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The Marin Lawyer

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GENERAL MEMBERSHIP MEETING
U.S. SUPREME COURT REVIEW: 2013-2014

With great pleasure, the Marin County Bar Association is proud to welcome back Professor Rory Little, who will speak at our General Membership meeting on June 25, 2014, at 12:00 p.m. at the McInnis Club Restaurant. A former U.S. Supreme Court law clerk, Professor Little will provide insights into the Court and its Justices, and discuss cases that are pending or decided in the current Term, including: Riley (the cellphone search case from California); Alice Corp. (the software patent case); McCutcheon (the new Citizens United campaign contributions case); Town Of Greece (public meeting prayers); Shuette (affirmative action bans like California's prop 209); the Sebelius cases (religious freedom exemption claim for corporations) and Hall v. Florida (mental retardation and the death penalty).

Professor Little has been a Professor of Law at U.C. Hastings College of the Law for 20 years, and teaches Constitutional Law and Constitutional Criminal Procedure among other subjects. On three occasions he has been awarded the "Best Professor" designation by the U.C. Hastings third-year class.

After graduating from Yale Law School, Professor Little served as law clerk to U.S. District Judge Louis F. Oberdorfer (Washington DC); Justice Potter Stewart (ret.), working on matters before the First, Third and Sixth Circuit Courts of Appeal; and Justice William J. Brennan, Jr., at the U.S. Supreme

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Calendar of Events

June 25th
General Membership Meeting
12 – 1:30 pm

June 6th
Fee Arbitrator Training
1 – 4 pm

June 10th
Labor & Employment Section Meeting
12 – 1:30 pm

June 18th
ADR Section Meeting
12 – 1:30 pm
Probate & Estate Planning Section Meeting
12 – 1:30 pm

June 19th
Real Property Section Meeting
12 – 1:30 pm

June 24th
Probate & Estate Mentor Group
12 – 1:30 pm

June 26th
Business Law Section Meeting
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

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Aida del Valle was Guest Editor of this issue of *The Marin Lawyer.* Caroline Joachim is Series Editor for 2014.

SO YOU WANT TO BE A JUDGE?

California Women Lawyers' award-winning So You Want to Be a Judge? ® program is scheduled for June 16th at McGeorge Law School. Twelve jurists, the Special Assistant to Governor Brown, Joshua Groban, along with the current and immediate past chairs of the Judicial Nominees Evaluations (JNE) Commission, have confirmed their participation. Don't miss this opportunity to ask the judges questions about the path to the bench during the workshop sessions. Please forward the flyer (on page 11 of this newsletter) and the following link to any friends, colleagues and members of your organizations, who may be interested in this program. http://www.cwl.org/events/So-You-Want-To-Be-a-Judge-34/details

California Women Lawyers (www.cwl.org) is the only statewide bar association dedicated to promoting the advancement of women in the profession

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Scott D. Rogers

Theodore K. Klaassen

EQUITABLE SUBROGATION: A BIT MORE CLARITY FOR AN OFTEN OPAQUE REMEDY

By Scott Rogers and Ted Klaassen
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As foreclosure and lien priority litigation peaks in the aftermath of the mortgage meltdown, California courts continue to refine and clarify the application of the often arcane remedy of equitable subrogation. Following quickly on the heels of its recent victory in *JPMorgan Chase Bank, N.A. v. Banc of America Practice Solutions, Inc.*, 209 Cal. App. 4th 855 (2012), in which constructive notice of a prior lien did not preclude application of equitable subrogation to Chase's benefit, Chase was again battling for its right to equitable subrogation and lien priority. In the current case, *Branscomb v. JPMorgan Chase Bank N.A.*, 2014 Cal. App. LEXIS 106, the issue was whether Chase's actual knowledge of a prior lien constituted "culpable and inexcusable neglect" that would preclude application of equitable subrogation to establish priority over an existing lien.

California follows a "first in time, first in right" lien priority rule, which means that earlier recorded liens have priority over those recorded later. So, for example, if there are existing first and second liens recorded against a property, the next recorded lien would be third in priority. However, lenders asked to make loans to pay off senior liens will typically require that, despite being recorded later in time, their new liens assume the senior lien priority of the loans they paid off. Otherwise, foreclosure by a junior lienholder could wipe out the new liens. This shuffling of lien priority is typically accomplished voluntarily by way of a written subordination agreement in which the existing junior lienholder acknowledges in writing that the new lender's lien is in a senior position.

Equitable subrogation is available as a remedy to a lender that advances money to pay off a senior lien in expectation of receiving a new lien with priority equal to that of the paid off lien but finds its lien behind an existing junior lien that has priority by date of recording. Equitable subrogation allows the court to put the new lender's lien in the same senior position as the lien paid off by the lender, even without a subordination agreement with the existing junior lienholder. However, the equitable subrogation remedy is not automatically applied in derogation of the first in time, first in right rule. In determining whether the remedy of equitable subrogation is available, the courts must (1) determine whether the new lender is guilty of "culpable and inexcusable neglect" in failing to identify and resolve the existing junior lien and (2) balance the equities between the existing lender and the new lender. See *Simon Newman Co. v. Fink*, 206 Cal. 143 (1928).

