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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP Nos.	NC-06-1256-SKuB
)		NC-06-1287-SKuB
7	MARK CHAPMAN TIFFANY and)		
	MELODYE GAYLE TIFFANY,)	Bk. No.	93-58255
8)		
	Debtors.)	Adv. No.	94-05278
9)		
	_____)		
10	FIRST FEDERAL BANK OF)		
	CALIFORNIA,)		
11)		
	Appellant and Cross-Appellee,)		
12)		
	v.)	MEMORANDUM ¹	
13)		
	CHEVY CHASE BANK, F.S.B.,)		
14)		
	Appellee and Cross-Appellant.)		
15)		
	_____)		

Argued and Submitted on February 23, 2007
at San Francisco, California

Filed - August 24, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable James R. Grube, Bankruptcy Judge, Presiding

Before: SMITH, KURTZ² and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Frank L. Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 In connection with the sale of debtors' residence, a dispute
2 arose among the lienholders as to the priority of their liens.
3 Ultimately, the bankruptcy court determined that First Federal
4 Savings Bank ("First Federal") held a valid judgment lien but
5 that Chevy Chase Bank F.S.B. ("Chevy Chase") was entitled to
6 equitably subrogate to the rights of World Savings Bank ("World
7 Savings"), which held a lien senior to that of First Federal.
8 First Federal filed a timely notice of appeal on July 17, 2006,
9 and Chevy Chase filed notice of its cross-appeal. We AFFIRM in
10 part and REVERSE and REMAND in part.

11 I. FACTS

12 On March 28, 1996, First Federal obtained a \$600,000
13 nondischargeable judgment against Mark Tiffany ("Debtor").³
14 First Federal promptly completed an abstract of judgment form
15 obtained from the bankruptcy court and recorded it on May 21,
16 1996, in the Santa Clara County Recorder's Office. At the time
17 the abstract of judgment was recorded, Debtor held no interest in
18 real property.

19 On March 15, 2001, Debtor's wife, Melodye Tiffany
20 ("Melodye"), recorded a grant deed showing that she had acquired
21 title to real property in San Jose, California (the "Property")
22 as her sole and separate property. That same day, two additional
23 deeds were recorded in connection to the Property: 1) a grant
24 deed showing the transfer of Debtor's interest in the Property to
25 Melodye and 2) a purchase-money deed of trust in the principal
26 amount of \$577,500 executed in favor of World Savings.

27 _____
28 ³ Interest of 10% per annum began accruing on the judgment
from the date of its entry.

1 Prior to purchasing the Property, Richard Lohr and his wife
2 Vitkova (collectively, the "Lohrs"), loaned \$50,000 to the
3 Tiffanys. On March 30, 2001, the Lohrs loaned the Tiffanys an
4 additional \$49,973.25. A deed of trust in favor of Sentinel
5 Trust ("Sentinel")⁴ for \$115,000 was recorded against the
6 Property on April 30, 2001. The Sentinel deed of trust secured
7 the two Lohr loans.

8 In early 2003, the Tiffanys applied to Chevy Chase to
9 refinance the Property. On June 13, 2003, as part of the
10 refinance agreement, Melodye transferred the Property to Debtor
11 and herself as joint tenants. It was the intent of the parties
12 to the refinance that title would be transferred to Debtor and
13 Melodye before the funding of the loans and the granting of a
14 security interest in the Property to Chevy Chase. On June 19,
15 2003, Chevy Chase loaned Debtor and Melodye \$584,000, which was
16 used to pay off the World Savings deed of trust in the amount of
17 \$576,668.84 and the Sentinel deed of trust in the amount of
18 \$73,053. The refinance also provided the Tiffanys with \$2,812.86
19 in cash. In connection with the transaction, Chevy Chase
20 obtained title insurance from First American Title Insurance
21 Company ("First American").

22 On July 18, 2003, Vitkova recorded a deed of trust against
23 the Property in the amount of \$27,116. The lien amount reflects
24 part of the difference between the \$115,000 Sentinel loan and the
25 \$73,053 Sentinel received from the refinance; the record does not
26 explain the remainder of roughly \$15,000.

27 More than a year later, on September 23, 2004, Chevy Chase
28 recorded two deeds of trust, both dated June 12, 2003, in favor

⁴ Sentinel is the estate planning trust of the Lohrs.

1 of Chevy Chase, in the amounts of \$584,000 and \$73,000, with
2 Debtor and Melodye named as trustors on each.

3 On May 18, 2005, First Federal renewed its judgment in the
4 amount of \$1,147,054.79. The renewal of judgment was recorded on
5 May 24, 2005. Shortly thereafter, First Federal applied for an
6 order permitting the judicial sale of the Property pursuant to
7 California Code of Civil Procedure § 704.740, et seq.⁵ ("sale
8 application"). The bankruptcy court ordered the sale of the
9 Property on September 20, 2005, with the proceeds of the sale to
10 be held pending resolution of the competing interests of First
11 Federal, Chevy Chase, and Vitkova.

12 After being notified of the sale application, Chevy Chase
13 submitted a claim to First American under its policy. First
14 American accepted the claim and appointed the law firm of Mount
15 and Stoelker to represent Chevy Chase in the lien priority
16 litigation.

