Real Property Law Section

The Need For A Federal District Court Certificate in All Title Examinations: A Reconsideration

By Kraettli Q. Epperson

INTRODUCTION AND SUMMARY

In this article, the author considers whether attorneys examining title to Oklahoma real estate, at the present time, should require the abstract that they are reviewing to include a current federal district court certificate.[1]

It is true that over time the relevant federal and state common law and statutes have changed so that eventually — after two initial stages — any pending federal district court proceeding would be constructive notice only when a document known as a notice of *lis pendens* was filed in the local land records of the county clerk where the land was located?[2]

Consequently, as explained in more detail below, it appears that there are three periods of time (going back to sovereignty) when different legal rules have applied concerning the need for a title examiner to look at federal district court proceedings, as reflected in an abstract containing a federal district court certificate. Oklahoma has three separate federal district courts with each district covering multiple counties.[3]

As the result of the interaction of such federal and state laws, the title examination requirement for these three periods of time could be reflected in a title examination standard worded as follows.

Pre-1958

For lands under examination which are located in any of the counties located in the multi-county jurisdiction of a federal district court, there must be a federal district court certificate covering from inception of title (*i.e.*, sovereignty) to Aug. 19, 1958.

1958-1977

For lands under examination which are located in the same county where the federal district court is located, there must be a federal district court certificate covering from Aug. 20, 1958, to Sept. 30, 1977.

Post-1977

For any lands under examination, there is no need for a separate federal district court certification for the period after Sept. 30, 1977.

Comment: Although the 30-year Marketable Record Title Act (16 O.S. §§71 to 79) may eliminate the impact of some of the matters in the federal district court arising in the earlier period of time (*i.e.*, pre-1977), the express exceptions to the extinguishing effect of the MRTA (*e.g.*, "easements," and "any right, title or interest of the United States") cause such matters (such as judgments) to continue to impact the title in the present.[4]

The circumstances which prompted this author to consider this issue involved a 1943 eminent domain proceeding in a federal district court, where a flowage easement was taken by the U.S. government. One of the questions being considered was whether, under applicable statutory and common law, a *lis pendens* notice had to be filed in the local county land records. Upon review of the applicable law, it became clear that, at that time (*i.e.*, 1943), the filing of a separate *lis pendens* notice in the local land records was neither required, nor

authorized, by either federal or state common law or statutes. The land involved was located in one of the counties (*i.e.*, Delaware County) of the multicounty district covered by the federal district court (*i.e.*, the Northern District of Oklahoma), but the tract was not located in the particular county where the federal court sat (*i.e.*, Tulsa County).

An analysis of the law showed that, at that time (*i.e.,* 1943), the filing of the federal action in the federal district court itself constituted notice of the proceeding, and of all judgments arising in such case. In addition, all subsequent owners of the underlying fee simple interest — up to and including the present day — took their title subject to such easement.

DETAILED DISCUSSION

Discussion of Notice in General

The concept of "notice" is defined by our state statutes as follows:

> *25 O.S. §10: Notice is either actual or constructive.*
>
> *25 O.S. §11: Actual notice consists in express information of a fact.*
>
> *25 O.S. §12: Constructive notice is notice imputed by the law to a person not having actual notice.*
>
> *25 O.S. §13: Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.*

Therefore, the concept of "constructive notice" relates to the knowledge of information being "imputed by the law to a person." Constructive notice derives its existence not from a person learning directly about the outstanding interest (*e.g.*, from seeing an instrument creating an interest or from talking to a claimant of an interest — *i.e.*, not "*actual notice*"), but from the statutorily-created presumption of the receipt of such knowledge. Such presumption arises when certain legally prescribed actions have been taken, such as the proper filing of a deed or judicial decree in the county land records where the subject land is located.[5]

