

2013 SENATE JUDICIARY

SB 2170

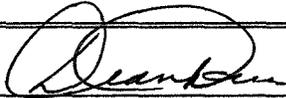
2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2170
1/23/2013
Job #17576

Conference Committee

Committee Clerk Signature



Minutes:

Relating to the effect of recording

Senator David Hogue - Chairman

Grant Shaft - Real Property Section - State Bar Association - He explains this comes out of the situation where the use of the Marketable Record Title Act has crossed the line from a method of clearing common defects to trying to divest title. A use it wasn't intended. He says the meat of the bill is in last four lines of page two. He says they are talking about unrecorded interests that may be a claim in the chain. This bill is to add clarification that says if you are the holder of a unrecorded conveyance you must get something of record of your interest.

Senator Hogue - Asks him about page one, lines 10-12, and wonders why that was struck.

Shaft - Replies they are trying to focus on the word conveyance and not limit conveyance to what is set forth in the specific language.

Senator Nelson - Asks for an example of how this would work.

Shaft - Explains record and record notice. He said ND is a record title state. That means we record our interests in the county recorder's office as notice to the whole world. Recording is the one sure way of giving notice.

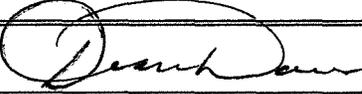
Close the hearing 2170

2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2170
1/23/2013
Job #17650

Conference Committee

Committee Clerk Signature 

Minutes:

Senator David Hogue - Chairman

Committee work

Senator Hogue discusses with the committee about amending the bill. He said it goes to all the lawsuits in the oil patch where there is mineral expiration and people are arguing about quit claim deeds and whether you can presume someone got title in good faith just because they took a quit claim deed. He gives examples of out in the west lawsuits over quit claim deeds. Senator Berry says it is like innocent till proven guilty. Senator Hogue said these conveyances people are fighting over happened in 1950 and those people may be deceased so no one has actual knowledge. Senator Hogue proposes an amendment for the bill. Committee discusses good faith.

Senator Hogue moves the amendment
Senator Armstrong seconded

Verbal vote - All yes

Senator Sitte moves a do pass as amended
Senator Berry seconded

Vote - 7 yes, 0 no

Senator Hogue will carry

January 23, 2013


1-24-13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2170

Page 1, line 8, replace "A" with "An unrecorded"

Page 1, line 8, overstrike "not recorded"

Page 1, line 9, overstrike the third comma

Page 1, line 10, overstrike "whose conveyance," and insert immediately thereafter "regardless of"

Page 1, line 10, remove the overstrike over "~~whether~~" and insert immediately thereafter "recorded"

Page 1, line 10, remove the overstrike over "~~in the form of a warranty~~"

Page 1, line 11, remove the overstrike over the first "~~deed~~"

Page 1, line 11, remove the overstrike over "~~or deed of quitclaim and release~~"

Page 1, line 11, after the third "of" insert "or"

Page 1, line 11, remove the overstrike over "~~the form in common use~~"

Renumber accordingly

Date: 1-23-13
 Roll Call Vote #: 2

**2013 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2170**

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Sitte Seconded By Berry

Senators	Yes	No	Senator	Yes	No
Chairman David Hogue	X		Senator Carolyn Nelson	X	
Vice Chairman Margaret Sitte	X		Senator John Grabinger	X	
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong	X				

Total (Yes) 2 No 0

Absent 0

Floor Assignment S. Hogue

If the vote is on an amendment, briefly indicate intent:

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REPORT OF STANDING COMMITTEE

SB 2170: Judiciary Committee (Sen. Hogue, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2170 was placed on the Sixth order on the calendar.

Page 1, line 8, replace "A" with "An unrecorded"

Page 1, line 8, overstrike "not recorded"

Page 1, line 9, overstrike the third comma

Page 1, line 10, overstrike "whose conveyance," and insert immediately thereafter "regardless of"

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Page 1, line 11, after the third "e" insert "or"

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Renumber accordingly

2013 HOUSE JUDICIARY

SB 2170

2013 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

SB 2170
March 26, 2013
JOB # 20497

Conference Committee

Cameron Hieble

Explanation or reason for introduction of bill/resolution:

Relating to the effect of recording.

Minutes:

Chairman Kim Koppelman: Opens SB 2170.