17 Following a total of nine hearings and several rounds of
18 briefing, on July 17, 2006, the bankruptcy court entered the
19 Distribution Order which addressed the following three issues:

- 20 1. Does First Federal hold an enforceable judgment
21 lien and, if so, when did that lien attach?
- 22 2. Can Chevy Chase be equitably subrogated to First
23 Federal if First Federal has a valid judgment lien
that has priority over Chevy Chase's liens?⁶

24 ⁵ Unless otherwise indicated, all references to sections are
to the California Code of Civil Procedure.

25 ⁶ The Distribution Order's statement of the equitable
26 subrogation issue is syntactically incorrect. "Subrogate" means
27 "to put (a person) in the place of, or substitute (him) for,
another in respect of a right or claim[.]" Bryan A. Garner, A
28 Dictionary of Modern Legal Usage 846 (1990). As such, Chevy
Chase only could be subrogated to the positions or priorities of
(continued...)

1 3. What priority does the Vitkova lien have?
2 Distribution Order at 3, July 17, 2006.

3
4 A. First Federal's Judgment Lien

5 Chevy Chase argued that First Federal's judgment lien was
6 invalid because the recorded abstract of judgment did not include
7 such required information as Debtor's driver's license and social
8 security number, or a statement that those numbers were not known
9 to First Federal, as required by § 674(a)(6). Consequently,
10 First Federal's abstract of judgment did not comply with
11 § 697.310(a)⁷ and its judgment was invalid.

12 The bankruptcy court concluded that although First Federal's
13 abstract did not comply with § 674(a)(6), its lien interest was
14 nevertheless protected by the "[e]xcept as otherwise provided by
15 statute" language of § 697.310(a). In this regard, § 697.060
16 provides that a judgment lien on real property can be created by
17 the filing of "an abstract or certified copy of a money judgment
18 of a court of the United States that is enforceable [under
19 California law]." Because § 697.060 does not require that an
20 abstract of a federal judgment conform with the requirements of
21 § 674, the court reasoned that First Federal's failure to list

22 ⁶(...continued)
23 World Savings and Sentinel, and not to their liens or First
24 Federal's lien. Even though the bankruptcy court misstated the
25 issue, it is clear from the Distribution Order as a whole, and
26 the entirety of the record, that the bankruptcy court addressed
27 the issue of whether Chevy Chase was entitled to equitably
28 subrogate to World Savings' position to the extent Chevy Chase
29 had paid off World Savings' lien.

30 ⁷ Section 697.310(a) provides in relevant part, "Except as
31 otherwise provided by statute, a judgment lien on real property
32 is created under this section by recording an abstract of money
33 judgment with the county recorder."

1 Debtor's social security or driver's license number on the
2 abstract of judgment form provided by the bankruptcy court did
3 not render the abstract defective. Stated otherwise, the
4 recordation of the federal abstract of judgment on May 21, 1996,
5 was sufficient to create a valid lien under California law.

6 As to the effective date of the judgment lien, the court
7 found that the lien instantaneously attached to the Property when
8 Debtor acquired title under the doctrine of "after-acquired
9 title." Weeks v. Pederson (In re Pederson), 230 B.R. 158, 163
10 (9th Cir. BAP 1999). Persuaded by First Federal's argument that
11 Debtor held a community property interest in the Property at all
12 times since its purchase in March 2001, the court concluded that
13 the judgment lien attached to the Property on March 15, 2001.
14 The court reasoned that even though Debtor had the right under
15 California Family Code § 850 to transmute community property to
16 separate property of Melodye without consideration, the transfer
17 by Debtor to Melodye of his interest in the Property was a
18 fraudulent transfer under California Civil Code ("CC")
19 § 3439.05.⁸ Hence, the bankruptcy court found the March 15, 2001
20 transfer to Melodye was "presumptively voidable" with the result
21 that First Federal's judgment lien attached to the Property as of
22 that date.

23
24 ⁸ CC § 3439.05 provides

25 A transfer made . . . by a debtor is fraudulent as to a
26 creditor whose claim arose before the transfer was made
27 . . . if the debtor made the transfer . . . without
28 receiving a reasonably equivalent value in exchange for
the transfer . . . and the debtor was insolvent at the
time or the debtor became insolvent as a result of the
transfer.

1 B. Equitable Subrogation

2 Under California law, equitable subrogation is proper when
3 the following five criteria are met:

- 4 (1) payment was made by the subrogee to protect his
own interest;
- 5 (2) the subrogee has not acted as a volunteer;
- 6 (3) the debt paid was one for which the subrogee was
not primarily liable;
- 7 (4) the entire debt has been paid; and
- 8 (5) subrogation would not work any injustice to the
rights of others.

9 Han v. United States, 944 F.2d 526, 529 (9th Cir. 1991). The
10 bankruptcy court held that Chevy Chase irrefutably met the first
11 four criteria; the only outstanding issue was whether subrogation
12 would cause an injustice to First Federal.

