



OKLAHOMA LAND TITLE ASSOCIATION

presents

Closing from Hell 2023

“TikTok Title”

I. DIGITAL CLOSINGS

A. Introduction

- Real estate settlements and mortgage transaction are going digital to create a better closing experience while reducing risk for all parties. A digital transformation is complicated as Title Agents are seeking to meet customer needs, comply with state and federal laws and regulations, and understand evolving technologies.
- Uniform Electronic Transactions Act or “UETA” – One of the National Conference of Commissioners on Uniform State Laws’ uniform acts adopted in 1999, with the intent of harmonizing state laws for the treatment of electronic signatures and documents the same as wet-signed documents. As of May 3, 2021, 47 states, the District of Columbia, Puerto Rico and U.S. Virgin Islands have adopted UETA. The remaining states of New York and Illinois and Washington State have not, but all have adopted laws making electronic signatures legally enforceable. The four major requirements that all electronic documents must meet to be considered valid are:
 - **Intent** to sign - signatures are valid only when the party intended to sign (just as with wet ink signatures)
 - All parties to a transaction must **consent** to conduct business electronically.
 - The system used to capture the eSignatures must create an **electronic record** of the transaction, which shows the process of how the document was signed and proved the person used and electronic signature, and essentially associates the signature with the record.

- **Record retention** requirement – parties who participated and/or signed must have access to the system where the electronic record is maintained.
- Electronic Signatures in Global and National Commerce Act (E-Sign) – Federal Act adopted in 2000, which together with UETA, gives legal effect to real estate transactions that are executed electronically and allows them to be enforced between the parties to the transaction.
- Uniform Real Property Electronic Recording Act or “URPERA” – Another of the National Conference of Commissioners on Uniform State Laws’ uniform acts, originally adopted in 2004. Once UETA and E-Sign took hold, only a very few county recorder’s office in a few states began recording electronic documents. There was no uniformity for acceptance and processing of such documents, and because of that, few attempts to endeavor to do so were made. This Act’s fundamental principle is that any requirements of state law describing or requiring that a document be an original, on paper, or in writing are satisfied by a document in electronic form. Furthermore, any requirement that the document contain a signature or acknowledgment is satisfied by an electronic signature or acknowledgement. The act specifically authorizes a recorder, at the recorder’s option, to accept electronic documents for recording and to index and store those documents. If the recorder elects to accept electronic documents, the recorder must also comply with certain other requirements set forth in the act. The majority of states have enacted URPERA. The reality is, however, that despite these enactments, many of those same states simply do not have the infrastructure, technology, money, or the support of a state agency necessary to move this to the new normal. The COVID-19 Pandemic caused those states and others, to reevaluate the absolute necessity of utilizing electronic documents, signatures and notaries and emergency legislation and procedures pushed this to the forefront of the leaders in the title industry, technology providers, and government leaders.

B. eClosing Types & eCabulary

eClosing Types

Traditional “Wet Signing”	“Hybrid Closing”	eClosings	
		“In-Person eNotarization” <i>(“IPEN,” Full eClosing)</i>	“Remote Online Notary” <i>(“RON,” “Webcam,” “Remote”)</i>
<ul style="list-style-type: none"> In-Person Notary All Paper Documents In-office / Mobile Notary 	<ul style="list-style-type: none"> In-Person Notary Rec and Note paper docs Some Documents <u>eSign</u> In-office / Mobile Notary 	<ul style="list-style-type: none"> In-Person <u>eNotary</u> All Documents <u>eSign</u> In-office / Mobile Notary 	<ul style="list-style-type: none"> <u>eNotary</u> via Webcam <u>NOT</u> in person All Documents <u>eSign</u> Notary public on Webcam
		<ul style="list-style-type: none"> eNote (Promissory Note) eVault (Authoritative Copy) 	<ul style="list-style-type: none"> eNote (Promissory Note) eVault (Authoritative Copy)



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- Traditional “Paper” Closing – Closing where all parties are in person and all documents are signed and notarized using pen-and-ink on paper.
- eClosing, Digital Closing or Digital Settlement – any real estate closing event or process in which some or all parties use an electronic signature to sign some, or all closing documents. Traditional paper or e-recording may be utilized depending on county availability. Any digital documents requiring notarization of the electronic signature are performed in person by a duly commissioned electronic notary, using their electronic signature and digital notary seal.
- Hybrid eClosing – At least some of the documents are in digital form and electronically signed, and some of the documents are in paper form and signed using pen-and-ink. The recordable documents are signed using pen-and-ink on paper in the physical presence of a notary public. If there is a promissory note, it may be in electronic form (an “eNote”).