Lis pendens notice (*i.e.*, "the matter is pending") is a form of constructive notice. *Lis pendens* notice, initially, was more of a matter of public policy than strictly a matter of notice. As stated in *McClaskey v. Barr*, 48 F. 130, 7 Ohio F. Dec. 55, (Nov. 10, 1891) at page 133: "*It has also been held that, as the doctrine [of lis pendens] operates in cases where there is no possibility of the purchasers having notice of the pendency of the suit,* ***it rests upon considerations of public policy, and not on presumptions of notice***." (emphasis added) In other words, in the beginning, when a lawsuit was filed in federal (or state) district court, whereby the court was asked to affect title to real property, *it was a matter of "public policy"* that anyone who received title to such real property, during the pendency of such action, from a party to the suit, took such interest subject to the outcome of the action. Otherwise, the court would be thwarted in its efforts to resolve the dispute, and, if the parties could convey their interest in the land free from the court's jurisdiction, the parties could be forced to relitigate the same matter repeatedly.[6]

The concepts, procedures, and consequences, being focused on herein, are those which relate to determining when real estate titles to land located in Oklahoma are impacted by that form of constructive notice, known as a *lis pendens* notice. In particular, under what circumstances would such constructive notice arise from court proceedings filed in federal district courts located in this state (such as quiet title actions, partition actions, mortgage foreclosures, and eminent domain takings), meaning when would there be imputed knowledge of the resulting orders and judgments?

Discussion of Lis Pendens Notice

Depending on the date of the initiation of a federal district proceeding — seeking to affect title to such real estate — there was and is a regimen prescribed in the beginning by the common law and then later by federal and state statutes. Such rules specified how federal district court proceedings affecting real estate were and are brought to the attention of subsequent purchasers and encumbrancers.

The *lis pendens* notice procedures have varied over time. The three periods of time and the actions which gave, and give rise to *lis pendens* notice during those periods were as follows.

Pre-1958

Initially, state court proceedings affecting land constituted *lis pendens* notice based on public policy established under the common law; from the moment the state court action was filed, it was notice as to lands anywhere in

the state of Oklahoma, not just as to lands in the county where the state court sat. It was notice "to all the world."[7] Such broad notice became restricted, as to state court actions, by the passage of Compiled Laws of 1909, §5621,[8] so that, according to a case decided in 1913,[9] such statute caused the *lis pendens* notice (arising from filing a petition in state court) to extend only to lands in the county where the state court sat. Consequently, if a state action sought to impact separate non-contiguous tracts of land in different counties, the single action filed in one county did not constitute notice in any other county. Hence, to avoid some interest being conveyed or encumbered affecting the land located in the other (non-court proceeding) county, there had to be either a separate action filed, or a judgment secured and filed as soon as possible, in the other county.[10]

During this same period (*i.e.*, pre-1958), based on the common law, federal district court actions constituted *lis pendens* notice solely upon the filing of the action in federal court as to any lands located in any of the counties in its multicounty district.[11]

During this period (pre-1958), there was a series of federal cases that began to reflect a shift which suggested that the concept of *lis pendens* notice was a rule of property, so that it was to be governed by the laws of the state where the land was located.[12]

1958 to 1977

However, Oklahoma only enacted a statute, requiring or allowing the filing of record a separate *lis pendens* notice in the local county land records, when it enacted the following statute in 1953 (12 O.S. §180.1):

> "***No action pending*** in either a state or ***federal court shall constitute notice with respect to any real property situated outside of the county where said action is on file*** until such time as a notice of the filing of such action identifying the case and the court in which it is pending, and describing the land affected by the action, is filed in the office of the county clerk where said land is situated." 12 O.S. §180.1 (emphasis added)

As is evident in this language, the simple filing of the petition in a state or federal court was for the first time, as of 1953 (by state statute), restricted so that it did not serve as *lis pendens* notice as to any "real property situated *outside* the county where *such action is on file*"; this language made it clear that *no separate filing* in the local land records, apart from the petition being filed in the court clerk's office, was required for either state or federal court, *as to lands situated in the same county as where the state or federal court sat.*