13 In analyzing the injustice element, the bankruptcy court
14 noted that at the time Chevy Chase provided the refinancing, it
15 assumed that its lien would be first in priority because it was
16 unaware of First Federal's judgment lien. The court found
17 equitably subrogating Chevy Chase to the position of World
18 Savings to the extent that it paid the World Savings lien would
19 not prejudice First Federal because, at the time of the
20 refinancing, the priority of First Federal's lien was lower than
21 that of World Savings' lien under CC § 2898(a), which gives
22 super-priority status to purchase money loans. On the other
23 hand, if equitable subrogation were denied, the court believed
24 that First Federal would receive a windfall by ascending to a
25 better position than it originally had.

26 The bankruptcy court recognized that, though Chevy Chase may
27 have had constructive notice of First Federal's judgment lien,
28 such notice was not definite notification that a judgment lien

1 encumbered the Property. "The Property was held in the name of
2 Melodye, not Debtor," causing "there [to be] no basis . . . to
3 find that Chevy Chase or [First American] should have been aware
4 of the potential lien." Distribution Order at 12, July 17, 2006.
5 Relying on Han v. United States, 944 F.2d 526 (9th Cir. 1991),
6 the court held that Chevy Chase's possible constructive notice
7 did not bar equitable subrogation.⁹

8 The court further rejected First Federal's argument that
9 First American, rather than Chevy Chase, was asserting the
10 equitable subrogation claim to avoid paying Chevy Chase pursuant
11 to the title insurance policy. Looking to the Mort decision for
12 support, the court found that equitable subrogation can be
13 applicable even where the lending party had title insurance.
14 Mort v. United States, 86 F.3d at 890, 892-93 (9th Cir. 1996).
15 Here, First American had only agreed to defend Chevy Chase in the
16 action; the court did not equate providing a defense with
17 pursuing the claim itself.

18 Based on the foregoing, the court held that Chevy Chase was
19 entitled to be equitably subrogated to the position of World
20 Savings to the extent of the amount paid on the World Savings
21 deed of trust.

22
23 ⁹ In Han, the Hans purchased a piece of residential real
24 property from Lok. Prior to escrow opening, the property was
25 encumbered by a properly recorded federal tax lien which the
26 Hans' real estate agent had knowledge of but did not advise them
27 about. After the Hans purchased the property, the IRS levied on
28 it to satisfy the tax lien. The Ninth Circuit held that the
knowledge of the Hans' real estate agent was only constructive
knowledge of the federal tax lien to the Hans, and thus the
doctrine of equitable subrogation could be used to permit the
Hans to be equitably subrogated to all liens and encumbrances
recorded prior to the tax lien. Han, 944 F.2d at 530.

1 C. Priority of Vitkova's Lien

2 As to Vitkova's lien, the court found that Vitkova had
3 notice of the unrecorded deeds of trust in favor of Chevy Chase
4 prior to obtaining her deed of trust from Melodye. Consequently,
5 Vitkova could not be a bona fide encumbrancer and priority of her
6 lien would be based upon when the lien was recorded under
7 CC § 2897. Vitkova did not record her deed of trust until June
8 19, 2003, which was after the attachment of First Federal's
9 judgment lien and after she received notice of Chevy Chase's
10 deeds of trust. Accordingly, she would only be entitled to any
11 sale proceeds remaining after satisfaction in full of the First
12 Federal and Chevy Chase liens.

13 Pursuant to the foregoing reasoning, the bankruptcy court
14 ordered the sale proceeds to be distributed as follows:

15 (1) Chevy Chase is equitably subrogated to First
16 Federal's lien [to] the extent of \$576,668.84 (the
17 payoff of the World Savings purchase money deed of
trust) and shall receive the first \$576,668.84 from the
proceeds of sale.¹⁰

18 (2) Next, First Federal's judgment lien shall be paid
19 in full with interest through the date of payment.

20 (3) Should there be any proceeds remaining after the
21 \$576,668.84 distribution to Chevy Chase and the
22 distribution to First Federal, the remaining Chevy
Chase liens shall be paid in full with interest through
the date of payment.¹¹

23 ¹⁰ As we previously noted, the bankruptcy court's use of
24 "subrogated" in the Distribution Order is syntactically
25 incorrect. See footnote 6, supra. Nevertheless, the
26 Distribution Order indisputably reflects the bankruptcy court's
ruling that Chevy Chase was entitled to equitably subrogate to
World Savings' position to the extent Chevy Chase had paid off
World Savings' lien.

27 ¹¹ The bankruptcy court does not provide any specific
28 analysis of the equitable subrogation issue concerning Chevy
Chase based on the payoff of the Sentinel deed of trust.
Instead, the court relies on the date Debtor obtained an interest
(continued...)

1 (4) Should there be any proceeds remaining after
2 distribution to First Federal and Chevy Chase, then the
3 Vitkova lien shall be paid in full with interest
4 through the date of payment.

5 Distribution Order at 14, July 17, 2006.

6 First Federal appealed on July 17, 2006, and Chevy Chase
7 cross-appealed on July 28, 2006.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
10 and §§ 157(b)(1) and (b)(2)(K). We have jurisdiction under 28
11 U.S.C. § 158.

