

# Title Management Today

# Title Gram™

Current legal issues published by Title Law Associates for the benefit of the title insurance and real estate industries  
Volume 13, Issue 10 Supplement

Date: Fall, October, 2003

**Editor's Note:** When we wrote the October issue of *Title Comments* we mentioned, in the preliminary section to *Maximizing the Benefits of Title Insurance*, at bullet 4 appearing on page 12, Professor Palomar's chapter appearing in *Patton and Palomar on Land Titles*, 3<sup>rd</sup> Ed. (2003), at section 41, the difference between title insurance and other forms of title evidence. However, we neglected to provide a link to the source material. Professor Palomar was kind enough to call this to our attention and provide the entire section, which is re-printed here in its entirety with her permission. We thank Professor Palomar for her courtesy and cooperation.

## § 41. Methods of Title Assurance -- Abstracts, Attorneys' Title Opinions & Title Insurance Compared.

### Library References:

C.J.S. Abstracts of Title §§ 1 et seq., 6 et seq.  
West's Key No. Digests,  
Abstracts of Title <KEY>1, 3.

A real property vendee will not be required to close on a purchase contract if the seller cannot convey a "marketable title." See § 49.0 *infra*. [See also Ed. Note at the end of this section regarding "marketable title"]. Nevertheless, in the United States, vendors of real property are not obligated to prove their titles,<sup>1</sup> unless they have contracted to do so.

<sup>1</sup> Baker v. Howlson, 213 Ala. 41,104 So. 239, 52 A.L.R. 1452 (Ala. 1925).

Bolton v. Branch, 22 Ark. 435 (1860); Easton v. Montgomery, 90 Cal. 307, 313, 27 P. 280, 281 (1891).

Turn, Verein Elche v. Kionka, 255 Ill. 392, 99 N.E. 684 (1912).

Instead, with certain exceptions explored *infra*,<sup>2</sup> the doctrine of caveat emptor, which arose as an incident to the sale of chattels, was extended to include sales of real property.<sup>3</sup> Thus,

Knox v. McMurray, 159 Iowa 171, 140 N.W. 652 (1913).

Symms v. Cutter & Webster, 9 Kan. App. 210, 59 P. 671 (1900).

Daily v. Litchfield, 10 Mich. 29, 38 (1862).

Brearley v. Schoening, 108 Minn. 447, 210 N.W. 588 (1926).

Taylor v. Williams, 45 Mo. 80 (1869).

Espy v. Anderson, 14 Pa. 308.

See also *infra*, § 42.

<sup>2</sup> Exception of judicial, ministerial, and fiduciary sales, see *infra*, note 76.

Exception of sales induced by fraud or false representations of vendor, see *Chisum v. Huggins*, 55 Ok. 423, 154 P. 1146 (1916).

Kentucky. Since 1904, Kentucky has had a statute requiring that deeds shall state the source of title. KRS 382.110, 382.990. The act is valid, and a purchaser need not accept a deed that does not comply with it. *McPherson v. Gordon*, 29 Ky.LawRep. 826, 1073 (1906). But, a deed that does not comply with the statute is nevertheless effective as a conveyance. *Perkins v. J.M. Robinson, Norton & Co., Ky.*, 124 S.W. 310.

<sup>3</sup> *Upton v. Tribilcock*, 91 U.S. (1 Otto) 45, 23 L.Ed. 203 (1875); *Kimball v. West*, 82 U.S. (15. Wall.) 377, 21 L.Ed. 95 (1872).

*Tobin v. Bell & McMahan*, 61 Ala. 125 (1878).

Letchworth v. Vaughan, 77 Ark. 305, 90 S.W. 1001 (1905).

Thurgood, v. Spring, 139 Cal. 596, 73 P. 456 (1903).

McDonough v. Martin, 88 Ga. 675, 16 S.E. 59 (1892).

Niles v. Harmon, 80 Ill. 396 (1875).

Gibson v. Richart, 83 Ind. 313 (1882).

Brandt v. Foster, 5 Iowa 287 (1857).

Durham v. Hadley, 47 Kan. 73, 27 P. 105 (1891).

Belfont Iron Works v. McGuire, 10 Ky.Law Rep. 965, 11 S.W. 203 (1889).

Wallis v. Wallis, 4 Mass. 135, 3 Am. Dec. 210 (1808).