- eNote - A promissory note in electronic form, which requires one authoritative copy of the eNote that is generally stored in an “eVault”.
- eVault – This is the location of the physical computer file holding the authoritative copy of the eNote.
- In-person eClosing - “IPEN” or “Full eClosing” – All documents are in digital form and electronically signed, typically on a tablet. The documents requiring notarization are electronically signed and electronically notarized in the physical presence of a notary public authorized to perform in-person electronic notarizations. Like the Hybrid model, if there is a promissory note, it may be in electronic form (an “eNote”). Recordable documents are submitted for electronic recording. If electronic recording is not available in the jurisdiction where the property is located, you must confirm that “Papering Out” is permissible before agreeing to insure an In-Person eClosing.
- Papering Out - This is the process of printing an electronic document containing an electronic signature and submitting the printed version for recording. The process typically involves applying a certification that the printed version is a true copy of the electronic version. Some platforms utilize a bar code or date/time stamp and authentication number.

C. Remote Online eClosing – “RON”: This is a fully digital type of eClosing, and *all* documents are in digital form *and* electronically signed. The documents requiring notarization are electronically signed using a vendor platform specially designed for this type of eClosing, during an online interactive two-way audio-video communication with a commissioned electronic notary public. The notary public electronically notarizes using the online notary public’s electronic signature and digital notary seal. The remaining documents are electronically signed, which may or may not occur during the online audio-video session. Executed recordable documents are submitted for electronic recording. If electronic recording is not available in the jurisdiction where the property is located, you must confirm that Papering Out is permissible before agreeing to insure a Remote Online eClosing. In this closing, if there is a promissory note, it must be in electronic form (an “eNote”).

- RON is a notarial process that allows the signer to “appear” before the notary over a live audio-visual communication technology platform, when executing digital documents rather than being physically present as in the traditional paper closing, and after signer is subjected to identity proofing. Communication technology is an electronic device or process that allows a

notary and a remotely located individual to communicate with each other simultaneously by sight and sound.

- Identity proofing is a process or service by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources.
- The vendor platform utilized will have Identify proofing as a pre-requisite to the signing. Many underwriters do not require the signer to be a United States citizen, if the signer is not a US citizen, this part of the process may fail because the sources accessed to obtain the proofing data, most often original from data available and collected in the United States.
- The notary must be commissioned to perform RONs, and typically, the state in which the signing takes places controls which state laws apply. However, some states like Maryland and Utah require the notary performing the RON, to be physically located in the state of execution.
- Minimum technology standards will be required for every signer, any required witnesses, and the notary. The notarization will be recorded on camera, creating new avenues for legal challenges against notarizations.
- Acknowledgments - For each document containing an acknowledgement (e.g., deed, mortgage, deed of trust, or lease), follow state law for the required wording for taking an acknowledgment, and be certain it also includes any required statement such as “This acknowledgement was taken using audio-visual communication.”

D. Oklahoma Legislation

- Electronic Notarization (UETA 12A O.S. §15-111):
 - A “traditional” Oklahoma notary can perform an electronic notarization (affixing an electronic signature and seal to an electronic document). Both notary and principal must be physically present together during the notarization
 - UETA does not apply to laws “governing the creation and execution of wills, codicils, or testamentary trusts” or UCC Transactions (with a few exceptions)
- Remote Online Notarization (49 O.S. §201 et. seq.):

- A remote online notary has authority to perform a notarization via audio-video feed
- Notary must register with SOS and must certify that notary intends to comply with technology standards through third party software provider
- Recordation of Electronic Documents in Tangible Form (16 O O.S. §87)
- Oklahoma Remote Online Notary:
 - Separate application is required to be commissioned as a RON
 - Must use approved, secure technology
 - Notary must verify principal by:
 - Notary's personal knowledge of the principal or affirmation of credible witness who personally knows principal
 - Using "Multi-Factor Authentication": (1) "Identity proofing of principal" – knowledge-based authentication (KBA); (2) remote presentation of government-issued ID with picture; and (3) credential analysis of ID
 - Notary must be located in Oklahoma
 - Certify that paper copy is a legitimate copy
 - "Notarial Certificate" (acknowledgment) must disclose RON
 - RON may charge \$25.00
 - RON must maintain "journal" and retain audio/visual recording for 10 years (can use third party depository)
 - Secretary of State Rules and Standards: OAR 655:25-1-1-1 et seq.

ACKNOWLEDGMENT FOR DEED

STATE OF _____
 COUNTY OF _____

This record was acknowledged before me by means of communication technology on [DATE] by [NAME OF PRINCIPAL].

 Notary Public
 (ELETRONIC SEAL)
 My commission expires: _____

- Papering Out Process
 - The RON must review and confirm that no security features present on the electronic record indicate any changes or errors in an electronic signature or other information in the electronic record after the electronic record's creation or execution.