12 **III. ISSUES**

- 13 A. Whether First Federal holds a valid judgment lien.
- 14 B. Whether the bankruptcy court erred in determining the
15 priority of the Worlds Savings, Sentinel, and First Federal
16 liens.
- 17 C. Whether the bankruptcy court erred in finding that Chevy
18 Chase, and not First American, was asserting the equitable
19 subrogation claim.
- 20 D. Whether Chevy Chase is entitled to be equitably subrogated
21 to the priorities of World Savings and Sentinel.

22 **IV. STANDARD OF REVIEW**

23 We review a bankruptcy court's interpretation of California
24 law de novo in order to determine if it correctly applied the

25 ¹¹(...continued)

26 in the Property, in other words, when First Federal's abstract
27 attached, and the date the Sentinel deed of trust was recorded.
28 According to the court's analysis, First Federal's abstract
attached on March 15, 2001. As a result, the bankruptcy court
concluded that First Federal's lien attached prior to the
Sentinel deed of trust being recorded on April 30, 2001, and that
Chevy Chase therefore was not entitled to equitably subrogate to
the rights of Sentinel.

1 substantive law. Kipperman v. Proulx (In re Burns), 291 B.R.
2 846, 849 (9th Cir. BAP 2003); Astaire v. Best Film & Video Corp.,
3 116 F.3d 1297, 1300 (9th Cir. 1997) (issues of state law are
4 reviewed de novo). Mixed questions of law and fact are also
5 reviewed de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788,
6 792 (9th Cir. 1997). "A mixed question of law and fact occurs
7 when the historical facts are established; the rule of law is
8 undisputed . . . and the issue is whether the facts satisfy the
9 legal rule." Id.

10 **V. DISCUSSION**

11 A. First Federal's Judgment Lien

12 1. Validity of First Federal's abstract of judgment

13 In California, "[e]xcept as otherwise provided by statute, a
14 judgment lien on real property is created by recording an
15 abstract of a money judgment with the county recorder." CCP
16 § 697.310(a). "[B]ecause § 697.310(a) is prefaced by the
17 language 'except as otherwise provided by statute,'" a creditor
18 can create a judgment lien on real property by recording an
19 abstract of judgment issued by a federal court under
20 § 697.060(a). Ford Consumer Fin. Co., Inc. v. McDonell (In re
21 McDonell), 204 B.R. 976, 978 (9th Cir. BAP 1996); CCP
22 § 697.060(a) ("An abstract . . . of a money judgment of a court of
23 the United States that is enforceable in this state may be
24 recorded to create a judgment lien on real property pursuant to
25 Article 2 (commencing with Section 697.310).").

26 Chevy Chase argues that the bankruptcy court incorrectly
27 found that First Federal's abstract of judgment did not have to
28 comply with § 674. According to § 674, an abstract of judgment

1 must contain the judgment debtor's social security number and
2 driver's license number or a statement indicating that such
3 information was unknown for the abstract. Upon recordation of a
4 valid abstract, a judgment lien on the property will be created.
5 CCP § 697.310(a). First Federal failed to adhere to these
6 requirements; therefore, Chevy Chase argues that First Federal's
7 abstract of judgment is defective under California law and cannot
8 be the basis for its judgment lien.

9 While it is true that First Federal's abstract does not
10 strictly comply with § 674, the California legislature has
11 created a separate statutory scheme for the creation of liens
12 based on federal abstracts of judgment. See McDonell, 204 B.R.
13 978 (holding that the statutory provisions for creating judgment
14 liens based on federal judgments is distinct from the provision
15 relating to state court judgments); Alcove Inv., Inc. v.
16 Conceicao (In re Conceicao), 331 B.R. 885, 893 (9th Cir. BAP
17 2005) ("separate statutory requirements apply to different types
18 of judgments"). Section 697.060(a), which states "[a]n abstract
19 . . . of a money judgment of a court of the United States that is
20 enforceable in this state may be recorded to create a judgment
21 lien on real property," acts as an exception to § 697.310(a).
22 McDonell, 204 B.R. at 978. This section provides no specific
23 requirements for what information must be included in the
24 abstract. Rather, it simply provides that a recorded abstract of
25 a money judgment of a court of the United States is sufficient to
26 create a judgment lien.

27 There is no dispute that First Federal's abstract of
28 judgment conformed with the bankruptcy court's abstract of

1 judgment form or that it was properly certified by the clerk of
2 the bankruptcy court. Thus, its recording with the Santa Clara
3 County Recorder's Office was sufficient to create a judgment lien
4 under § 697.060(a).