Miller v. Miller, 47 Minn. 546, 50 N.W. 612 (1891).

Wiggins v. McGimpsey, 21 Miss. (13 Smedes & M.) 532 (1850).

Herryford v. Turner, 67 Mo. 296 (1878).

Hammond v. Chamberlain Banking House, 58 Neb. 445, 78 N.W. 718 (1899).

Perkins v. Bumford, 3 N.H. 522 (1826).

Leach v. Johnson, 114 N.C. 87, 19 S.E. 239 (1894).

Evans v. Dendy, 29 S.C.L. (2 Speers) 9, 42 Am.Dec. 356 (S.C. 1843).

Higley v. Smit, 1 D. Chipm. (Vt.) 409, 12 Am.Dec. 701 (1824).

Johnston's Adm'r v. Mendenhall, 9 W.Va. 112 (1876).

Booth v. Ryan, 31 Wis. 45 (1872).

See also *Cardi v. Gump*, 121 Ohio App.3d 16, 698 N.E.2d 1018 (Ohio App.1997).

*Cifani v. Vana*, 1997 WL 379972, \*3 (Ohio App.1997) (both acknowledging that the doctrine of caveat emptor governs real property sales transactions in Ohio).

Compare, however, *Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand.L.Rev. 541 (1961).

the responsibility of examining the title and obtaining protection against title defects falls on the vendee. Otherwise, once the vendee closes on a purchase transaction and accepts a deed, apparently satisfied from her own examination with the quality of the vendor's title, the vendee bears the risk of title claims.<sup>4</sup>

<sup>4</sup> *Alger v. Anderson*, C.C. Tenn. 92 F. 696 (1899).

*Alger-Sullivan Lbr. Co. v. Union Trust Co.*, 218 Ala. 448, 118 So. 760 (1928).

*Yeates v. Pryor*, 11 Ark. 58 (1850).

*Mickler v. Reddick*, 38 Fla. 341, 21 So. 286 (1896).

*Mathis v. Crowley*, 146 Ga. 749, 92 S.E. 213 (1917).

*Wheeler v. Wayne County*, 132 Ill. 599, 24 N.E. 625 (1890).

*Lucas v. Crippen*, 76 Iowa 507, 41 N.W. 205 (1889).

*Towels v. Campbell*, 204 Ky. 591, 264 S.W. 1107, 50 A.L.R. 175 (1924).

*Cannon v. Female Orphan Soc.*, 24 La. Ann. 452 (1872).

*Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N.E. 990 (1896).

*Cartier v. Douville*, 98 Mich. 22, 56 N.W. 1045 (1893).

*Brown v. Manning*, 3 Minn. 35 (GH. 13), 74 Am.Dec. 736 (1859).

*Hart v. Hannibal & St. J. R. Co.*, 65 Mo. 509 (1877).

*Morehouse v. Northern Land Co.*, 68 Mont. 96, 216 P. 792 (1923).

*Joyner v. Scherer*, 105 N.J.Eq. 94, 147 A. 193 (1929).

*Clark v. Post*, 113 N.Y. 17, 20 N.E. 573 (1889).

*Walsh v. Hall*, 66 N.C. 233 (1872).

*Thomas v. Title Guarantee Trust Co.*, 81 Ohio St. 432, 91 N.E. 183 (1910).

*Brady v. Bank of Commerce of Coweta*, 41 Okl. 473, 138 P. 1020 (1913).

*Fellows v. Evans*, 33 Or. 30, 53 P. 491 (1898).

There are four modern methods of protecting against defects in the title to land being purchased. The oldest is to require the vendor to convey title via a warranty deed, giving the vendee recourse against the vendor in the event of a breach of the deed's warranties of title. The second, and

---

Wasserman v. Fleisher, 249 Pa. 29, 94 A. 454 (1915).

Garvin v. Cohen, 13 Rich. Law (S.C.) 153 (1861).

Kansas City Land Co. v. Hill, 87 Tenn. 589, 11 S.W. 797 (1889).

Adams v. Reed, 11 Utah 480, 40 P. 720 (1895).

Max Meadows Land & Imp. Co. v. Brady, 92 Va. 71, 22 S.E. 845 (1895).

Decker v. Schulze, 11 Wash. 47, 39 P. 261 (1895).