Grant Shaft, State Bar Association of ND and Real Property Probate and Trust Section: Time on tape :24 to 9:08. This bill deals with constructive notice. This bill arises out of the Swanson versus Swanson decision that came from the Supreme Court in 2011. When you deal with real estate in ND we deal with record title. Record title means if you record a document, the recording of that document is considered notices to all the world of that existing document. We establish certain priorities in this state when document are reported. For instance if there are competing mortgages on a piece of property, mortgages recorded first has first priority. When we are dealing with changes of title and deeds, we look at what was recorded and that helps us determine the marketability and who is the actual vested owner is in the title. It is very important in this state the priority established with regard to first record. When we have documents that affect real estate that aren't recorded we get into the complicated question that has been in the courts. It has to do with what notice do you need to have than to be placed on notice if something is not recorded. So if there is an unrecorded deed and you can't find it at the recorder's office, when does it affect somebody placing a mortgage, or if there is a claim of a prior mortgage? The Swanson decision issued by the Supreme Court underscored the complication. That case comes out of a deed that was given in the 1960's and the deed was never recorded, it was held onto by the individual. When the individual died the estate claimed they did not have notice of that. A deed was issued to another person who in turn conveyed the property to their children. The heirs of the 1963 deed said there was a deed, this is our property and the children in 2003 said this no we didn't have any notice. The decision didn't clarify what do you mean by record title and what priority does it establish. Now what you have in front of you you will see the important language. In the old statue it referred to a deed of bargain and sale, we don't use that term anymore, we use either a warrantee deed or a deed of quick claim. Page 2 line 4 through 6 you will see what it does. It does away with constructive knowledge and uses actual knowledge. We are intending as the practicing bar is to emphasize you need to record your documents because that is why we the record statues and that establishes priority. You can no longer rely on constructive notice. But in

the case of actual notice that does give you the ability to question good faith. If I know there is a mortgage out there, I can't claim good faith because even with that knowledge I went and recorded mine and claiming first position. But if I only had constructive knowledge, which means I didn't see it, I heard hearsay; I can still act in good faith. There are some further legal complications that go with that. The constructive notice the reason why we were looking to limit this to actual notice was constructive notice as discussed in the Swanson case had certain duties that had been placed on the person to further explore and try to flush it out. There isn't any way other than going to the Supreme Court to do that. What we want to do is say first record your documents, if you do record the only challenge you are going to get to that is if you had actual notice. If you had actual notice your good faith can be challenged.

Rep. Karen Karls: Why would you put a mortgage on property that you had knowledge that already had a mortgage on it?

Grant Shaft: It stretches belief that a banker who was shown this document would actually give that. But if I had some interest and wanted to sneak in a head of someone else so I am going to claim that since the other person didn't get into the recorder's office, I am going to run in and get mine recorded and I am going to claim I'm first. Someone could challenge my good faith under Lines 4, 5, and 6 because of actual knowledge.

Rep. Lois Delmore: That gets away from he said she said though, I have to have knowledge of the actual document; I have to have seen it, rather than just open it up to challenge?

Grant Shaft: That's correct. The Swanson case at a funeral in Florida someone made a passing comment about the existence of a deed. But then the property was transferred another time after that and that is when the challenge came. At what point to do say record your documents or just rely on actual notice?

Chairman Kim Koppelman: What is the burden of proof now to prove constructive knowledge?

Grant Shaft: It is a preponderance of the evidence

Rep. Gary Paur: Does the time in a signal day of filing, does that ever enter into the equation?

Grant Shaft: Every day. It establishes priority and so it's called a race to the recorder. When I have a transaction where there has been I record them in a certain order with the time down to the minute, recorded on the document and the document number. It comes into play on a daily basis particular when you have multiple claims against real estate.

Chairman Kim Koppelman: What was the change the Senate made?

Grant Shaft: It wasn't a substantive change to the bill but I don't have that here.

Vice Chairman Larry Klemin: You started talking about a race to the courthouse and we have a race notice statute and this new language at the end of the bill does the language on the end change that?

Grant Shaft: It doesn't because the race notice only deals with record notice, documents that have been recorded. That's the race notice when we talk about race the court house. This is claims of priority for unrecorded documents. The challenge good faith of a recorder that's what we are dealing with.

Vice Chairman Larry Klemin: What has good faith of the person recording the document have to do with it?

