



BONA FIDE PURCHASERS (BFPs) – THE RACE IS ON

1. To understand the meaning and importance behind the **Bona-Fide Purchaser** (“BFP”) Doctrine, it is first critical to understand the differing recording acts. There are **three** types of recording acts:
 - a. **Race;**
 - b. **Notice; and**
 - c. **Race-Notice**

2. **Race.** In a **race** jurisdiction, the **first to record** is first in right. This result occurs even when the purchaser who records first takes with notice (that is, with actual knowledge of a properly executed document) of the prior transfer. Thus, the knowledge of the winning transferee is irrelevant.
 - a. The object of such act is to promote the use of the public records and to give them certainty.
 - b. Note: only a small minority of jurisdictions have race statutes.

3. **Notice.** A **notice** recording act, on the other hand, protects the subsequent purchaser who is a BFP.
 - a. Again, a BFP is one who takes his interest without either actual or constructive notice of the prior transfer and pays value for the interest.
 - b. In a **notice state**, a subsequent BFP prevails over a prior unrecorded transferee, regardless of whether he/she records first.
 - c. However, if the prior transfer is recorded, the subsequent purchaser cannot become a BFP. Why? Because the prior recording gives, by law, **constructive notice** of the interest who instrument is recorded.
 - i. Last I checked, 21 states have this type of recording act.

4. Historically, the “notice” recording act replaced the “race” recording statute of many states; state legislatures recognized the fact that the winners of the race to the courthouse were arriving at the recorder’s office with a malevolent sparkle in their eyes.
 - a. However, the trouble with the notice recording act was that the change in the law protected the lazy – that is, later purchasers who were protected by the notice act had little incentive to record. They had only to remain subsequent purchasers. This did not promote use of the records, and their certainty was diminished to that extent.

5. With defects in notice statutory scheme in mind, 25 states and D.C. amended their recorded acts even further. What came about was the enacted “**race-notice**” legislation.
 - a. In these jurisdictions, the protected class of subsequent purchasers is narrowed. To come within the protected class, a subsequent purchaser must not only be a

BFP, as in a notice act state, but it must also be the first to record, as in a race act state.

6. Note: when litigation occurs between prior and subsequent transferees of the same property, the only issue is priority of title: the effectiveness of the deed or other conveyance, as between the parties to it, is not the issue. The recording acts do not render conveyances ineffective as between the parties.

SO, WHY DOES ALL OF THIS MATTER?

1. **Risk.** Title Companies are generally hesitant to insure a transaction and issue an owner's policy in which the buyer is not a BFP.
 - a. The reason for this in Oregon is that, if a title company were to insure such a transaction, the title company would not be entitled to the protections of the Oregon BFP statute, also known as **ORS 93.640**.
2. ORS 93.640 provides that any unrecorded conveyance or other agreement affecting the title to real property is **void** as against any **BFP** of that property who records first. **Accordingly, as long as the buyer in an insured transaction is a BFP, the title company is protected against liability arising from past unrecorded conveyances or other agreements popping up at some point in the future and affecting (or even completely defeating) the title of the title company's insured's.** Conversely, if the buyer is not a BFP, the title company automatically runs the risk of failure of title and the resulting full policy loss.

WAIT. SAY THAT AGAIN. WHAT IS A BFP? AND, SPECIFICALLY FOR OREGON PLEASE.

1. **Oregon's basic Race-Notice Recording Law and BFP doctrine is found under ORS 93.640.**
 - a. Every conveyance ... affecting the title of real property within this state which is not recorded as provided by law is void as against any **subsequent purchaser in good faith** and **for a valuable consideration** of the same real property, or any portion thereof, whose conveyance ... is **first filed for record**, and as against the heirs and assigns of such subsequent purchaser.
 - b. Accordingly, this phrasing protects **(1) a subsequent purchaser, (2) in good faith (and without notice), (3) for valuable consideration, (4) who records first.**
2. Let's break the BFP elements down and then we will go into some hypotheticals.
 - a. **(1) Subsequent Purchaser**
 - i. Any person taking a deed to real property, mortgagees, assignees of a mortgage lien, and sometimes a lessee.
 - ii. This includes a person paying a portion of the agreed purchase price under an installment or land sale contract.
 - b. **(2) Good Faith (and without notice)**

- i. The Oregon Supreme Court has inserted the lack of notice onto the good-faith requirement.
 - ii. Thus, a subsequent purchaser or encumbrancer must take its interest “in good faith for value and without notice of the outstanding interests.” *High v. Davis*, 283 Or 315, 332–33, 584 P2d 725 (1978).
- c (3) Valuable Consideration**
- i. The subsequent purchaser’s reliance on the grantor’s clear title causes no injury until he/she pays value. For example, taking title as a donee causes the subsequent purchaser no injury; it is only when that purchaser subsequently pays the purchase price that he or she suffers injury.
 - ii. To qualify as a subsequent purchaser “**for value**”, one must pay more than a **nominal consideration**.
 - 1. How much more though?
 - a. At least enough to support a deed with a covenant given for consideration.
 - 2. Judges are hesitant to make the lines too bright.
 - a. More than EM or a contract down payment should be given; otherwise, a court can use the contract itself as a guide in putting the subsequent purchaser back in his place, **status quo ante**.
 - b. Reasonably adequate consideration is required of the subsequent purchaser
- d (4) Who Records First**

EXAMPLES OF WHEN THE BFP ISSUE COMES UP

- 1. Foreclosures;
- 2. Deaths;
- 3. Divorce;
- 4. Flips;
- 5. Others?
 - a. Transactions between family members
 - b. Elderly Seller(s) (financial elder abuse?)
 - c. More?

HYPOTHETICAL:

O conveys to A, who does not record and pays less than full market value. O then conveys to B, a donee, who records. Who prevails between A and B?

For the answer: email msandler@wfgnationaltitle.com