In order to end any question about whether the creation of *lis pendens* notice for federal district courts had to comply with state statutes, 28 U.S.C. Section 1964 was enacted in 1958 (effective Aug. 20, 1958), to provide:

> "***Where the law of a State requires a notice of an action concerning real property*** *pending in a court of the State* ***to be*** *registered,* ***recorded****, docketed, or indexed in a particular manner, or* ***in a certain office or county*** *or parish* ***in order to give constructive notice*** *of the action as it relates to the real property,* ***and such law authorizes a notice*** *of an action concerning real property pending in a United States district court* ***to be*** *registered,* ***recorded****, docketed, or indexed in the same manner, or in the same place,* ***those requirements of the State law must be complied with*** *in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State."* (emphasis added)

The 1953 state statute, 12 O.S. §180.1, remained unchanged until Oct. 1, 1977.

1977 to present

In 1977, 12 O.S. §180.1 was amended (effective October 1, 1977) to require, inter alia, for the first time, that a separate *lis pendens* notice instrument be filed of record "in the office of the county clerk where said land is situated."

Such 1977 version of this statute removed the phrase: "in either state or federal court," but it was again amended in 1978 to reinsert words expressly making it applicable to both state and federal courts.

Since then, the statute 12 O.S. §180.1 was repealed Nov. 1, 1984, and replaced with 12 O.S. §2004.2 (effective Nov. 1, 1985), with essentially the same provisions, for both state and federal courts.[13] Consequently, such notice given by *lis pendens* includes knowledge of all the contents of the court file, including but not limited to any orders or judgments.[14]

The 1943 federal eminent domain case, discussed above, was initiated in the federal dis-

trict court affecting lands included in one of the counties in its district prior to 1958; consequently, the procedure that was relevant was the "pre-1958" one.

Under the "pre-1958" rules (*i.e.*, such constructive notice covered all lands in any of the counties in the federal district — without any filing in the local county clerk's land records) — all third parties, acquiring an interest in the subject lands from the then owner, or from subsequent owners, had *lis pendens* notice of the pendency and of the results of that eminent domain action, including whatever the court therein concluded and ordered concerning such taking.

Non-Applicability of the MRTA

An argument might be advanced suggesting that any pre-1958, or pre-1977 interests created by a federal district court case (*i.e.*, a flowage easement in favor of the United States) was an interest that was extinguished by a curative act that the Oklahoma Legislature enacted to dispose of "stale claims." This 30-year Marketable Record Title Act (which was preceded by a 40-year version), was first adopted in 1963 (collectively referred to herein as the MRTA).[15]

The MRTA is intended to facilitate determination of title to real estate and, in order to do so, is designed to extinguish all claims arising prior to the instrument constituting the root of title (a root is explained below). However, for practical and public policy reasons, there is a designated set of outstanding real property interests and liens and encumbrances arising prior to the root instrument (*e.g.*, deed or decree) which are not eliminated.[16]

To be a root of title, the instrument must have been the first instrument recorded more than 30 years prior to the date for which a person is determining the ownership of title. In other words, if you are looking at a chain of title in 2012 (*i.e.*, a series of conveyances or decrees), you examine all instruments back for 30 years to 1982, and slowly look further backward in time (one instrument at a time) from that date to locate the first instrument prior to such 30-year date.

Any title claims (*i.e.*, outstanding interests, or liens and encumbrances) which are recorded *after the root* will require release or remediation (such as requiring a quiet title proceeding, mortgage release, conduct of a probate, etc.). Without remediation, the title continues to be subject to such post-root instrument's negative impact, such as the threat of a successful challenge to title or a foreclosure.