5 2. Attachment of First Federal's judgment lien

6 In determining the effective date of First Federal's
7 judgment lien, the bankruptcy court found "that Debtor's March
8 15, 2001 transfer of the Property to Melodye [was] presumptively
9 voidable" under CC § 3439.05. Distribution Order at 8, July 17,
10 2006. Though the record might support that 1) Debtor transferred
11 his interest in the Property to Melodye, 2) the Property was
12 purchased with community assets, 3) First Federal's claim arose
13 prior to Debtor's transfer of his interest, and 4) at the time of
14 the transfer Debtor owed approximately \$900,000 to First Federal,
15 there was no fraudulent transfer claim asserted by First Federal,
16 or any other creditor, upon which the court could base its
17 fraudulent transfer finding. That being the case, the bankruptcy
18 court had no basis for declaring, sua sponte, that Debtor's March
19 15, 2001 transfer was presumptively voidable or using that
20 finding to determine the effective date of First Federal's
21 judgment lien. Procedurally, before a transfer can be declared
22 fraudulent and avoided, an adversary proceeding must be initiated
23 and findings of facts and conclusions of law made as to each
24 element of CC § 3439.05. See Fed. R. Bankr. P. 7001 ("a
25 proceeding to recover money or property" must be initiated as an
26 adversary proceeding); Fed. R. Bankr. P. 7052 (findings
27 required). This was never done. Because there has been no
28 proper determination that Debtor's March 15, 2001 transfer is

1 void, the effective date of First Federal's judgment lien must be
2 determined according to §§ 697.310 et seq.

3 Under California's judgment lien law, a judgment creditor's
4 recordation of an abstract of judgment creates a judgment lien
5 that "attaches to all interests in real property in the county
6 where the lien is created (whether present or future, vested or
7 contingent, legal or equitable) that are subject to enforcement
8 of the money judgment against the judgment debtor . . . at the
9 time lien was created." CCP §§ 697.340(a) & 697.310. This
10 includes the community property interest of the judgment debtor's
11 spouse. Lezine v. Sec. Pac. Fin. Servs., Inc., 925 P.2d 1002,
12 1006 (Cal. 1996). If the judgment debtor acquires an interest in
13 real property subsequent to the creation of its judgment lien,
14 the lien attaches to such interest at the time it is acquired.
15 CCP § 697.340(b).

16 Until the lien is satisfied or extinguished, it remains
17 enforceable against the judgment debtor's real property interests
18 regardless of who holds that interest. Dieden v. Schmidt, 128
19 Cal. Rptr. 2d 365, 369 (Cal. Ct. App. 2002). Under § 697.390(a),
20 "a subsequent conveyance of an interest in real property subject
21 to a judgment lien does not affect the lien." Id.; see also
22 Pederson, 230 B.R. at 163 (holding that a debtor cannot transfer
23 property away without the transfer being subject to the attached
24 judgment lien). The judgment lien may be enforced against the
25 property in the same manner and to the same extent as if there
26 has been no transfer. CCP § 695.070.

27 Here, the Debtor did not acquire a record interest in the
28 Property until June 13, 2003, when Melodye reconveyed the

1 Property to Debtor and herself as joint tenants. The chain of
2 title reveals that on March 15, 2001, a grant deed was recorded
3 in which the former owner granted the Property to Melodye, "a
4 married woman as her SOLE AND SEPARATE PROPERTY." The title
5 record then discloses the World Savings deed of trust recorded on
6 March 15, 2001, and subsequently the Sentinel deed of trust
7 recorded on April 30, 2001.

8 Although Debtor also recorded a grant deed on March 15,
9 2001, in which he, as a married man, purported to transfer the
10 Property to Melodye, this grant deed appears to only represent
11 the couple's intent that the Property be Melodye's separate
12 property. In light of the fact that the former owner only
13 granted the Property to Melodye as her separate property and
14 given the timing of the recordation of Debtor's grant deed to
15 Melodye,¹² there is no evidence that Debtor had any interest to
16 convey. Rather, the recording of Debtor's grant deed indicates
17 that such action was done only to confirm Debtor's and Melodye's
18 intentions as to the characterization of the Property.

19 Based on the forgoing, the bankruptcy court erred in holding
20 that Debtor acquired an interest in the Property as of March 15,
21 2001. As Debtor's interest in the Property did not arise until
22 Melodye conveyed an interest to him on June 13, 2003, First
23 Federal's judgment lien did not attach until that date.

24 B. Lien Priority

25 Lien priority in California is largely governed by

26 ¹² The grant deed from the former owner to Melodye was
27 recorded with the Santa Clara County Recorder as instrument
28 immediately afterwards with the Santa Clara County Recorder as
instrument number 15593924.

1 recordation. Bratcher v. Buckner, 109 Cal. Rptr. 2d 534, 539
2 (Ct. App. 2001). Under California's race-notice system, a lien's
3 priority is determined according to the time of its creation and
4 gives priority to the person whose instrument is first recorded.
5 CC § 2897. Chevy Chase argues that World Savings and Sentinel
6 held lien priority positions senior to that of First Federal.
7 First Federal's arguments are primarily based on its contention
8 that its judgment lien attached to the Property when its abstract
9 was recorded, rather than when Debtor obtained a record interest
10 at the time of the Chevy Chase refinancing. Most of First
11 Federal's arguments are eviscerated when the attachment sequence
12 is correctly viewed, and thus, we agree with Chevy Chase.

13 World Savings and Sentinel recorded their deeds of trust on
14 March 15, 2001, and April 30, 2001, respectively. As previously
15 discussed above, Debtor acquired his interest in the Property on
16 June 13, 2003. Not only was Debtor's interest acquired over two
17 years later, but it came subject to World Savings' and Sentinel's
18 deeds of trust, which were already recorded against the Property.