- The notary must personally print or supervise the printing of a paper copy of the electronic document.
- Execute and notarize the statutory form of "Certification of Authenticity" to confirm that the paper copy is a true and correct copy of the electronic document.
- The notary must affix or attach the "Certification of Authenticity" to the printed paper or tangible copy of the electronic record. Submit the copy of the document for recording in the normal manner with the "Certification of Authenticity" attached to it.

CERTIFICATE OF AUTHENTICITY

STATE OF _____
 COUNTY OF _____

I certify that the preceding or attached document (entitled (document title)), (dated (document date)), containing (number) pages is a true and correct copy of an electronic document printed by me or under my supervision, and that, at the time of printing, no security features present on the electronic document indicated any changes or errors in an electronic signature or other information in the electronic document since its creation or execution.

Signed this ____ day of _____, 20____.

 Notary Public

(SEAL)

My commission expires: _____

E. How do eClosings affect underwriting risk?

- For title insurance underwriters, eClosings have powerful potential. If deployed well, they can simultaneously reduce underwriting risk and improve the borrower/seller experience. For example, a well-designed eClosing process can give borrowers and sellers more time to review documents in advance of the closing, prevent "missed signatures" on documents at the closing, enable the efficient and accurate distribution of executed documents to the parties, create a seamless process for recording documents upon closing, and reduce post-closing "clean-up" work.
- However, poorly deployed eClosings with weak processes can have exactly the opposite effect. This is especially true with regard to remote online notary closings because the buyer/seller/borrower is not in the same room as the

notary public. This can make it difficult to detect serious problems like fraud, duress, elder abuse, and mental incapacity. These problems create substantial risk of claims unless stopped in advance. For this reason, it is important to use only eNotary processes that have been carefully designed to prevent these problems.

- Why does this matter? Covered Risks in the ALTA Standard policies:

- Owners and Loan Policy: Identical Covered Risk 2(a)(iv) and (vi):

“2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from

(a) A defect in the Title caused by

(i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;

(ii) failure of any person or Entity to have authorized a transfer or conveyance;

(iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;

(iv) failure to perform those acts necessary to create a document by electronic means authorized by law;

(v) a document executed under a falsified, expired, or otherwise invalid power of attorney;

(vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or ...”

- Loan Policy only: Covered Risk 9(d)(f):

“9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage

(a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;

(b) failure of any person or Entity to have authorized a transfer or conveyance;

(c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;

(d) failure to perform those acts necessary to create a document by electronic means authorized by law;

(e) a document executed under a falsified, expired, or otherwise invalid power of attorney;

(f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or..”

- Definitions in the policies:

- Owners and Loan Policy:

"Mortgage": *Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.*

➤ Loan policy only:

"Indebtedness": *The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of...*

"Insured": *The Insured named in Schedule A.*

(i) The term "Insured" also includes ...

(A) ...

(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;

II. MECHANICS' LIENS

A. TYPES OF LOANS

- **Development Loans:** After the land has been acquired by the real estate developer, he may need to seek financing to pay for the next phase of the project. A "real estate development loan" is a loan made to a developer to enable the developer to plat the property, to design and construct streets and utilities, and to lay out the development. It may include what is referred to as "soft" costs – those costs paid to other professionals for legal, engineering, architectural, and title costs.

The lender financing any development should be required to join in the plat if the lender's mortgage has been placed of record prior to the filing of the plat, or the lender may be required to "ratify" the plat and the restrictions.

Otherwise, the mortgage lien of the lender will be superior to the plat, the dedications contained therein, and any other restrictions or easements with respect to the property.

Development loans are substantially similar to a real estate construction loan, with one important difference. The difference is that partial releases must be obtained from the development lender when (1) there is a sale of one or more lots by the developer to a homebuilder or (2) construction of a completed home by the developer is sold to a home buyer. Normally, the land developer and his lender will negotiate a schedule of lots included in the development loan for the partial release of the subject lots in exchange for a pre-determined "lot release price". It is recommended that the borrower require that such items as dedicated streets and common areas established by the plat also be released by the lender.

- **Residential Construction Loans:** A residential home builder will normally require financial assistance in order to construct houses on the subdivision

lots. The types of construction by the builder might be “custom” homes or “speculative” homes.

For custom homes, the bank making the construction loan may require the home builder or home buyer to purchase the lot before construction commences. The home buyer must be aware that if he is the mortgagor, then the burden of completion of construction is on the home buyer even though the home builder is responsible for constructing the house.

For speculative homes, the home builder will purchase the lot under the residential construction loan and will be responsible not only for completing the house, but also for its ultimate sale to a home buyer.

The greatest risk in real estate construction loans is project cost overruns on the builder or diverting the construction loan proceeds, either of which can result in the filing of mechanic’s and materialmen’s liens on the property, as discussed below.