Topping v. Parish, 96 Wis. 378, 71 N.W. 367 (1897).

See further *infra*, § 45.

#### *Illustrative Cases:*

Connecticut. The vendee is conclusively presumed to have examined the land records and to have knowledge of all facts appearing thereon affecting the title to the property in question. *Monterosso v. Kent*, 96 Conn. 346, 351, 113 A. 922, 923 (1921).

Maryland. The entire burden is on purchaser to see that title is clear. The sale contract usually provides only for a "good and marketable title." The only requisite of vendor is to sign the deed drawn by vendee's attorney. *Caveat emptor* applies as soon as deed is accepted. *Middlekauff v. Barrick*, 4 Gill (Md.) 290 (1846).

Pennsylvania. "It is always the duty of a purchaser to investigate the title of his vendor." *Ohio River Junction R. Co. v. Pennsylvania Co.*, 222 Pa. 573, 72 A. 271 (1909).

The expense of removing a cloud is not covered by the usual covenants of a warranty deed. *Thorne v. Clark*, 112 Iowa 548, 84 N.W. 701 (1900). But there may be, by statute, an implied warranty against clouds. Cf. *Minnesota*. M.S.A. § 507.21.

See generally, Comment, *Rights of the Vendee in Land Where There Is a Failure of Title*, 13 Ala.L.Rev. 409 (1961).

least common method of title assurance in the United States today, is the issuance by a governmental body of official certificates of title. Chapter 14 examines the modern use of such "Torrens" land registration systems.<sup>5</sup>

A third method is for the vendee to obtain an attorney's opinion of the legal status of the grantor's title. By the year 2000, this method predominates only in some southeastern states and southwestern oil-producing states, parts of a few middle-American states, and parts of New England.<sup>6</sup> The

---

#### <sup>5</sup> *The Torrens System of Land Title Registration.*

The registration or certificate system, as applied in England, Canada and other former British jurisdictions, was the result of the idea and work of Sir Robert Torrens (born in Ireland in 1814, educated at Trinity College, Dublin, and afterwards the first premier of South Australia). His idea was to apply the principles of registration of ownership in ships to registration of title to lands – that is, to have land ownership conclusively evidenced by certificate and thereby made discoverable and transferable quickly, cheaply and safely. See Chapter 14 *infra*.

*Petition of McGinnis ex rel. Lot Sixty six (66), First Addition to Sherwood Forest*, 536 N.W.2d 33 (Minn.App.1995) (purpose of Torrens law is to establish indefeasible title which is immune from adverse claims not registered with registrar of titles and to assure that property can become encumbered only with registered rights and claims).

See Patton, *Evolution of Legislation on Proof of Title to Land*, 30 Wash.L.Rev. 224 (1955); Patton, *Title to Land: Documentary Proof of Ownership*, 2 Inter-Am.L.Rev. 169 (1960).

See McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 Wm. Mitchell L.Rev. 61 (Winter 1992).

<sup>6</sup> As of the year 2000, attorneys' title opinions still are written in Iowa, Georgia, Illinois, Indiana, Oklahoma, Maine, Massachusetts, Minnesota, South Dakota, North Dakota, North Carolina,

process begins with a search of the real property records in the county where the land was located. In years past, one attorney might perform the record search, write the title opinion, and then close the real estate transaction. Because the volume of records affecting each parcel of real property has so multiplied over time, few attorneys find it cost-effective today to do title searches themselves and, in all but a few states<sup>7</sup> and the rural areas of others, either a title insurance company or abstract company will perform the title search. Attorneys then write their title opinions based on their examination of abstracts of the title<sup>8</sup> or title reports

---

Maryland. They most often are given in conjunction with the issuance of a title insurance policy, but also may be given in lieu of a title insurance policy in a few states or parts thereof.

<sup>7</sup> In Connecticut, Iowa, North Carolina, northern New Jersey, much of Maine, rural areas of Kentucky and Maryland, around Pittsburgh, and in cash transactions in West Virginia, attorneys reportedly still customarily perform the title search and title examination in the year 2000. Sometimes, however, attorneys begin their search of the public records after the date of the most recent title insurance policy on the property. If the present examining attorney did not perform the title search and exam for the prior policy, he or she must obtain consent of the prior attorney to “tack on” to the prior policy.

