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# The Role of Indexing in Record Notice under the Maryland Recording Statutes

by Professor Michele Gilligan



**R**ecording systems are purely statutory and therefore creatures of individual state legislatures.<sup>1</sup> Each state legislature sets the requirements of its statutes, and decisions under those recording statutes vary accordingly. One area where decisions under Maryland's recording statutes vary from some other states is the role of indexing in creating record notice.<sup>2</sup>

Under the Maryland recording statutes any document affecting land may be recorded and deeds must be recorded.<sup>3</sup> To record a document the person filing it may mail it to the clerk of circuit court, where the land is located, with the proper fees.<sup>4</sup> Usually though, a person will bring the document with the recording fees to the clerk.<sup>5</sup> This process of "walking" the document through recording is preferred because recording of a mailed document may take two to three months depending on the clerk's office. The recording fees which must be paid to the clerk include the state transfer tax, the recordation tax referred to as the documentary stamps, plus administrative fees.

The document presented to the clerk must be accompanied by a lien sheet in some counties showing that no municipal liens are attached to the property.<sup>6</sup> An affidavit of consideration and disbursement must also accompany the document if it is a mortgage or deed of trust.<sup>7</sup> In addition to these requirements, the document must bear an endorsement that the property has been transferred on the assessment books.<sup>8</sup> This endorsement is obtained by first going to the county finance office and paying the county real property and transfer taxes, and then taking proof of the payment of these taxes to the state assessment office.<sup>9</sup>

Once the document is accepted, the clerk will copy the document into the permanent bound books of land records or place it on microfilm.<sup>10</sup> Which process is used depends on the practice in the county where the land is located. The clerk will then index the document in separate alphabetical indices.<sup>11</sup> By this entire process of recording, the filer of the document is putting anyone interested in the property on notice of any rights the filer has that flow from the contents of the recorded document. The doc-

trine of record notice imputes knowledge of the contents of the recorded document to the world at large.

The recent Court of Appeals of Maryland case, *Frank v. Storer*,<sup>12</sup> held that indexing is not necessary to create record notice under the Maryland recording statutes.<sup>13</sup> The document in that case was notice of its contents, when it was micro-filmed and given a liber and folio number. The fact that someone looking for it could only find it by reading every page of the land records had no bearing on whether the document gave record notice. Filing the document in accordance with state and county law was sufficient. Indexing the document and being able to find it was not necessary.

The document at issue in *Frank* was a modification agreement to a deed of trust in which the Storer's substituted one lot, the Waterford Lot in Prince George's County, for another, a Montgomery County property, as security under the deed of trust. The Waynes held the Storer's promissory note and Morton Frank and Edith C. Rollins were the Waynes' trustees under the

deed of trust. The modification agreement was microfilmed and given a liber and folio number, but was never indexed. Instead, the modification agreement was red tagged because it failed to comply with several technical requirements.<sup>14</sup> The clerk testified that the red tag indicated the attorneys who apparently represented the Waynes' trustees were notified that the modification agreement had not been indexed. Glenn purchased the Waterford lot and the ultimate issue was whether his title was subject to the deed of trust and could be taken in the Waynes' foreclosure action against the Storer.

The modification agreement making the Waterford lot subject to the deed of trust was recorded seven months prior to Glenn's purchase of the lot. Therefore, the court of appeals held that Glenn had record notice of the interest the Waynes held in the Waterford lot, although Glenn had no actual knowledge of their interest and was not charged with constructive knowledge of their interest due to their possession.<sup>15</sup> Because of the presence of the modification agreement in the land records, the world at large had record notice of its contents, and therefore, Glenn could not claim that the Waynes' prior interest under the deed of trust was cut off by his purchase for value under the recording acts.<sup>16</sup>

The court of appeals clearly found that the initial risk of loss from failure to index a document is on the subsequent purchaser of land.<sup>17</sup> Stability of result with regard to the effect of land records is essential and this allocation of risk has been the rule since 1930.<sup>18</sup> The policy behind this allocation is that once an individual has tendered a document to the clerk for recording he has done all he can do to protect his title.<sup>19</sup> In *Standard Fin. Co. v. Little*,<sup>20</sup> the 1930 case, the court of appeals focused on what constituted recording to determine if the clerk's failure to index a document meant that the document was not recorded. They held that indexing was not made part of recording by the legislature and that the requirements of recording were set by the legislature. The court of appeals then invited the legislature to change the statutes to make indexing part of recording. The current court of appeals in *Frank* found that the recording statutes had not changed since *Standard*. Since nothing had changed legislatively, the court of appeals was bound by *Standard*, and therefore indexing was not required to find a document properly recorded to give record notice.