Grant Shaft: Under this you essentially have to have two components. One you have to have the actual knowledge and only when the actual knowledge is there then can you challenge the good faith of a banker who recorded it.

Vice Chairman Larry Klemin: That may not affect the validity and priority of first to record there mortgage?

Grant Shaft: That's right. To be clear this doesn't necessarily mean that there will never be litigation over this issue. It eliminates the constructive mortgage claims for the most part which then places greater importance on getting a document recorded.

Chairman Kim Koppelman: If you are saying it could be good faith because if you are the lender and you record your mortgages as a matter of course. However, if you see another mortgage is there any ethical obligation on the part of someone issuing a mortgage if they are aware of another to seek the filing of that?

Grant Shaft: That would be the where the court would go into. An example of good faith might be if I am Banker B I call up my lawyer and say I just this but you don't have to worry about that because if it's not recorded. Then we can debate if it was recorded in good faith. The bad faith would be I knew it was out there, I'm going to run to the court house and get recorded so I can claim priority even though I probably don't have it. Then you would no longer have that discussion in a recording case dealing with constructive notice.

Vice Chairman Larry Klemin: All the examples you have been given are in term of the mortgage and this just doesn't apply to just mortgages?

Grant Shaft: that's right, I'm not intending to mislead the committee sometimes the mortgage is the best way explain priority and recording. But what we are dealing with is conveyances. So you have a situation where I have given someone a deed and they put it in a file cabinet and didn't record it. They I give someone else the deed later. The second person doesn't know about the first person having a deed. If the first person has told the second person they have the deed and keep it in my file. The second asks the first person if it was recorded and the first says no. The second person goes and records it that would be the bad faith.

Rep. Lois Delmore: Does this include wills as well?

Grant Shaft: No, we are just talking about recorded deeds.

Vice Chairman Larry Klemin: What are the implications for doing this for minerals?

Grant Shaft: It would have an effect in this sense if you are talking about unrecorded conveyances. If you dealing with someone who severs the minerals and tries to sell the same thing to several people, that is why you get in and record your notices. To be clear on the constructive notice that we are essentially eliminating, It gets grey about how far you inquire.

Chairman Kim Koppelman: Suppose there is a cloud on a title? A piece of property was purchased and title work was done and it was a clear title. No mortgage on the property but the neighboring property was sold, when they recorded the title description they infringed on the property description by ten feet. What is the responsibility of the owner of parcel A to do something about that? If the owner of parcel B that is mis-recorded starts mowing that 10 feet of lawn and parcel A doesn't do anything about it. How does this constructive knowledge and actual knowledge come into to play if at all?

Grant Shaft: That wouldn't come into play with what we have in front of us because we are talking about questions of priority. That would be encroachments and adverse possession rights. You could cure it with a quit claim deed or an encroachment agreement. But by allowing you we would cut off your adverse claim rights.

Rep. Kathy Hogan: I compared the two bills; the first thing Senate changed was the unrecorded conveyance on line 8. The other thing was it referenced the date of quit claims that were originally eliminated in your bill.

Grant Shaft: Senate asked what should be used and quit claim was put back in.

Nick Hacker, ND Land Title Association: We support the bill, it add certainty which is basically what we operate off of.

Chairman Kim Koppelman: Closes the hearing.

Rep. Ben Hanson: Made a do pass motion.

Rep. Kathy Hogan: Second the motion.

Vote 14-0-0

Rep. Karen Karls: Will carry the bill.

Date: 3-26-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2170

House Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Hanson Seconded By Rep. Hogan

Representatives	Yes	No	Representatives	Yes	No
Chairman Kim Koppelman	/		Rep. Lois Delmore	/	
Vice Chairman Lawrence Klemin	/		Rep. Ben Hanson	/	
Rep. Randy Boehning	/		Rep. Kathy Hogan	/	
Rep. Roger Brabandt	/				
Rep. Karen Karls	/				
Rep. William Kretschmar	/				
Rep. Diane Larson	/				
Rep. Andrew Maragos	/				
Rep. Gary Paur	/				
Rep. Vicky Steiner	/				
Rep. Nathan Toman	/				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Karls

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2170, as engrossed: Judiciary Committee (Rep. K. Koppelman, Chairman)
recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed SB 2170 was placed on the Fourteenth order on the calendar.