If a title claim arises *prior to such root*, then, unless it is among the limited list of types of interests, proceedings, or persons expressly exempted from the impact of the MRTA (exempt title claims, discussed below), it is automatically extinguished, as if it never existed (the MRTA is a statute of repose, and not a statute of limitation).[17] Consequently, a subsequent purchaser or encumbrancer takes title free from such potential challenge.

However, as noted above, there is an express list of certain types of pre-root title claims which are exempt from the cleansing effect of the Oklahoma MRTA.[18] The Uniform MRTA was designed as a Uniform Act and was crafted based on the language of several other states' similar acts adopted before the uniform version was created. However, each state that adopted their version of the Uniform MRTA had to decide whether to adopt the Uniform Act in its entirety without changes, or to choose to exempt certain specific types of interests or certain proceedings and persons (*i.e.*, the exempt title claims) from its effect.

When Oklahoma adopted its version of the Uniform MRTA for use in Oklahoma in 1963, it expressly made certain items exempt from the extinguishing impact of the MRTA (*i.e.*, the exempt title claims). Such exempt title claims were expressly listed in 16 O.S. Section 76(A) as follows:

> *§76(A). Sections 71 through 80 of this* ***title shall not be applied*** *[1] to bar any lessor or his successor as a reversioner of his right to possession on the expiration of any lease; or [2] to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title of the land;[3] or to bar or extinguish* ***any easement or interest in the nature of an easement****, or any rights granted, reserved or excepted by any instrument creating such easement or interest; or [4] use restrictions or area agreements which are part of a plan for subdivision development or [5] to bar* ***any right, title or interest of the United States*** *by reason of failure to file the notice herein required.* (numbering and emphasis added)

The interest in question, in the sample case, is a flowage *easement* granted in an eminent domain case running in favor of the *United States*. The eminent domain case was filed in

1943 in the federal court for the Northern District of Oklahoma.

Such type of interest, an "easement," and the holder of the interest, the "United States," are expressly exempt from the extinguishing effect of the MRTA, as the Uniform Act was modified and adopted in Oklahoma. Consequently, the MRTA cannot and does not extinguish such disputed flowage easement, even if there was not a *lis pendens* notice filed in the local land records of the county clerk over 30 years ago (*i.e.*, before the root).

CONCLUSION

In conclusion, the rules for the creation of *lis pendens* notice as constructive notice, relating to federal district court actions in Oklahoma affecting real property, have steadily increased the steps needed to impute knowledge to subsequent grantees and encumbrancers. It started as being sufficient (until 1958) for the simple filing of a federal district court action to be sufficient to give *lis pendens* notice as to all lands in such multicounty federal court district. Later, such filing of the federal case alone only gave notice as to lands located in the single county where the federal court was situated (from 1958 to 1977). Currently (post-1977), it is required that a written *lis pendens* notice document be filed in the local county land records, where the subject land is located, to give constructive notice of such proceeding. Because constructive notice arises simply from the filing of the action in federal district court in the earlier periods (*i.e.*, pre-1958, and 1958-1977), the federal district court records for such periods will need to be abstracted, as evidenced by a federal district court certificate, with any court cases that are revealed needing to be examined.

The existing Title Standard No. 30.14, covering "Federal District Court Cases and Bankruptcy" cases provides: "*The absence of certification as to federal district court and bankruptcy court matters should not be deemed a deficiency in the title evidence for the real property under examination*." A significant revision to this existing Title Examination Standard No. 30.14 (substantially in the form suggested above), is apparently appropriate, because the current version is only accurate as to post-1977 federal district court matters.

The proposed revised Title Examination Standard (set forth above) has been adopted by the Title Examination Standards Committee of the Oklahoma Bar Association Real Property Law Section at the committee's Aug. 18, 2012, meeting. The proposed revision is scheduled to be considered by the OBA Real Property Law Section and the OBA House of Delegates at their annual meetings in November 2012.

Comments from other title examiners and other title professionals are solicited by this author.