<sup>8</sup> See generally, 1 Flick, *Abstract and Title Practice* §§ 191–212 (2d Ed. 1958). Abstracts are discussed more fully in subsequent sections of this chapter, including § 43. By the year 2000, they are regularly utilized in only a few states, *e.g.* Iowa, Oklahoma, Massachusetts, North Dakota, South Dakota, northern and rural Wisconsin, rural parts of Kansas, Minnesota, Illinois, New Mexico, Texas, Utah, Wyoming and Arkansas; some counties in Florida, Maine, Maryland, Montana, Indiana, and Alabama. In Mississippi, abstracts often are used in oil and gas transactions, but not in other real estate transactions. The attorney should always inquire locally to determine the practice in a particular county.

prepared by title insurance companies.<sup>9</sup> The attorney weighs the facts shown and provides the client with a written opinion as to the status of the title. The attorney’s opinion sets out any requirements as to information to be obtained, prior liens to be satisfied, or instruments to be recorded before the transaction is closed in order for the vendee to receive marketable title to the particular interest being conveyed. The attorney also has an obligation to explain to the client the nature and extent of the risk presented by each of the disclosed title defects. Based on this information, the client may decide whether to assume the risk and complete the transaction or forego the purchase or loan unless the grantor can clear the title.

Except in the regions noted above, by the year 2000, title insurance had all but displaced the attorney opinion method of assuring purchasers and lenders as to the status of title to real property. Title insurance has the distinction of being the only form of insurance to have originated in the United States.<sup>10</sup> While title insurance has similarities to other forms of insurance,<sup>11</sup> its origins in the context of real property transactions and the financing thereof has resulted in title insurance possessing several unique characteristics. The distinctive features of title insurance have to do with the role title insurance companies have retained as discoverers and eliminators of risks to title.

Prior to the closing of the title insurance applicant’s real estate transaction, the title insurance company performs or hires a search of the real property records pertaining to the

---

<sup>9</sup> Some attorneys today also will rely on either their own search or another attorney’s search for a prior title insurance policy. They begin their title search for a new transaction in that chain of title after the date of the prior title policy. If the present examining attorney did not perform the title search and exam for the prior policy, he or she must obtain consent of the prior attorney to “tack on” to the prior policy.

<sup>10</sup> The history of the development of title insurance is fully described in Joyce Palomar, *TITLE INSURANCE LAW* § 1.01[2] (West Group publisher).

<sup>11</sup> These similarities are examined in Joyce Palomar, *TITLE INSURANCE LAW* § 1.03 (West Group publisher).

interest to be insured.<sup>12</sup> If this search uncovers any encumbrances or title defects, the title insurer lists them in a “preliminary commitment to insure” or “title insurance binder” as special exceptions to any policy to be issued.<sup>13</sup> The title insurance company presents that preliminary commitment to the applicant before the real estate transaction is closed. This, in fact, is at the same point in the transaction that an attorney would have issued an opinion of title. In this way, the title insurer discloses the discovered defects in the title at a time when the applicant still may rescind the transaction or require the grantor to cure the defects. The title insurance policy generally is not issued until after the real estate transaction is closed.

With title insurance, unless a state statute requires the title insurer to do so, the insured will have the responsibility of ascertaining that the policy date is after the closing of the insured transaction, so that the policy will cover both the insured transaction and title matters that arose after the date of the preliminary commitment but before the insured took title.<sup>14</sup> As is discussed later in this chapter, with the attorney opinion method of title assurance, the attorney has the abstract updated and performs a final title exam at the time the client’s real estate transaction is to be closed, to prevent a similar gap in protection between the date the title opinion was issued and the date the client took title.<sup>15</sup>

Both title insurance and an attorney’s title opinion are intended to protect when a title claim is asserted after the date of the insured’s real estate transaction, based on an encumbrance or title matter that was in existence prior to the date of the title opinion or insurance policy.<sup>16</sup> An exception to this

<sup>12</sup> For discussion of what official records will be searched and covered by the standard title insurance policy, see Joyce Palomar, *TITLE INSURANCE LAW*, § 8.02[1] (West Group, publisher).

<sup>13</sup> These are found in “Schedule B” of standard title insurance policies. See a complete analysis of the effect of special exceptions in Joyce Palomar, *TITLE INSURANCE LAW*, § 7.0 (West Group, publisher).