19 First Federal contends that under the relation back doctrine
20 its lien should be deemed recorded as of May 21, 1996, the date
21 the abstract of judgment was recorded. Under this theory, First
22 Federal's lien would be first in priority.

23 Assuming this is true, First Federal's judgment lien only
24 attached to the extent of Debtor's interest in the Property. See
25 20th Century Plumbing Co. v. Sfregola, 179 Cal. Rptr. 144, 145-46
26 (Ct. App. 1981) ("judgment creditor acquires only the interest the
27 judgment Debtor has in the property"). When Debtor acquired his
28 interest in the Property, it was subject to World Savings' and

1 Sentinel's existing recorded deeds of trust. Thus, First
2 Federal's judgment lien only attached to the equity remaining
3 after satisfaction of the liens of World Savings and Sentinel.
4 Stated otherwise, even if First Federal's lien related back to
5 1996, it would still be junior in position to World Savings and
6 Sentinel.

7 While it is clear that World Savings and Sentinel held liens
8 superior to First Federal's lien, it is equally clear that Chevy
9 Chase's liens are junior to that of First Federal's. There is no
10 dispute that First Federal's judgment lien was recorded prior to
11 the recordation of Chevy Chase's liens. Consequently, for Chevy
12 Chase to be paid from the sale proceeds, it must be found that
13 its liens should be equitably subrogated to the liens of World
14 Savings and/or Sentinel.

15 C. Holder of the Equitable Subrogation Claim

16 First Federal argues that First American, Chevy Chase's
17 title insurer, is the true party asserting the equitable
18 subrogation claim and that First American was negligent in
19 failing to discover First Federal's judgment lien. Therefore, it
20 takes issue with the court equitably subrogating Chevy Chase to
21 the position of the World Savings lien it paid off. To support
22 its argument, First Federal relies on Universal Title Insurance
23 Co. v. United States, 942 F.2d 1311 (8th Cir. 1991), and Coy v.
24 Raabe, 418 P.2d 728 (Wash. 1966).

25 In Universal Title Insurance, the insurer failed to discover
26 a properly recorded federal tax lien in conducting a title search
27 of property before issuing title insurance policies to the
28 property buyer and the mortgage holder. The policies provided

1 that if the insurer paid to remove the liens from the title, it
2 would be subrogated to the rights of its insureds. Following the
3 discovery of the tax lien, the insurer placed money into an
4 escrow account in exchange for a release of the lien. The Eighth
5 Circuit held that the mere transfer of the lien from the property
6 to an escrow account was insufficient to entitle the insurer to
7 be conventionally or legally subrogated to the rights of the
8 prior lienholders under Minnesota law. Universal Title
9 Insurance, 942 F.2d at 1316. Because the insurer was a
10 professional in the business of insuring marketable title to real
11 property, the court ruled that its failure to discover the
12 federal tax lien was not an excusable mistake of fact, but
13 instead resulted from negligence, and thus it was not entitled to
14 be legally subrogated to the rights of the prior senior
15 lienholders. Id. at 1318.

16 Coy, a case decided by the Washington Supreme Court, also
17 dealt with a title insurance company failing to ascertain the
18 existence of an existing lease against the property and option to
19 purchase. In Coy, the court opined that,

20 It would be a gross misapplication of the doctrine of
21 subrogation were we to hold that its cloak settles
22 automatically upon one who has simply made a mistake,
23 when it is a commercial transaction involving a
24 consideration. . . . Either [title insurance companies]
insure or they don't. It is not the province of the
court to relieve a title insurance company of its
contractual obligation.

25 418 P.2d at 731. Based on this reasoning, the court denied
26 equitable subrogation to the title insurance company because its
27 problems had been precipitated by its failure to ascertain the
28 existence of the lease. Id.

1 The problem with First Federal's argument is that, unlike in
2 Universal Title Insurance and Coy, First American is not
3 asserting the equitable subrogation claim on its own behalf.
4 Instead, it is complying with its duty to defend Chevy Chase
5 against First Federal's adverse claim. Horace Mann Ins. Co. v.
6 Barbara B., 846 P.2d 792, 795 (Cal. 1993) (a liability insurer
7 owes a broad duty to defend its insured against claims that
8 create a potential for indemnity).

9 Under the title insurance policy,

10 Upon written request by [Chevy Chase] . . . [First
11 American], at its own cost and without unreasonable
12 delay, shall provide for the defense of [Chevy Chase]
13 in litigation in which any third party asserts a claim
14 adverse to the title or interest as insured, but only
15 as to those stated causes of action alleging a defect,
16 lien or encumbrance or other matter insured against by
this policy. [First American] shall have the right to
select counsel of its choice (subject to the right of
[Chevy Chase] to object for reasonable cause) to
represent [Chevy Chase] as to those stated causes of
action and shall not be liable for and will not pay the
fees of any other counsel.