Many banks are looking at creative ways to finance their larger developer / builder customers. Some may consider “revolving lines of credit”, or “open end” financing of some sort. If a title insurance agent is asked to provide special endorsements relating to these types of unconventional construction financing, they should contact their state underwriter staff.

- **Construction Loans:** A construction loan is usually a short term loan of not more than two years. The loan may include not only financing for the cost of building the home, but also application or commitment fees, loan administration fees, points, or standby fees. Generally, the construction lender’s main security for the payment of his loan, is the “take out” loan of the permanent lender upon completion of construction. A primary concern of the construction lender is that the project be completed – on time and within budget.
- **Permanent Loans:** The long term or permanent lender (the “take out lender”) looks for a completed project capable of producing a long term loan and income stream. Conditions precedent to the closing of the permanent loan often involve the availability of utilities and public services, access, and the cost or appraisal of the project in relation to the amount sought for permanent financing.
- **Holdbacks:** Construction or permanent loans often involve “holdbacks” of a portion of the loan proceeds pending satisfaction of completion, occupancy, or tenants. Since the construction lender is looking to the permanent lender as its principal payment source, it will generally not disburse funds equal in an amount to cover contingencies until it is satisfied that all holdback requirements have been met.

B. Mechanics' and Materialmen's Liens in Oklahoma

- **How the Lien Arises and is Perfected:** The mechanic's' and materialmen's lien, sometimes simply referred to as the "mechanics' lien," is a lien created by statute to secure the priority of payment for work performed and materials furnished to construct or repair improvements to land. 42 Okla. Stat. §141 et seq. Once filed, the mechanics' lien attaches to the land as well as the improvements. The mechanics' lien provides security for the payment for labor or materials furnished; if the debt is not paid, the claimant has the right to sell the property to recoup the debt through judicial proceedings. The reasoning for these extraordinary rights in favor of the unpaid provider of services or materials is that the unpaid provider is instrumental in improving the value of the land which benefits the owner thereof.
- Statutory mechanics' liens give rise to a fair amount of breach of contract and title insurance claims. The nature of the lien makes this situation unavoidable because the lien can be filed up to 90 days or four months, depending on the situation, after the work was performed or material was delivered. The lien then "relates back" to the time when the material or labor was first provided. 42 Okla. Stat. §§142 and 143. At the time of most real estate closings, there is no knowledge of the existence of these liens on the part of the title company or the lender.
- The problem of unfiled liens might arise in a number of scenarios:

Scenario #1: Suppose the seller in a real estate transaction has contracted to have various improvements made to the property in order to get the property ready to sell. The seller hires a contractor, who in turn hires various subcontractors who actually do the labor and provide the materials for the project. The seller pays the contractor the agreed price of the job. The seller and purchaser close on their real estate purchase contract and the purchaser goes into possession. Unbeknownst to the seller or purchaser, the contractor fails to pay his subcontractors. Several weeks after the closing, the purchaser begins to receive notices from the county clerk that liens have been filed by the subcontractors.

Scenario #2: Suppose the seller himself in a real estate transaction has contracted to have various improvements made to the property in order to get the property ready to sell. The seller hires a several contractors to do the work. The seller cannot come up with the funds to pay contractor at the completion of his work; or perhaps the amount charged or the quality of the work by one of the contractors is contested by the seller. The seller and purchaser close on their real estate purchase contract and the purchaser goes into possession. Several weeks after the closing, the purchaser begins to receive notices from the county clerk that liens have been filed by the contractors who dealt directly with the owner.

Scenario #3: The owner of a commercial development hires a contractor to complete a commercial building. The project begins to fail for any of the following reasons: (1) the project is underfunded and the developer lacks resources to complete it; (2) the developer misappropriates construction funds, leaving the project underfunded; (3) the contract gets paid for work not adequately done, then abandons the project; (4) unexpected work is needed, leaving the balance of the project underfunded; or (5) sudden market changes doom the success of the project.

