NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. NC-06-1256-SKuB NC-06-1287-SKuB
MARK CHAPMAN TIFFANY and MELODYE GAYLE TIFFANY,	Bk. No. 93-58255
Debtors.	Adv. No. 94-05278
FIRST FEDERAL BANK OF CALIFORNIA,	
Appellant and Cross-Appellee,	
v.	**M E M O R A N D U M**[1]
CHEVY CHASE BANK, F.S.B.,	
Appellee and Cross-Appellant.	

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, KURTZ[2] and BRANDT, Bankruptcy Judges.

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[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.

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

I. FACTS

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

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

[3] Interest of 10% per annum began accruing on the judgment from the date of its entry.

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

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

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

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

[4] Sentinel is the estate planning trust of the Lohrs.

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

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

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

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

1. Does First Federal hold an enforceable judgment lien and, if so, when did that lien attach?

2. Can Chevy Chase be equitably subrogated to First Federal if First Federal has a valid judgment lien that has priority over Chevy Chase's liens?[6]

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

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

(continued...)

3. What priority does the Vitkova lien have?

Distribution Order at 3, July 17, 2006.

A. First Federal's Judgment Lien

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

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

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

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

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

As to the effective date of the judgment lien, the court found that the lien instantaneously attached to the Property when Debtor acquired title under the doctrine of "after-acquired title." Weeks v. Pederson (In re Pederson), 230 B.R. 158, 163 (9th Cir. BAP 1999). Persuaded by First Federal's argument that Debtor held a community property interest in the Property at all times since its purchase in March 2001, the court concluded that the judgment lien attached to the Property on March 15, 2001. The court reasoned that even though Debtor had the right under California Family Code § 850 to transmute community property to separate property of Melodye without consideration, the transfer by Debtor to Melodye of his interest in the Property was a fraudulent transfer under California Civil Code ("CC") § 3439.05.[8] Hence, the bankruptcy court found the March 15, 2001 transfer to Melodye was "presumptively voidable" with the result that First Federal's judgment lien attached to the Property as of that date.

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[8] CC § 3439.05 provides

> A transfer made . . . by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without 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.

B. Equitable Subrogation

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

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

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

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

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

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

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

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

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[9] In Han, the Hans purchased a piece of residential real property from Lok. Prior to escrow opening, the property was encumbered by a properly recorded federal tax lien which the Hans' real estate agent had knowledge of but did not advise them about. After the Hans purchased the property, the IRS levied on 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 subrogration 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.

C. Priority of Vitkova's Lien

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

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

> (1) Chevy Chase is equitably subrogated to First Federal's lien [to] the extent of $576,668.84 (the payoff of the World Savings purchase money deed of trust) and shall receive the first $576,668.84 from the proceeds of sale.[10]
>
> (2) Next, First Federal's judgment lien shall be paid in full with interest through the date of payment.
>
> (3) Should there by any proceeds remaining after the $576,668.84 distribution to Chevy Chase and the distribution to First Federal, the remaining Chevy Chase liens shall be paid in full with interest through the date of payment.[11]

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[10] As we previously noted, the bankruptcy court's use of "subrogated" in the Distribution Order is syntactically incorrect. See footnote 6, supra. Nevertheless, the 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.

[11] The bankruptcy court does not provide any specific 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

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

Distribution Order at 14, July 17, 2006.

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

II. JURISDICTION

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

III. ISSUES

A. Whether First Federal holds a valid judgment lien.

B. Whether the bankruptcy court erred in determining the priority of the Worlds Savings, Sentinel, and First Federal liens.

C. Whether the bankruptcy court erred in finding that Chevy Chase, and not First American, was asserting the equitable subrogation claim.

D. Whether Chevy Chase is entitled to be equitably subrogated to the priorities of World Savings and Sentinel.

IV. STANDARD OF REVIEW

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

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[11](...continued)
in the Property, in other words, when First Federal's abstract attached, and the date the Sentinel deed of trust was recorded. 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.

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

V. DISCUSSION

A. First Federal's Judgment Lien

1. Validity of First Federal's abstract of judgment

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

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

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

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

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

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

2. Attachment of First Federal's judgment lien

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

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

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

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

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

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

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

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

B. Lien Priority

Lien priority in California is largely governed by

[12] The grant deed from the former owner to Melodye was recorded with the Santa Clara County Recorder as instrument number 15593923. Debtor's grant deed to Melodye was recorded immediately afterwards with the Santa Clara County Recorder as instrument number 15593924.

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

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

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

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

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

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

C. Holder of the Equitable Subrogation Claim

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

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

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

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

> It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settles automatically upon one who has simply made a mistake, when it is a commercial transaction involving a 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.

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

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

Under the title insurance policy,

> Upon written request by [Chevy Chase] . . . [First American], at its own cost and without unreasonable delay, shall provide for the defense of [Chevy Chase] in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, 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.

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

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

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

D. Chevy Chase's Entitlement to Equitable Subrogation

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

In California, equitable subrogation is appropriate where:

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

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

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

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

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

1. Culpable and inexcusable neglect

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

[13] Sentinel's beneficiary statement, which it returned to Chevy Chase on May 27, 2003, provided for a payoff demand of $73,053. As a result, this was the amount Chevy Chase conveyed to Sentinel through the escrow process, even though the deeds of trust recorded against the Property were for $115,000. 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.

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

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

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

2. The equities

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

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

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

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

decision[14], found evidence of collusion between the title insurer and the title insured based upon the circumstance of the insurer paying the litigation costs of the insured. Id. Based on this case and the facts surrounding Chevy Chases's representation, First Federal believes it would be inequitable to allow subrogation due to the alleged collusion between Chevy Chase and First American.

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

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

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[14] The footnote in Mort infers that if there is evidence of collusion between the title insured and the title insurer, then such evidence may be sufficient to indicate that the real party in interest asserting the equitable subrogation claim is the 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.