<sup>14</sup> For full discussion of the risk of a “gap” in title insurance coverage, see Joyce Palomar, *TITLE INSURANCE LAW*, § 4.03 (WestGroup publisher).

<sup>15</sup> See *infra* § 45 considering “Essentials of an Abstract.”

<sup>16</sup> For a fuller examination of title insurance’s exclusion for matters first created after the date of *Title Management Today Title Gram*

rule is that limited insurance for certain title defects first arising after the policy date appears in title insurance policy forms that insurers began to offer in 1998 to purchasers of one-to-four family residences.<sup>17</sup>

Abstracters and attorneys will only be obligated to indemnify their client if they failed to discover or disclose title defects that would have been found or disclosed by a member of the relevant profession exercising reasonable care. The real property purchaser or mortgagee who relies on an abstract and/or attorney’s opinion, thus, has no recourse upon suffering loss from a title defect that is not discoverable from a reasonable search of the record. The following list includes examples of types of title defects that will not be disclosed from an examination of recorded instruments, each of which could cause the invalidity of some conveyance in the chain of title.

- (1) Fraud, forgery or duress in the execution of instruments affecting title to the property.
- (2) False impersonation of the owner of the land.
- (3) Deeds that appear to convey title but are really mortgages.
- (4) Execution by a minor or an insane or incompetent person of instruments affecting the title.
- (5) Heirs not disclosed in the public records, including after-born children, who have an interest in the property.
- (6) Wills not discovered at the time of the owner’s death that devise real property to devisees other than those who have already conveyed away their supposed interests in the title.
- (7) Heirs of a prior owner who died before judgment in a foreclosure action who were not included in the action by name and thus not foreclosed out; other failure to include necessary parties in judicial proceedings involving the title to the real property.

the policy, see Joyce Palomar, *TITLE INSURANCE LAW*, § 6.07 (West Group, publisher).

<sup>17</sup> See Joyce Palomar, *TITLE INSURANCE LAW*, § 5.13[2] & 6.07 (West Group, publisher).

(8) A grantee receives an interest under one name and conveys it using a different name.

(9) Improper notice of judicial proceedings given to those with interests in the real property.

(10) Deeds executed but later found not to have been actually delivered, not delivered until after the grantors' deaths, or conditionally delivered, so that the deed is void.

(11) Deeds executed under powers of attorney subsequently declared to be invalid.

(12) Undisclosed marriages and divorces that result in claims of marital property rights.

(13) An interest is conveyed by a party before or after that party had record ownership. Or, a grantee records a "wild" instrument that purports to transfer title from a party not in the record chain of title.

(14) Copyists' errors.<sup>18</sup>

NB Ed. Note: When I was working for LTIC in New Jersey back in the early 1980's we had come up with 52 title defects covered by the title insurance policy which were not discoverable from a review of the public record.

A title insurance policy should indemnify the insured against both loss from discovered defects, and from the undiscoverable defects listed supra, unless they are explicitly excluded or excepted from the policy.

In the majority of states where title insurance has become the most common method of title assurance, title insurance companies operate private title plants with tract indexes from which they conduct their own title searches.<sup>19</sup> Even in

<sup>18</sup> See Roberts, Public Regulation of Title Insurance Companies and Abstracters, 7 (1961); see also Travaskis, 55 Very Good Reasons Why Your Client Should Be Protected by Title Insurance, Title Insurance: The Lawyer's Expanding Role, 320-22 (1985).

<sup>19</sup> Joyce Palomar, TITLE INSURANCE LAW § 1.01[2].  
*Title Management Today Title Gram*

locations where the abstract/attorney opinion system continues, commercial lenders will require their borrowers to provide them with a lender's policy of title insurance, so that their mortgage liens may be sold into the secondary mortgage market. Because title insurers offer a discount on the policy covering the lender when the borrower also purchases an owner's title insurance policy, property buyers in these states are more often choosing owner's title insurance policies over attorneys' title opinions as well. In these locales, national title insurance underwriters often retain, or even buy, abstract companies to become their title insurance agents. The local abstract/title company or attorney then performs the standard record search on which the title insurance underwriter bases its policy. In some locations, attorneys have formed their own bar-related title insuring companies that underwrite title insurance policies, based on the title searches and examinations of their attorney members.<sup>20</sup>