1. Consideration of this issue by this author was prompted by his involvement as an expert in a recent case involving a 1943 flowage easement taken in an eminent domain action by the United States; the legal research that was undertaken was guided initially by study of a law review article written by attorney Dale Astle, and the supporting authorities cited therein; see Astle, Dale L., 32 *Oklahoma Law Review* 812 (1979), "An Analysis of the Evolution of Oklahoma Real Property Law Relating to *lis pendens* and Judgment Liens."

2. This author has previously written the following articles concerning some of the series of changes in requirements for giving notice of federal district court proceedings and other federal actions, affecting title to real property in Oklahoma: Epperson, Kraettli Q., *Oklahoma Bar Association Real Property Law Section Newsletter* (Summer 1992), "Local Real Property Filings Required for Federal Matters – or – The Proposed End of 'Standard 1.3. Federal Court Certificates;'" Epperson, Kraettli. Q., 63 *Oklahoma Bar Journal* 2697 (09-30-92), "Local Real Property Recordings Required for Federal Money Judgments;" Epperson, Kraettli Q., 64 *Oklahoma Bar Journal* 3195 (10-23-93), "Federal Money Judgment Liens Under the Federal Debt Collection Procedure Act: A 40-Year Super-Lien"; and Epperson, Kraettli Q., 47 *Consumer Finance Law Quarterly Report* 352 (Fall 1993), "Federal Money Judgment Liens Under the Federal Debt Collection Procedure Act: A 40-Year Super-Lien."

3. Oklahoma's three federal district courts are the Northern (Tulsa), Eastern (Muskogee) and Western (Oklahoma City); see PACER for which counties are in each district (www.pacer.gov).

4. Consideration is currently underway to revise Oklahoma's current Title Examination Standard 30.14 to reflect such new language. The current TES 30.14 was adopted in 2000, and provides:

The absence of certification as to federal district court and bankruptcy court matters should not be deemed a deficiency in the title evidence for the real property under examination.

Authority: 28 U.S.C.A. §1964; 28 U.S.C.A. §1962; 28 U.S.C.A. §3201.

Comment: Title 28 U.S.C.A. §1964 requires lis pendens notice as to federal district court actions to be filed in same manner as required by state law, (i,e., with the county clerk where the real property is located), 12 O.S. §2004,2 (A)(1). Title 28 U.S.C.A. §§1962 and 3201 requires any judgment of a federal district court to be filed in the same manner as required by state law to create a lien on real property,(i.e., with the county clerk where the real property is located), 12 O.S. §706; See also 68 O.S. §3401 et seq.

Caveat: The automatic stay of a federal bankruptcy proceeding is not subject to the requirements of Title 28 U.S.C.A. §1964. The automatic stay is generally effective without filing notice and regardless of where the bankruptcy is filed, 11 U.S.C.A. §362(a); See Chapter 34, infra, regarding bankruptcy proceedings.

History: The 2000 Title Examination Standards Committee recommended adopting this standard to evidence the fact that the constructive notice aspects of federal court matters are the same for all counties in Oklahoma. 71 OBJ 2629 (2000). The Real Property Law Section approved the committee's proposal on Nov. 16, 2000, and the House of Delegates adopted the standard on Nov. 17, 2000, 71 OBJ 3136 (2000).

5. *See: 16 O.S.§15-16: §15: "Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided. No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 [12-706] of the Oklahoma Statutes."*

§16: "Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors."

16 O.S. §31: "Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest

therein, duly certified, may be filed for record and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged."

16. *See: Hart v. Pharoh*, 1961 OK 45, ¶25, 359 P.2d 1074 (*"The chief purpose of lis pendens is to keep the subject matter involved within the power of the court until final judgment is rendered so that such judgment may be effective. Guaranty State Bank of Okmulgee v. Pratt*, 72 Okl. 244, 180 P. 376."); and *Bowman v. Bowman*, 1949 OK 70, ¶16, 206 P.2d 582 (*"The filing of the petition of the plaintiff herein was sufficient to charge the world with notice that the land involved was in litigation, and the above-quoted statute clearly states that no interest could be acquired therein by third parties pending litigation."*)

7. *See* Astle, Dale L., 32 *Oklahoma Law Review* 812, P. 813, "An Analysis of the Evolution of Oklahoma Real Property Law Relating to *lis pendens* and Judgment Liens."

