

A man who owned property in fee simple mortgaged the property to a bank to secure a loan of \$100,000. The mortgage was promptly and properly recorded. The man later mortgaged the property to his mother to secure a loan of \$50,000. This mortgage was also promptly and properly recorded. Subsequently, the man conveyed the property to a purchaser. About a year later, the purchaser borrowed \$100,000 from an elderly widow and gave her a mortgage on the property to secure repayment of the loan. The widow did not know about the mortgage held by the mother. The understanding between the purchaser and the widow was that the purchaser would use the \$100,000 to pay off the mortgage held by the bank and that the widow would therefore have a first mortgage on the property. The widow's mortgage was promptly and properly recorded. The purchaser paid the \$100,000 received from the widow to the bank and obtained and recorded a release of the bank's mortgage.

The \$50,000 debt secured by the mother's mortgage was not paid when it was due, and the mother brought an appropriate action to foreclose, joining the man, the purchaser, and the widow as defendants and alleging that the mother's mortgage was senior to the widow's mortgage on the property.

If the court rules that the widow's mortgage is entitled to priority over the mother's mortgage, which of the following determinations are necessary to support that ruling?

- A. The bank's mortgage was originally senior to the mother's mortgage.
- B. The widow is entitled to have the bank's mortgage revived for her benefit, and the widow is entitled to be subrogated to the bank's original position as senior mortgagee.
- C. There are no countervailing equities in favor of the mother.
- D. All of the above.

Explanation:

Lien priority is generally determined by who records first (ie, first in time, first in right). However, **subrogation** allows a **third party** who fully **pays off** a senior mortgage to take that **senior mortgage's priority** so long as the third party had **no actual knowledge of junior interests**.^{*} This does not harm junior interests because they retain the same lien priority.

Here, the bank's mortgage was recorded first, so it had priority over the mother's mortgage. The widow's mortgage was recorded last. However, the widow's loan was used to fully pay off the bank's senior mortgage, and the widow did not know about the mother's mortgage. As a result, the widow acquired the bank's senior mortgage through subrogation. Also, there are no equities in the mother's favor because she has retained her second-in-priority status (**Choices A, B & C**).

^{*}In a minority of jurisdictions, **record notice** is also sufficient to preclude subrogation.

Educational objective:

Subrogation allows a third party to take a senior mortgage's priority when the third party (1) fully pays off the senior mortgage and (2) has no *actual* knowledge of junior interests.

References

Restatement (Third) of Property: Mortgages § 7.6 (Am. Law Inst. 1997) (doctrine of subrogation).

Copyright © 1995 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