The consequences of this decision are apparent. As a practical matter, it means that a subsequent purchaser of property who engages in a careful search of the indices will not find all documents of which he is

on record notice. The only means of finding them is to read each page of the land records. Therefore, to protect himself a subsequent purchaser should avoid buying property, or should negotiate an indemnification agreement with his seller, or seek insurance against the loss from a recorded but unindexed document.<sup>21</sup> The court of appeals considered these alternatives adequate to protect the subsequent purchaser, although they may not be very satisfactory to the subsequent purchaser in the marketplace.

Embodied in this holding is a rejection of the fundamental premise justifying the doctrine of record notice. Record notice is based on the belief that an individual performing a careful search of the indices to

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***“The Maryland recording statutes should be amended to make indexing a necessary part of recording.”***

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the land records will find all documents affecting a piece of property and thus have knowledge of the contents of those documents.<sup>22</sup> From this perspective, indexing is essential to recording.<sup>23</sup>

The court of special appeals in *Frank v. Storer*<sup>24</sup> was swayed by an argument parallel to this. It held that the modification agreement did not give Glenn record notice because the Waynes' trustees knew the document was not indexed. To expect Glenn to find an unindexed document in the voluminous land records would be unreasonable. As a policy matter, the court of special appeals held that it would be unfair to allow someone the protection of the recording statutes when he knew that a subsequent purchaser could not find the doc-

ument from which his rights flowed. The individual filing a document should have the burden of checking to be sure that a document was indexed properly so that it could be found. He knows of the existence of the document which the subsequent purchaser does not. In this way the court of special appeals made indexing a part of recording. The court of appeals rejected this approach.

In reviewing the role of indexing several facets of the problem should be considered in addition to the tension between the person recording the document and his duty to check on the clerk's indexing of the document, and the subsequent purchaser and his duty to seek an indemnification agreement or insurance before purchasing property. The court of appeals' position on the role of indexing creates different roles and liabilities for the other participants in the transfer of property.

The initial risk of loss from failure to index may be on the subsequent purchaser, but the ultimate risk of loss is on the abstractor who searches the land records, the lawyer who offers an opinion on marketability of title and on the title insurance company which insures the title. These three groups are in an untenable position. Even using the most exacting practices of the industry, unindexed documents cannot be found unless the person searching title has set up a block index or has access to one, and the document has been entered into it.

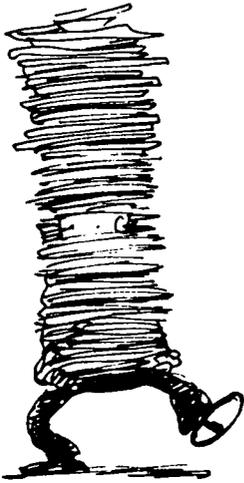
The abstractor will be liable for failing to find a document and include it in the report to the lawyer or title insurance company. They must carry errors and omissions insurance policies to protect against this loss.

The lawyer will be liable for loss from their opinions on marketability of title and must carry malpractice insurance to cover those potential claims. In addition, they may be liable for part of the loss the title insurance company suffers because of their agency contract with the title insurance company. Those agency agreements may have a clause requiring the lawyer-agent to pay a pro-rata share of a claim, or to pay the first \$100,000 of a loss, but most likely agency agreements will have a clause requiring the lawyer-agent to use due care in issuing policies.

The title insurance company faces loss from claims under the standard title insurance policy. That policy provides coverage for loss from all interests of record. Once the document is made part of the land record books or microfilm even though not indexed, it is part of the record. The title insurance company must compensate the insured for the loss from the recorded but

unindexed document up to the face amount of the policy. Under the agency agreement, they may be indemnified by the lawyer who gave the title opinion for part or all of the loss, but showing lack of due care for failing to find an unindexed document is hard.

If the coverage under the title insurance policy is not great enough to cover the loss, the lawyer who offered the title opinion may also be sued by the insured for any difference between the face amount of the title insurance policy and the loss. These possibilities increase a lawyer's potential liability and need for malpractice insurance with broad coverage.



Clearly, as the court of appeals pointed out, the initial risk of loss from an unindexed document is on the subsequent purchaser, but in the usual real estate transaction it is ultimately shared by the abstractor who searched title, the lawyer who gave an opinion on title and the title insurance company which insured the title. Assuming all of them have some form of malpractice insurance, the ultimate loss is finally borne by the insurance industry.

The one person who bears the most responsibility for the loss in this situation, the clerk, has no liability. Under *Standard* the clerk's failure to index does not deprive a person of the protections which flow from recording. Consequently, the clerk is not liable for failing to index. The immunity of the clerk saves the state treasury, but hardly seems fair.