So that title insurance will retain the loss avoidance character of the abstract/attorney opinion method of title assurance, many states statutorily mandate that title insurance companies have an in-house abstract or title plant<sup>21</sup> and that no

<sup>20</sup> Id. at Chapter 2.0. See also see Carter, New Role for Lawyers: The Florida Lawyer's Title Guaranty Fund, 45 A.B.A.J. 803 (1959); 23 Ky.S.B.J. 206 (1959); Carter, Lawyers' Title Guaranty Fund, 8 U.Fla.L.Rev. 480 (1955); Schaeffer, Why the Ohio Bar Title Insurance Company, 22 Ky.S.B.J. 32 (1957); 31 Ohio Bar 88 (1958).

<sup>21</sup> Alaska Stat. § 21.66.200 (1994).

Ariz. Rev. Stat. Ann. § 20-1567 (1990 & Supp. 1994) (title insurer may not write title insurance in a county with over 100,000 people unless insurer or its agent maintains a title plant covering that county).

Idaho Code § 41-2702 (1994) (if title insurer does not own and maintain tract indexes or abstract records, it must have its title insurance policies countersigned by a person or entity who does own or maintain tract indexes or abstract records), § 41-2710

(1994) (title insurance agent must own or lease, separately or with another licensed agent, a complete set of tract indexes and abstract records of each county for which polices are written), § 41-2708 (1994) (title insurer or its agent must own or lease tract indexes and abstract records of the county in which the property is located); Idaho Ins. Dept. Reg. 18.01.01 § 011 (required tract indexes and abstract records defined).

N.M. Stat. Ann. § 59A-12-13 (1994); N.M. Regs. ch. 59A § 30-C-IV (title insurance agent must own, operate, or control an abstract plant having been maintained for the previous 20 years in each county in which the agent operates).

Okl. Stat. Ann. tit. 36, § 5001 (West 1990) (every title insurance policy must be countersigned by one engaged in abstract of title business in Oklahoma or by an attorney duly appointed as agent of the title insurance company).

Or. Rev. Stat. § 731.438 (1993) (title insurer and its agent must own and maintain a title plant covering a period of the preceding 20 years for lands in counties where policies are to be issued), Or. Admin. R. 836-10-140 (title plant shall maintain adequate maps that will allow a person to locate a tract of land, the title plant shall maintain a general index, the title plant shall maintain a currently posted tract or geographic index).

Tex. Ins. Code Ann. art. 9.02 (West 1981 & Supp. 1994) (title agent is one who owns, leases, or controls an abstract plant . . .).

Wash. Rev. Code § 48.29.020 (1984) (title insurer must own or lease and maintain tract indexes for the county in which its principal office is located), § 48.29.040 (1984 & Supp. 1994) (title insurer may transact title insurance in counties other than where the insurer's principal office is located only if the insurer or its agent owns or leases and maintains tract indexes in those counties), § 48.29.160 (1984) (title insurance agent must own or lease and maintain tract indexes in counties in which the agent will do business).

title insurance policy may be issued unless it is based on a reasonable title search.<sup>22</sup> A few states even provide that no

A title insurance company usually may satisfy the requirement of owning or controlling a title plant by entering into agreements to share such records and facilities with other title companies. See id. See also Alaska Stat. § 21.66.240 (1993).

N.H. Rev. Stat. Ann. § 416-A:14 (1991).

Ohio Rev. Code Ann. § 3953.14 (Page 1989).

40 Pa. Cons. Stat. § 910-32 (1992).

<sup>22</sup> In Florida this is accomplished by barring the issuance of title insurance on a "casualty" basis. Fla. Stat. Ann. § 627.784 (West Supp. 1995). To issue title insurance on a casualty basis would mean that the insurer had not based the policy on a prior search and examination of the title and had not attempted to discover or eliminate risks prior to issuing the policy. "The term 'casualty basis' as used in this section means the issuance of a title insurance policy or guarantee of title with disregard to the possible existence of adverse matters or defects of title." *Id.* at § 627.784(2).

In other states, the express mandate is that no title insurance policy may be issued without a reasonable title search, examination of title, and determination of insurability. Alaska Stat. § 21.66.170 (1994) ("A policy or contract of title insurance may not be written until the title insurance company conducts or has conducted a reasonable search and examination of the title and has made a determination of insurability of title in accordance with its established underwriting practices.").

