CONNECTICUT ADOPTS FIRST IN TIME PRIORITY – FINALLY!

By: Thomas J. Donlon

Have you ever included a well-accepted legal principle in a brief or memorandum, and then searched fruitlessly for an actual case that states it? As your frustration mounts with every wasted minute, you say, "but everybody knows that's the law!" *Hudson Valley Bank v. Kissel*, 303 Conn 614, 35 A.3d 260 (2012), ends that frustration in Connecticut on one issue at least.

The legal principle ultimately confirmed in *Kissel* was "first in time is first in right;" requiring the proceeds of a foreclosure sale to be distributed to lienholders in order of their priority of filing. Connecticut practitioners, writers and title insurers had long accepted and applied this principle. The Connecticut Supreme Court had even relied on the principle 60 years ago in *Brown v. General Laundry Service*, 139 Conn. 363, 94 A.2d 10 (1952).[1] However, the U.S. Supreme Court vacated the *Brown* decision, finding Connecticut had improperly given local taxes priority over federal taxes. *See United States v. New Britain*, 347 U.S. 81 (1954). While lower courts had referenced the "first in time" principle in the interim, the Connecticut Supreme Court did not address it again before *Kissel*.

The case has unusual facts. Andrew Kissel received a $1.6 million mortgage from Washington Mutual Bank in July 2004 to purchase a home in Greenwich. Eight months later, by recording a forged release of the Washington Mutual mortgage, Kissel fraudulently obtained another mortgage for new construction from Hudson Valley Bank of $4.5 million. In May and June 2005, Kissel used the same scheme, recording forged releases, to obtain two more mortgages on the property – $1.0 million from Independence Community Bank and $4.5 million from Ridgefield Bank. Eventually, the scheme was discovered and the banks commenced foreclosure actions.[2]

Hudson Valley obtained a foreclosure judgment first. The property, appraised for $2.2 million, was scheduled for sale in March 2007. However, any foreclosure sale in the Hudson Valley action would be subject to the prior Washington Mutual mortgage, depressing the price. As First American Title had issued policies on both the Washington Mutual and Hudson Valley mortgages, prior to the foreclosure sale First American elected to purchase Washington Mutual's note and mortgage, and then subordinate them to Hudson Valley's. As a result, the foreclosure sale brought $100,000 more than the appraisal. After Hudson Valley's judgment was paid, First American, as holder of Washington Mutual's now second priority mortgage, moved for award of the over $400,000 surplus.

Stewart Title Guaranty Company, which had issued a policy for the Independence Community mortgage in third position, objected. Stewart claimed that, due to Kissel's fraud, the surplus should be apportioned between the two title insurers. Based on an unrecorded federal court judgment, including damages from another defaulted Kissel mortgage on a separate piece of property, Stewart contended that it should receive 70% of the surplus.

Stewart initially convinced a trial court judge to apportion the surplus, giving Stewart 70%. First American sought reargument, contending the court ignored the "first in time" rule. On reconsideration, the trial court refused to apply the "first in time" rule, but awarded First American the entire surplus based on the equitable doctrine of *pari passu*. Stewart Title appealed.

Much of the *Kissel* decision dealt with preliminary procedural questions.[3] Once the court reached the central issue, it took only a paragraph to reaffirm the "fundamental principle" that "a mortgage that is recorded first is entitled to priority over subsequently recorded mortgages ...". *Id.*, at 626. The court affirmed the award of the entire surplus to First American on this alternate ground, rejecting Stewart's argument that equitable apportionment should apply.[4] Although it took 60 years, *Kissel* determined that "first in time is first in right" really was the law as everybody 'knew.'

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1 An early case, *Beers v. Hawley*, 2 Conn. 467 (1818) referred to the principle in *dicta*.

2 In a bizarre twist, Kissel was murdered during the foreclosure proceedings.

3 *See* 303 Conn., at 616-626.

4 The court noted that *pari passu* applied to bankruptcy proceedings, not to foreclosures.