17 Chevy Chase made such a request on June 17, 2005, when it filed a
18 claim with Alliance Title Company (First American's agent).
19 First American only became involved in the dispute after
20 reviewing Chevy Chase's policy and determining that it had a duty
21 to defend Chevy Chase under it. Pursuant to its duty, First
22 American retained the legal services of Mount and Stoelker
23 ("Stoelker") on behalf of Chevy Chase and has paid for the cost
24 of litigation.

25 Since Stoelker's employment, all documents filed in the
26 proceeding and all court appearances have occurred on Chevy
27 Chase's behalf. There is no indication that First American is
28 pursuing the claim on its own behalf. Rather, the record

1 supports the finding that First American has only agreed to
2 defend Chevy Chase in the pending action. Neither an agreement
3 to defend, nor the provision of a defense, causes the party
4 defending to be substituted for the party defended. The
5 bankruptcy court did not err in determining that Chevy Chase is
6 the party asserting the equitable subrogation claim.

7 D. Chevy Chase's Entitlement to Equitable Subrogation

8 The doctrine of equitable subrogation is a matter of state
9 law. Mort, 86 F.3d at 893. Thus, whether equitable subrogation
10 is available to Chevy Chase is a question of California law.

11 In California, equitable subrogation is appropriate where:

12 "(1) Payment [was] made by the subrogee to protect his
13 own interest. (2) The subrogee [has] not . . . acted as
14 a volunteer. (3) The debt paid [was] one for which the
15 subrogee was not primarily liable. (4) The entire debt
[has] been paid. (5) Subrogation [would] not work any
injustice to the rights of others."

16 Han, 944 F.2d at 529 (citing Caito, 576 P.2d at 471). When
17 equitable subrogation is being sought by a lender who has paid
18 off an encumbrance on property, under the belief that its advance
19 was secured by the first lien on the property but who later
20 learns it is not, in addition to the five factors above, the
21 lender must prove that it was not its culpable and inexcusable
22 neglect which caused the lien to not be in first priority.
23 Lawyers Title Ins. Corp. v. Feldsher, 49 Cal. Rptr. 2d 542, 546
24 (Ct. App. 1996).

25 Equitable subrogation is a broad equitable remedy that
26 applies not only when these factors are met, but also "whenever
27 'one person, not acting as a mere volunteer or intruder, pays a
28 debt for which another is primarily liable, and which in equity

1 and good conscience should have been discharged by the latter.'"
2 Han, 944 F.2d at 529 (citing Caito, 576 P.2d at 471). The
3 doctrine has been liberally applied by California courts and
4 considered to be "sufficiently elastic to take within its remedy
5 cases of first instance which fairly fall within it." Id.
6 (quoting In re Johnson, 30 Cal. Rptr. 147, 149 (Ct. App. 1966)).

7 Here, there is no dispute that 1) Chevy Chase paid the World
8 Savings deed of trust and Sentinel deed of trust to protect its
9 interests, 2) Chevy Chase was not a volunteer, 3) the debts paid
10 were not ones which Chevy Chase was primarily liable for, or 4)
11 the entire amounts owed to World Savings and Sentinel were
12 paid¹³. Instead, the dispute revolves around whether Chevy
13 Chase's failure to discover First Federal's judgment lien is due
14 to its culpable and inexcusable neglect and whether the facts of
15 the case warrant the granting of equitable subrogation.

16 1. Culpable and inexcusable neglect

17 First Federal argues that Chevy Chase's failure to discover
18 the recorded abstract of judgment constitutes the kind of
19 "culpable and inexcusable neglect" which justifies denial of
20 equitable subrogation. The argument continues that, because
21 Chevy Chase was on notice of the Tiffanys' marriage, it should
22 have conducted a title search under both names, especially in

23 ¹³ Sentinel's beneficiary statement, which it returned to
24 Chevy Chase on May 27, 2003, provided for a payoff demand of
25 \$73,053. As a result, this was the amount Chevy Chase conveyed
26 to Sentinel through the escrow process, even though the deeds of
27 trust recorded against the Property were for \$115,000.
28 Subsequent to this payoff, Vitkova recorded a note in the amount
of \$27,116, which represents most of the amount remaining owed on
the Sentinel lien. Because Sentinel provided Chevy Chase with a
payoff demand of only \$73,053 and Sentinel reconveyed its deed of
trust, we find that Chevy Chase paid the Sentinel lien in full.

1 light of the fact that it required the transfer of title into
2 both names as part of the refinance. We do not find this
3 argument persuasive.

4 "Although equitable subrogation will be denied to a new
5 lender who has actual knowledge of the junior encumbrance, it has
6 long been the rule in California that" constructive knowledge
7 does not bar equitable relief. Smith v. State Savs. & Loan
8 Ass'n, 223 Cal. Rptr. 298, 301 (Ct. App. 1985) (emphasis added);
9 Han, 944 F.2d at 530. By statute, knowledge that is imputed by
10 action of law is constructive knowledge, not actual knowledge.
11 CC § 18. The recording of a judgment affecting title to real
12 property only provides constructive notice. Han, 944 F.2d at
13 530; Gregg v. Cloney (In re Cloney), 110 Cal. Rptr. 2d 615, 621
14 (Ct. App. 2001).