8. §5621: "When the petition has been filed, the action is pending, so as to charge third parties with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within 30 days after the filing of the petition."

9. *Orton v. Citizens State Bank*, 1929 OK 332, ¶0, 291 P.15 (*"The statutes of this state failing to allow the filing of a notice lis pendens in counties other than the one where the action is brought, an action, brought to recover real estate consisting of separate and distinct noncontiguous tracts situate in different counties, will affect only the tract or tracts situated in the county where the action is pending so as to charge a purchaser pendente lite, who is not a party to the action, with notice under the provisions of section 260, C. O. S. 1921.")*

10. *Id*.

11. *Tilton v. Cofield*, 93 U.S. 163 (1876), p.168 (*"The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."*); *see, City of Mankato v. Barber Asphalt Paving Co.*, 142 F. 329, 341 (8th Cir. 1905), relying on *Tilton; see also Stewart v. Wheeling & Lake Erie Ry.*, 53 Ohio St. 151, 157, 41 N.E. 247 (1895) (*"A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder."*)

12. *Erie R.R. v. Thompkins*, 304 U.S. 64, 78 (1938) (*"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."); United States v. Calcasieu Timber Co.*, 236 F. 196, 198 (5th Cir. 1916) (*"It is well settled that the acquisition and ownership of real estate and all the means by which the title to it is transferred from one person to another, whether by deed, by will or descent, or by judicial proceedings, and the construction and effect of all instruments intended to convey it, are governed exclusively by the laws of the country or state in which the property is situated, and that such laws of the several states, being rules of property, are binding upon and are to be applied by the federal courts."*)

13. 12 O.S. §2004.2: *A. Upon the filing of a petition, the action is pending so as to charge third persons with notice of its pendency.* ***While an action is pending, no third person shall acquire an interest in the subject matter of the suit as against the prevailing party's title; except that:***

1) As to actions in either state or federal court involving real property, such notice shall be effective from and after the time that a notice of pendency of action, identifying the case and the court in which it is pending and giving the legal description of the land affected by the action, is filed of record in the office of the county clerk of the county wherein the land is situated*; and*

2) Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant or service by publication is commenced within one hundred twenty (120) days after the filing of the petition.

B. Except as to mechanics and materialman lien claimants, any interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency of action, shall be void as against the prevailing party or parties to such action.

C. No person purporting to acquire or perfect an interest in real property in contravention of this section need be given notice of a sale upon execution or of hearing upon confirmation thereof.

14. It should be noted that according to the sixth syllabus of *Wilkin v. Shell Oil Company*, 10th Cir., 1951, 197 F. 2d 42, 43, as quoted in *Hart v. Pharoh*, 1961 OK 45, ¶27: "*Generally, under Oklahoma law, lis pendens continues through time within which appeal, writ of error, or other action may be taken to review judgment."*

15. 16 O.S. Sections 71 to 79.

16. 16 O.S. §76(A).

17. *Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547.

18. 16 O.S. §76(A).

ABOUT THE AUTHOR

Kraettli Q. Epperson graduated from OU (B.A., political science, 1971), and from OCU (J.D., 1978). He is a partner of Mee Mee Hoge & Epperson in Oklahoma City, and focuses on mineral and real property litigation (arbitration, lien priorities, ownership, restrictions, title insurance and condemnation issues) and commercial real property acquisitions. He teaches Oklahoma land titles at OCU School of Law and serves as chair of the OBA Title Examination Standards Committee.