- When a project fails, the lender and the purchaser face tough questions of whether they will advance additional funds to complete the project, to file suit, or do nothing. Most purchasers and their lenders consider title insurance as their best protection against mechanics' lien claims. However, title insurance coverage for a lender or purchaser is not freely offered or provided. The industry regards this as a "special risk" and special underwriting, investigation and assurances are required before coverage is given. It is hoped that the information contained in this section will help you, as a title insurance agent, to understand and identify the special risks associated with the prospects of off-the-record mechanics' lien rights.
- **Lien of the Contractor** (42 Okla. Stat. §141): Any person claiming a lien must file in the office of the county clerk of the county in which the land is situated a statement setting forth the amount claimed and the items thereof as nearly as practicable, the names of the owner, the contractor, the claimant, and a legal description of the property subject to the lien, verified by affidavit. Such statement must be filed within four (4) months after the date upon which material or equipment used on said land was last furnished or labor last performed under contract. Immediately upon the receipt of such statement the county clerk enters a record of the same against the tract index and in a book kept for that purpose, called the mechanics' lien journal, and sends notice to the parties set forth in the lien statement.
- **Lien of the Subcontractor** (42 Okla. Stat. §143): Any person who furnishes any such material or lease or rent equipment used on said land or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material, equipment and labor; and any artisan or day laborer in the employ of, and any person furnishing material or equipment used on said land to, such subcontractor may obtain a lien upon such land, or improvements, or both, for the same time, in the same manner, and to the same extent as the subcontractor, for the amount due him for such material, equipment used on said land and labor, by filing with the county clerk of the county in which the land is situated, within ninety (90) days after the date upon which material or equipment used on said land was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting

forth the amount due from the contractor to the claimant, and the items thereof, as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a legal description of the property upon which a lien is claimed. Immediately upon the filing of such statement the county clerk enters a record of the same against the tract index and in the journal provided for in the preceding section.

- The mechanics' lien statute goes on to provide that the owner of any land affected by such lien shall not become liable to any claimant for any greater amount than he contracted to pay the original contractor. *"The risk of all payments made to the original contractor shall be upon such owner until the expiration of the ninety (90) days herein specified,"* and no owner shall be liable to an action by such contractor until the expiration of said ninety (90) days. 42 Okla. Stat. §143. The owner may pay such subcontractor the amount due him from such contractor for such labor, equipment used on said land and material, and the amount so paid shall be held and deemed a payment of said amount to the original contractor.
- **Rental Equipment:** Section 143.2 further provides that if leased or rented equipment is used, the owner of the equipment must give the owner of the property a notice that the equipment is in fact leased or rented. The notice must be delivered to the owner (or the owner's representative) within five (5) days after the equipment is first used. The notice must be given at least sixty (60) days before filing the lien. A copy of the notice certificate of service must also be filed with the lien.
- **Effect on the Transaction:** A lien filed pursuant to one of the above sections can violate the terms of the real estate purchase contract and the warranty deed itself, because the interest of the contractor or subcontractor, as the case may be, can relate back to the time before the purchaser acquired title. In other words, the liens are "inchoate" from the time the lien rights arise and the time that the lien is actually filed.

C. Stale Liens: A mechanics' lien shall not be effective unless suit to foreclose the lien shall be brought within one (1) year after it accrued. Thus, a lien is considered unenforceable after one year from its recording.

D. Discharge of Liens: What about the situation where the seller has had liens filed against him and the project prior to closing, but there is a dispute as to the amount of the outstanding bill or quality of the work? How can the seller proceed to close the transaction and provide clear title? The lien may be discharged under 42 Okla. Stat. §147.1 and a cash or surety bond may be posted to stand in the place of the real property as security for the payment of the outstanding lien claim.

- Any property owner or other interested party, including, but not limited to mortgagees, contractors, subcontractors and others against whom a lien claim

is filed under the provisions of the law relating to mechanics' and materialmen's liens, may at any time discharge the lien by depositing with the county clerk in whose office the lien claim has been filed either: (1) an amount of money equal to one hundred twenty-five percent (125%) of the lien claim amount; or (2) a corporate surety bond with a penal amount equal to one hundred twenty-five percent (125%) of the lien claim amount.

- If a cash bond is deposited, then the lien is deemed to be released immediately of record. If a surety bond is posted, a ten day notice period exists before the lien may be shown as released. Under 42 Okla. Stat. §147.1, the lien claimant has ten (10) days after the notice of deposit is mailed by the county clerk within which to file a written objection to the bond. The statute is very clear as to the requirements of the bond. If a surety bond is posted, mechanics' lien coverage cannot be given in the title policy until:
 - (a) ten (10) days has expired from the time the notice is mailed by the county clerk; and
 - (b) the title agent has determined from the county clerk that no objection to the bond has been filed.

A copy of the Notice of Cash Bond and Notice of Surety Bond to discharge mechanics' liens are attached to this section. The particular county clerks of the various counties may mandate different or additional filing requirements.

E. Release of Mechanics' Liens: If the search of the title reveals a filed mechanics' lien, the title agent must assure itself that the mechanics' lien will be released, if not otherwise discharged as set forth above. The seller may make arrangements for the payment of the outstanding lien prior to closing and provide an executed release (the validity of which should be verified – remember Richard Nixon's philosophy: "Trust, then verify"?). Payment in exchange for the release may also be arranged through the closing itself, if sale proceeds are to be used for the payment of the lien amount.