15 According to the record, Chevy Chase did not have actual
16 knowledge of First Federal's abstract of judgment prior to the
17 refinance and recordation of its liens. Chevy Chase obtained a
18 title insurance policy for the Property which only disclosed the
19 recorded liens of World Savings and Sentinel. Nothing in the
20 record indicates that Chevy Chase had knowledge of First
21 Federal's abstract of judgment against Debtor. At most, the
22 addition of Debtor's name to title of the Property could have
23 only provided Chevy Chase with constructive notice of the
24 judgment lien. Because Chevy Chase did not have actual notice,
25 there is no reason to bar it from asserting the doctrine of
26 equitable subrogation on the basis of inexcusable neglect.

1 2. The equities

2 First Federal maintains that subrogating Chevy Chase to the
3 rights of World Savings and Sentinel would work an injustice. We
4 disagree.

5 Permitting equitable subrogation of Chevy Chase does not
6 prejudice First Federal. As we have already noted, the liens of
7 World Savings and Sentinel were senior to that of First Federal.
8 Allowing Chevy Chase to step into their positions does no
9 violence to the priority of First Federal's lien interest; First
10 Federal will continue to maintain the position it has always had.
11 On the other hand, if equitable subrogation is denied to Chevy
12 Chase, First Federal "will receive a windfall, moving up to a
13 better position than it originally had." Mort, 86 F.3d at 895.

14 We also decline to accept First Federal's argument that
15 Chevy Chase and First American would be unjustly enriched if
16 Chevy Chase is equitably subrogated. At the time Chevy Chase
17 provided the refinancing, it assumed that its liens would be in
18 first and second priority since it was unaware of First Federal's
19 judgment lien. Chevy Chase had at most constructive notice of
20 First Federal's abstract of judgment. Constructive notice, as we
21 have noted, is insufficient to bar equitable subrogation. Han,
22 944 F.2d at 530.

23 Moreover, we find First Federal's argument that there is
24 evidence of collusion between Chevy Chase and First American
25 without merit. In making this argument, First Federal relies
26 heavily on First Federal Savings Bank of Wabash v. United States,
27 118 F.3d 532, 534 (7th Cir. 1997). In that case, the Seventh
28 Circuit, relying on the footnote from the Ninth Circuit's Mort

1 decision¹⁴, found evidence of collusion between the title insurer
2 and the title insured based upon the circumstance of the insurer
3 paying the litigation costs of the insured. Id. Based on this
4 case and the facts surrounding Chevy Chases's representation,
5 First Federal believes it would be inequitable to allow
6 subrogation due to the alleged collusion between Chevy Chase and
7 First American.

8 First, we decline to adopt the ruling in First Federal
9 Savings Bank to the extent that it supports a finding of
10 collusion based solely on an insurance company paying for the
11 defense of its insured, and no other factors. Second, a finding
12 of collusion is not supported by the record in this case.

13 Collusion is defined as "[a]n agreement to defraud another
14 or to obtain something forbidden by law." Black's Law Dictionary
15 259 (7th ed. 1999). The evidence First Federal uses to support
16 its collusion argument is principally derived from correspondence
17 between First American and Chevy Chase's counsel concerning First
18 American's duty to defend and its right to interpose a defense
19 and/or pursue any litigation. In a letter, First American
20 discusses a section of the insurance policy titled "Defenses and
21 Prosecution of Actions; Duty of Insured Claimant to Cooperate."
22 Included in this section are provisions that provide detail about
23

24 ¹⁴ The footnote in Mort infers that if there is evidence of
25 collusion between the title insured and the title insurer, then
26 such evidence may be sufficient to indicate that the real party
27 in interest asserting the equitable subrogation claim is the
28 title insurer. 86 F.3d at 895 n.5. If the title insurer is the
real party in interest and the insured claim is in a junior
position because of the insurer's negligence, then the
application of equitable subrogation may be barred. See id. at
895.

1) First American's duty to defend Chevy Chase upon written request, 2) First American's right to institute and prosecute any action to establish title, and 3) Chevy Chase's obligation to provide First American with information.

First Federal has taken portions of the provisions and pieced them together with a paragraph in the letter to make the case for collusion. However, when these quotes are read within the context of the letter as a whole, it is clear that they relate to First American's right to prosecute a claim on its own behalf if it wished to do so. It did not do so. See Section C. Holder of the Equitable Subrogation Claim, supra p. 17. At bottom, Chevy Chase simply requested that First American uphold its duty to defend by paying for the litigation Chevy Chase has brought against First Federal.

First American's only connection to the lien priority litigation is through its duty to defend. Because there is no evidence showing that Chevy Chase and First American are working together to defraud First Federal or that First American is the real party in interest, we find that First Federal's collusion argument fails.

VI. CONCLUSION

Accordingly, we AFFIRM the bankruptcy court's finding that First Federal holds a valid judgment lien and its judgment that Chevy Chase is subrogated to the position of World Savings, respective of the priority of the Vitkova lien. We REVERSE in part and REMAND for entry of an amended judgment which also subrogates Chevy Chase to Sentinel's position, based on Chevy Chase's payoff of the Sentinel lien out of closing.