Reviewing the situation, it seems unfair that an unindexed document gives record notice of its contents. The legislature created a system for registering documents to preserve individual's rights under the document. The system is incomplete without requiring an access to the system. Indexing should be part of recording and a document not considered recorded until it is indexed. If this were the case, an individual filing a document would be required to

check to see that the document he recorded is indexed to protect himself. He is the party with knowledge that the document exists and this burden would fall more fairly on him than on a subsequent purchaser who would have the burden of reading every page of the land records to find a document of which he has no knowledge.

The National Conference of Commissioners on Uniform State Laws has looked at this problem.<sup>25</sup> In the Uniform Simplification of Land Transfers Act, they make indexing an essential part of recording.<sup>26</sup> The burden is on the person filing the document for recording to supply all the necessary information for indexing.<sup>27</sup> Until a document is indexed it is not recorded and does not give record notice.

The Maryland legislature should respond to the issues raised in *Standard* and *Frank*. The Maryland recording statutes should be amended to make indexing a necessary part of recording. In addition, the clerk should be liable for failure to perform the ministerial act of indexing a document.

#### Notes

<sup>14</sup> AMERICAN LAW OF PROPERTY § 17.25 (A. Casner 1974) (hereinafter Casner), 6A R. POWELL ON REAL PROPERTY § 906 (P. Rohan 1986) (hereinafter Powell).

<sup>2</sup>Annotation, *Failure properly to index conveyance of mortgage of realty as affecting constructive notice*, 63 A.L.R. 1057 (1929).

<sup>3</sup>MD. REAL PROP. CODE ANN. §§ 3-101-102 (Supp. 1986).

<sup>4</sup>MD. REAL PROP. CODE ANN. § 3-104 (Supp. 1986).

<sup>5</sup>MD. REAL PROP. CODE ANN. §§ 3-601, 3-103 (Supp. 1986).

<sup>6</sup>BALTIMORE CITY, MD., CODE art. 28, § 7 (1983); BALTIMORE COUNTY, MD., CODE §§ 11-71, 11-78.1 (1976); ANNE ARUNDEL COUNTY, MD., CODE art. 6, § 7-101 (1985); HARFORD COUNTY, MD., CODE § 11-37 (1978); HOWARD COUNTY, MD., CODE § 20.200 (1986).

<sup>7</sup>MD. REAL PROP. CODE ANN. § 4-106 (Supp. 1986).

<sup>8</sup>MD. REAL PROP. CODE ANN. § 3-104(a) (Supp. 1986).

<sup>9</sup>MD. REAL PROP. CODE ANN. § 3-104(b)&(c) (Supp. 1986).

<sup>10</sup>MD. REAL PROP. CODE ANN. § 3-301 (Supp. 1986).

<sup>11</sup>MD. REAL PROP. CODE ANN. § 3-302 (Supp. 1986).

<sup>12</sup>308 Md. 194, 517 A.2d 1098 (1986).

<sup>13</sup>The statutes governing recording are found in MD. REAL PROP. CODE ANN. §§ 3-101-3-603, 4-101-4-110 (Supp. 1986). Title 3 covers recordation with the subtitles covering general rules and exceptions, priorities based on recording and record books and indexes. Title 4 covers the requisites of a valid instrument.

<sup>14</sup>The document did not contain a reference to the election district in which the property was located or the certification that it was prepared by an attorney. MD. REAL PROP. CODE ANN. §§ 3-104(f)(1)-(2) (1986).

<sup>15</sup>MD. REAL PROP. CODE ANN. § 3-202 (1986).

<sup>16</sup>MD. REAL PROP. CODE ANN. § 3-203 (1986).

<sup>17</sup>308 Md. 194, 203, 517 A.2d 1098, 1102 (1986).

<sup>18</sup>*Standard Fin. Co. v. Little*, 159 Md. 621, 152 A. 264 (1930).

<sup>19</sup>See Powell, *supra* note 1.

<sup>20</sup>159 Md. 621, 152 A. 264 (1930).

<sup>21</sup>308 Md. 194, 204, 517 A.2d 1098, 1103 (1986).

<sup>22</sup>See Casner & Powell, *supra* note 1.

<sup>23</sup>See Casner, *supra* note 1.

<sup>24</sup>66 Md. App. 459, 504 A.2d 1163 (1986).

<sup>25</sup>UNIF. SIMPLIFICATION LAND TRANS. ACT, 14 U.L.A. 218 (1986).

<sup>26</sup>*Id.* at § 3-202(2).

<sup>27</sup>*Id.* at §§ 2-301-303.

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