F. Oklahoma case law affecting broken priority

- No General Contractor - When the owner serves as his own general contractor, he makes separate contracts with each of his contractors. The right to the lien arises as of the date each contractor commences work or material is first furnished by the individual contractor. The lien period will run to 120 days from the date each contractor who has contracted with the owner finished the work contemplated by the contract. Each individual contractor has his own lien period which is different and separate from the other contractors on the job. American-First Title & Trust Company v. Ewing, 403 P.2d 488 (Okla. 1965).
- General Contractor - When the owner hires a general contractor under a comprehensive construction contract, the mechanics' lien rights are different. Priority of mechanics' liens over a mortgage is determined from the date

construction is commenced; in other words, priority begins when the first subcontractor steps foot on the property or delivers materials to the site. The other subcontractors then are able to “ride the coattails” of the first man on the job and obtain priority over a subsequently filed mortgage through the lien of the general contractor. The lien period for the general contractor will run to 120 days from the date of actual completion of construction contract; in other words, the lien period for the general contractor expires when the last man leaves the project. Determining what is considered “completion” of construction is sometimes difficult. Perhaps completion may be evidenced by a Certificate of Occupancy issued by the appropriate municipality or perhaps it may be evidenced by an Architect’s Certificate. In any event, construction isn’t complete until it is complete, which may be a somewhat subjective determination.

III: **“HOT TOPICS” – ALIEN OWNERSHIP OF LAND AND TRANSACTIONS INVOLVING CANNABIS ACTIVITY**

A. Can an “Alien” Buy Property in Oklahoma?

1. Basic Definitions under Oklahoma law
 - Citizen
 - Naturalized Citizen
 - Alien
 - Resident Alien
 - Non-Resident Alien
2. “Alien” Ownership in Oklahoma
 - Aliens have only such rights to take and hold real property as is permitted by state and federal law.
 - Subject to U.S. Constitution and Treaties, rights of aliens are primarily matters of state regulation
3. Can an “alien” buy property in Oklahoma?
 - A common misconception in real estate community
 - Provided for in state constitution and statutes since 1907
 - Ability to hold property depends upon “intent” relative to “residency”
 - Oklahoma Constitution, Article XXII Sec. 1:

No alien or person who is not a citizen of the United States, shall acquire title to or own land in this state, and the Legislature shall enact laws whereby all persons not citizens of the United States, and their heirs, who may hereafter acquire real estate in this state by devise, descent, or otherwise, shall dispose of the same within five years upon condition of escheat or forfeiture to the State: Provided, this shall not apply to Indians born within the United States, nor to aliens or persons

not citizens of the United States who may become bona fide residents of this State.

4. 60 Okla. Stat. §121-123 / Attorney General Opinions
- An Alien must dispose of property and has five years to dispose before State can institute escheat proceedings
 - If alien takes up bona fide residence in Oklahoma, he may acquire and hold lands during the continuance of such bona fide residency.
 - If alien ceases to be a bona fide residence, he has five years to dispose of property
 - A corporation formed by an alien and “domesticated” in Oklahoma by registering with the Secretary of State was found to be a “bona fide resident”. It would appear that the same concept would apply to LLC’s and partnerships.

5. An Alien does not own title fee simple absolute, but holds subject to the conditions of the statute

6. Owners Title Insurance Policy – Suggested Exception:

Any adverse matters created by violation of Title 60, Oklahoma Statutes, §121, et seq., or based on Article XXII, Section I of the Oklahoma Constitution, or any other similar statutory or constitutional provisions, which restrict alien ownership of real property in Oklahoma.

7. FIRPTA - Foreign Investment in Real Property Tax Act of 1980

- The disposition of a U.S. real property interest by a “foreign person” is subject to FIRPTA income tax withholding
 - If the seller is a foreign person and the buyer fails to withhold, the buyer may be held liable for the tax
 - Not a tax in itself, but a payment on account of the ultimate tax due from the Seller
 - Buyer’s responsibility
 - Does not exempt the Seller from filing a U.S. tax return and payment of tax due
 - If amount withheld exceeds tax due, refund may be obtained by Seller
 - Remittance of IRS Form 8288 and withholding must be made within 20 days of closing.
- Who is a “United States Person”?
 - U.S. Citizen
 - Resident alien with “green card”
 - Foreign person who meets the “Substantial Presence Test”
 - 31 days in calendar year or 183 days under 3 year formula
 - Legal Entity which has elected to be treated as a domestic entity