What is or is not deemed to be culpable and inexcusable neglect continues to evolve in the California courts. The general rule is that a new lender who has actual knowledge of a junior lienholder will be denied equitable subrogation. *Smith v. State Savings & Loan Assn.*, 175 Cal. App. 3d 1092 (1985). However, California courts have found no culpable and inexcusable neglect, and allowed equitable subrogation, in some cases where a new lender had "some knowledge" of an intervening lien. *Lawyers Title Ins. Corp. v. Feldsher*, 42 Cal. App. 4th 41 (1996). This is one such case.

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(Equitable Subrogation, continued from page 9.)

In the current case, Chase and another lender made concurrent loans to refinance existing first and second liens on the property. There was an existing third lien, held by the plaintiff, on the property. All three liens were properly recorded and referenced in the lenders' preliminary title reports. At trial, it was established that the lenders expressly required, as a condition to closing, that their liens be in first and second positions, respectively. It was also established that the plaintiff's agent had forged and submitted to escrow in the refinance loan closing a zero payoff request and request to reconvey the plaintiff's third-position lien, wrongfully suggesting that nothing was owed to plaintiff. Despite this, the trial court concluded that the lenders' constructive and actual knowledge of the existing lien constituted "culpable and inexcusable neglect" and balanced the equities in favor of the plaintiff by noting that the lenders would likely have a cause of action against the escrow for holder for negligence.

The appellate court reversed the trial court's ruling, holding that equitable subrogation was available to the new lenders to establish their lien priority over the unpaid prior lien, notwithstanding their actual knowledge of it. The court noted that doctrine of equitable subrogation is designed to effectuate the intent of the parties. In the current case, the new lenders intended to receive first and second priority liens with the unpaid existing lender remaining in third position, as had been the case when it made its loan. The appeals court also cited the forged zero payoff and request for reconveyance that plaintiff's agent had deposited in escrow. Finally, the appellate court found that the fact that the lenders might have a potential (though, unlikely) claim for recovery from the escrow officer did not affect equities between the lenders and that any alleged negligence of the escrow holder for failure to recognize the forged zero payoff was not imputable to the lenders in any event.

This case and the prior case involving Chase evidence the power of the remedy of equitable subrogation to protect a lender's lien priority expectation. Of course, obtaining this remedy requires that the lender itself act prudently. To maximize the potential application of equitable subrogation should it become necessary, lenders should clearly and in writing express their expectation of lien priority, follow customary industry practices in their closing procedures, and utilize the services of reputable and skilled escrow and title professionals.

Scott Rogers is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. He is the former Chair of the Real Property Section of the State Bar of California and a member of the Advisory Board of the California Real Property Journal. Scott obtained both a J.D. and an M.B.A. from UCLA.

Ted Klaassen is senior counsel in the Palo Alto office of Rutan & Tucker, LLP where he represents developer, investor, corporate, and institutional clients in a broad spectrum of real estate transactional and litigation matters. Ted earned his journalism degree from the University of Missouri and his law degree from the University of Southern California.

(Rory Little, continued from page 1.)

Court. While at the Court, Professor Little also worked for Justices Powell, Stevens, and Chief Justice Burger—a unique one-year experience.

After three years in private practice, Professor Little served as a Trial Attorney in the U.S. Department of Justice's Organized Crime & Racketeering Strike Force in San Francisco. He then became the Appellate Chief for the U.S. Attorney's Office for the Northern District of California for five years, and has argued over 60 federal and state appeals while briefing many more. In 1996 to 1997, Professor Little served as an Associate Deputy Attorney General in Washington D.C. under Attorney General Janet Reno and Deputy AG Jamie Gorelick. In addition to his full-time teaching duties, Professor Little maintains an Of-Counsel position with the law firm of McDermott Will & Emery (where he currently has a pro bono capital habeas appeal pending in the Eleventh Circuit). He is also the Reporter for the American Bar Association's eight-year project to revise the Criminal Justice Standards for Prosecutors and Criminal Defenders. He lives in Marin County with his wife and three children, and for many years was a coach in the San Rafael Youth Soccer League.

(So you want to be a Judge?, continued from page 1.)

of law and society. The organization has represented the interests of more than 30,000 women in all facets of the legal profession, influencing lawyers, educators, students and judges. CWL was founded in 1974 as a commitment to the advancement of women, to universal equal rights and to the elimination of unfair bias. Connect with CWL on LinkedIn and Facebook. Our local affiliate organization is the Marin County Women Lawyers (http://www.mcwlawyers.org).