. The broker or salespersons retained by the broker must have provided services that resulted in the procuring of a person ready, willing and able to purchase or lease the real estate as provided by the agreement or which were otherwise acceptable to the owner as evidenced by a written agreement signed by the owner. §58-30a03.

Buyer’s Agents: A buyer’s broker also has lien rights. If a broker becomes entitled to compensation pursuant to a written agreement to represent the buyer in the purchase or the lessee in the lease of commercial real estate, the broker is granted a lien on the real estate at the time the buyer acquires title if payment is not made. §58-30a03.

Attachment of Lien: A broker’s lien attaches when the broker has performed services as described above and recorded a notice of lien in the office of the register of deeds of the county in which the real estate is located, ***so long as the notice is filed prior to the actual transfer of the commercial real estate*** subject to the lien. §58-30a05. If the broker has an agreement with the buyer, the lien attaches when the broker records a notice of the lien within 90 days after the recording of the deed. §58-30a08. In the case of a lease, the lien must be recorded within 180 days after the lessee takes possession of the property. §58-30a07.

Enforcement of Lien: A broker may enforce a lien by filing a petition to foreclose it in the district court of the county in which the real estate is located. The petition must be filed within two years of recording the lien. The foreclosure petition must contain the name of the broker and his license number, the name of the owner of the real estate, a statement of the terms of the agreement on which the lien is based, the date when the agreement was made, a description of the services performed, the amount due and unpaid, a description of the real estate that is subject to the lien and any other facts necessary for a full understanding of the rights of the parties. The plaintiff must file the action against all known parties who have an interest in the real estate. §58-30a14.

Attorney’s fees and costs are recoverable by the prevailing party in a proceeding arising out of a commercial broker’s lien. §58-30a18.

Termination of Lien:

If a broker claiming a lien fails to file suit to enforce the lien within 30 days after a properly served written demand of the owner, the lien is extinguished. Service of the demand must be by restricted mail, return receipt requested, showing address where delivered and “deliver to addressee only”, or by personal service. §58-30a15.

If the claim with respect to a filed lien is paid or otherwise discharged, or if the broker fails to timely bring suit to enforce the lien, the broker is required to record a satisfaction or release of the lien within 20 days after written demand therefor. §58-30a16. In addition to the owner, a lender or designated closing agent acting as a closing agent in the sale, financing or refinancing of the real estate may make demand upon a broker to enter satisfaction or release of the lien. A broker who refuses or neglects to enter satisfaction or release of such lien within 20 days after demand has is liable to the person for whom the demand was made in the sum of \$500 as a civil penalty, together with a reasonable attorney’s fee. §58-30a17.

Title Insurance Considerations:

It is not necessary to take any special steps in connection with the sale of commercial real estate except where you receive information – usually coming from the claimant – that a commission is due and the seller does not intend to recognize the obligation. In this situation, you must make certain, right up to the moment of recording the deed, that no notice of lien has been recorded. If one has been recorded, you must withhold from the seller’s proceeds enough to satisfy the claim, plus interest, costs and the claimant’s attorney’s fees. You should contact your underwriter for further guidance.

If a recorded lien is discovered in the title search for issuance of a commitment, requirement for its release must be made, even if it appears to be time-barred. As stated above, the statute requires the claimant to do so, and its refusal should be a concern to you.