- Fiduciary or Personal Representative
- Who is a “Foreign Person”?
 - individual who is not a U.S. citizen or resident alien
 - *(IRS definition NOT OK definition!)*
- Personal Residence Exception
 - Not required to be primary residence
 - Must meet OCCUPANCY requirement
 - Option of Buyer
 - Buyer or member of Buyer’s family
- Required Withholding
- Affidavit of Non-Foreign Seller
 - Sworn statement completed and signed by Seller
 - Certifies that Seller is NOT a “Foreign Person” and no withholding is required
 - Includes Seller’s tax identification number
 - Statement under penalty and perjury of law
 - Provided directly to Buyer
 - Title Company should provide Affidavit
- Settlement Agent as “Qualified Substitute”
 - A Withholding Agent is personally liable for the full amount of FIRPTA withholding tax required to be withheld, PLUS penalties and interest
 - Closers are typically NOT agents of the Seller or the Buyer for purposes of FIRPTA, however some title companies do withhold and report or prepare exemption or affidavit forms as part of the closing process.
- Do not provide legal or tax advice
- Make sure to obtain the Affidavit prior to or at closing to protect your Buyer
- Form 8288 / 8288A – Completed by buyer to report and transmit funds
- Form W-7 – to apply for an IRS Taxpayer ID
- Publication 515 form the Department of Treasury – Internal Revenue Service at www.irs.gov

B. Cannabis Transactions

1. Is it legal?

- Over the past few years, several states passed laws decriminalizing marijuana and allowing licensed and regulated use. Although using the property for the production, sale, or distribution of marijuana may be allowed under these new state laws, the problem is that it remains illegal under federal law. Therefore, parties to the transaction may be subject to criminal prosecution under federal law regardless of what state law says.

- The conflict between state and federal laws, as well as the uncertainty of when and if federal authorities will enforce these laws, makes this a difficult landscape for title insurers to navigate.
- What is your underwriter's position? Most underwriters may not knowingly participate in a transaction that may be viewed as facilitating a criminal enterprise and advise their agents that if they receive a request to provide title insurance or serve as the escrow/closing agent for a transaction in which the agent has "actual knowledge" that the property is currently used or will be used for the production, sale, or distribution of marijuana, they must decline to participate in or insure the transaction or contact a Company underwriter for further guidance.
- What does "actual knowledge" mean? In this context, "actual knowledge" means that you know or reasonably believe that the property was, is, or will be used for the production, sale, or distribution of marijuana. Do I need to investigate? As representatives of the Company, we do not regularly question customers about the current or proposed use of the insured premises. In some circumstances, however, you may be told that the property was, is, or will be used, for the production, sale, or distribution of marijuana. In other cases, there may be red flags that necessitate further investigation.
- Do not turn a blind eye to facts and circumstances that would lead a reasonable person to believe that marijuana activity is involved. Some red flags include: i) extensive use of cash - entities linked with the production, sale, distribution and use of marijuana typically run on cash due to the reporting regulations of banks; ii) a steep increase in the valuation of a property suitable for the production, sale or distribution of marijuana, such as a warehouse or agricultural lot; and iii) the entity name references marijuana (real life examples include: Hollyweed, Grin Reefer Deliveries, Grateful Meds, HIGHlands Health, and Buds and Roses).
- Communicate with an underwriter. It can be challenging to know what to do in some circumstances. Gather the relevant facts and contact your underwriter.
- Key takeaways for future transactions:
 - Communication is key.
 - Inform customers of our position on insuring property that was, is, or will be used for the production, sale, or distribution of marijuana as early as possible. The earlier that they know and understand our position, the less chance there is for a poor customer experience.
 - Contact your underwriter.

IV. "Ethics" – Fraud Prevention

Fraud in the title insurance and settlement services industries has a long history and is a continuous concern. The schemes utilized by fraudsters are sophisticated and show an insider's knowledge of our business. Fraud schemes include email hacking and

spoofing, fraudulent wiring instructions, forged deeds and mortgage releases, phishing and other attempts to obtain private information. While our policy issuing agents and those involved in the transaction are in the best position to identify possible fraud and red flags. Prevention is key and, as underwriters, we are in a position to educate those involved in transactions and being aware of common fraud schemes is important. The key to not falling victim to these traps is being educated, aware, and vigilant. This section will cover some of the more common fraud schemes and the signs for being able to spot potential transactions where fraud may occur.

A. Distressed Properties - Fraudsters often target properties in financial stress or in foreclosures. Red Flags:

- Recently recorded Assignment of Mortgage or Deed of Trust
- Recently recorded Release, Reconveyance, Trustee Deed, Substitution of Trustee, or other foreclosure document
- Request to rush the opening or closing of a transaction.
- Use of a Power of Attorney

B. Wire Fraud - Fraudsters often use compromised email accounts to deceive parties involved in real estate transactions in order to misappropriate funds through unauthorized wire transfers. Red Flags:

- Changes to wiring instructions (language, timing, amounts, etc.). Wire instructions rarely change, and most title companies' wire instructions never change.
- Wire account name payee differs from the principals in the transaction.
- Request to wire funds to foreign or an unknown bank.
- Instructions sent by email, especially when sent late in the transaction process when verification would be more difficult – at month end, for example.
- Instructions marked as rush, urgent or secret.

C. Closing Fraud Scheme - Properties with no encumbrances (sometimes referred to as “free-and-clear properties”) and properties that are not owner occupied or unimproved are common targets for fraudsters. Unencumbered properties that are either non-owner occupied property or vacant are tempting targets due to the available equity and the ease to conceal the fraud. These properties may also be owned by business entities and fraudsters may impersonate the principals of the entity to perpetuate the fraud. Red Flags:

- Free and clear property (i.e. no mortgage to be paid off).
- Seller is positioned to receive a large amount of cash from the proceeds of the sale.
- Sales price on non-owner occupied or unimproved property seems too good to be true.
- Purchase contract has confusing counter offers, amendments or unusual terms.

- Property is being transferred to another party immediately after close of escrow.
- Use of a Power of Attorney (POA) to sign documents with a request to disburse funds to the holder of the POA.
- Communication is exclusively via email or electronically without being able to speak to, or communicate directly via telephone or electronically with, a principal at the request of another party (the principal is “out of the country” or “very busy”).
- Chain of title reveals a recent purchase, or flip, indicating a sale price significantly different from the previous and/or current transaction.
- Recent transfer of title for no consideration.
- Requests for a rush closing.
- Unexplained disbursements from seller proceeds. (e.g. payments or repairs with no supporting bill or documentation provided).
- Sales/loan proceeds are paid to someone other than the borrower or seller of record.
- Seller or borrower appears disoriented, demonstrates a lack of understanding or unable/not allowed to speak on their own behalf.
- Change of contact person or authorized representative.

D. Financial Abuse of Elder or Vulnerable Adults - Elderly and vulnerable adults (due to physical or mental incapacity) are often victims of financial abuse and fraud. The elderly owner may lack the capacity to consent to a sale or mortgage or may be the subject of undue influence. As our population continues to age, we must remain vigilant especially in the context of real estate transactions which are a prime target for fraudsters. Authority and capacity issues in real estate transactions must be carefully considered to prevent, detect, and respond timely to fraud attempts. Red Flags:

- Large cash withdrawal from equity
- Recent, uninsured deed in the chain of title
- Use of a power of attorney
- Documents signed outside of escrow
- Request to disburse sale or loan proceeds to someone other than the record owner, borrower, or seller
- Third party appearances in the transaction with excuses for the unavailability of the record owner, borrower, or seller
- A family member, friend, caregiver, religious advisor, attorney, or financial advisor leverages a position of trust or power by directing, controlling, or acting “on behalf” of the victim
- Diminished mental capacity or cognitive impairment evidenced by displays of short-term memory loss, disorientation, comprehension problems, and difficulty articulating thoughts
- Person appears submissive, agreeable, or fearful of another person or disengaged or disinterested with the transaction
- Anything else that disagrees with your intuition

If you suspect elder and vulnerable adult financial abuse or fraud in your transaction, you must escalate to your management and local underwriting. Most states permit rescission of a real estate transaction or mortgage involving undue influence, duress, incompetency, incapacity, or lack of authority. Remember that title insurance policies provide affirmative coverage against such defects.

- Be aware of the red flags; detect, and report appropriately
- All financial institutions are required to train staff to recognize abuse
- Report suspicious activity to authorities

E. Hard Money Lenders - The least sympathetic of all the victims are the hard money lenders. A hard money lender is typically considered to be a non-institutional, or private, lender. The source of many claims involving fraudulent activity involves hard money loan policies, and this is in large part due to limited, if any, loan underwriting and vetting processes on the part of the lender which present opportunities for fraudsters in title fraud or equity stripping schemes. Red Flags:

- Lending based upon the value of the property. Hard money lenders typically only consider the value of the asset and nothing more
- No credit check. Hard money lenders typically do no real due diligence of credit worthiness of the borrower
- Fast cash. Without the stringent underwriting requirements like a traditional lender, they can make cash available very quickly for Fast closings
- Push to close. Fraudsters want to close as quickly as possible and don't want anyone looking too hard or long at them. For fraudster's stripping equity from a home, the hard money lender is the ideal target.

F. Information Security - Title insurers receive lots of Non-Public Personal Information (NPI) in the course of handling real estate transactions. Underwriters must be aware of and careful in the handling of NPI. Your company should have requirements for the handling of NPI.

Take the following security measures to reduce the risk of leaking NPI or other sensitive information:

- Use secure email features when sending messages or attachments containing NPI.
- Click Smart. Be aware of possible "phishing" emails. Do not click on suspicious links.
- Improve your network security. Avoid public Wi-Fi when traveling or working remotely.
- Keep software up to date so you have the latest security patches.