Ariz. Rev. Stat. Ann. § 20-1567 (1990 & Supp. 1994).

Colo. Rev. Stat. § 10-11-106 (1990).

Conn. Gen. Stat. § 38a-407 (1992).

Fla. Stat. Ann. § 627.7845 (West 1994 Supp.).

Haw. Rev. Stat. § 431:20-113 (1994).

Idaho Code § 41-2708 (1994).

Kan. Stat. Ann. § 40-235(b) (1993).

Mo. Rev. Stat. § 381.071 (1991). Mo. Code Regs. tit. 20, § 500-7.200 (before a title insurance policy is written, the title insurer or its licensed agent shall cause a search of the title which is to be insured, except: a licensed attorney is not required to base a title exam upon a set of geographically indexed records if she is personally responsible for the inspection of the best title evidence available, if a set of indexed records is not in existence for the county where the property is located, the title insurance policy shall be based upon the best title evidence available, if evidence for a title exam cannot be obtained from an indexed set of records at a reasonable charge or within a reasonable amount of time, the title insurance policy shall be based upon the best title evidence available).

Mont. Code Ann. § 33-25-214 (1993).

Neb. Rev. Stat. § 44-1947 (1994).

Nev. Rev. Stat. § 692A.220 (1993).

N.H. Rev. Stat. Ann. §4 16-A:6 (1991).

N.J. Rev. Stat. § 17:46B-9 (1994)

N.M. Stat. Ann. § 59A-30-11 (1994).

N.C. Gen. Stat. § 58-26-1 (1993) (requires title opinion by attorney who has conducted or caused to be conducted a reasonable examination of title; requires title company to make a determination of insurability).

N.D. Cent. Code § 26.1-20-05 (1993) (requires attorney examination of record title evidence), N.D. Admin. Code § 26.1-20-06 (title insurer may not issue a policy unless it has secured from an authorized person the record title evidence of

the title to be insured and the title evidence has been examined by a person duly admitted to the practice of law).

Ohio Rev. Code Ann. § 3953.07 (Page 1989) ("No policy or contract of title insurance shall be written unless it be based upon a reasonable examination of the title and a determination of insurability of title has been made in accordance with sound underwriting practices for title insurance companies.").

Okla. Stat. Ann. tit. 36, § 5001 (West 1990) (no title insurance policy may be issued except after examination of an abstract of title prepared by a bonded and licensed abstractor), Okla. Admin. Code 365:20-3-2 (no title insurer shall issue, permit, or cause to be issued, a binder, commitment, or policy of title insurance until either the title insurance company or its authorized agent shall have obtained an opinion of a licensed attorney based upon an examination of a duly certified abstract of title prepared by a bonded and licensed abstractor).

40 Pa. Cons. Stat. § 910-07 (1992); Tenn. Code Ann. § 56-35-129 (1994).

Tex. Ins. Code Ann. art. 9.34 (West 1981 & Supp. 1994) ("No policy or contract of title insurance shall be written until the title insurance company (a) has caused a search of title to be made from the title evidence prepared from an abstract plant as herein defined, or if no such abstract plant of the county exists, or the owner of such plant refuses to furnish the title insurance company desiring to insure, such title evidence at its regular charge and within a reasonable period of time, then such policy or contract of title insurance shall be based upon the best title evidence available, and (b) has caused to be made a determination of insurability of title in accordance with sound title underwriting practices."),

Utah Code Ann. § 31A-20-110 (1994).

Wyo. Stat. § 26-23-308 (1993) (title insurance policy may only be issued if there is adequate evidence of title by an abstractor or an attorney title

opinion).

Such statutes usually further require that evidence of the reasonable examination of title and determination of insurability be retained in the title insurance company's files for a specified period of time after the policy is issued. Colo. Rev. Stat. § 10-11-106 (1990) (must be retained for at least 15 years after the title insurance policy is issued).

Conn. Gen. Stat. § 38a-407 (1992) (must be retained for at least 10 years after the policy has been issued).

Fla. Stat. Ann. § 627.7845 (West 1994 Supp.) (must be retained in insurer's or title insurance agent's files for at least 7 years after the policy was issued).

Haw. Rev. Stat. § 431:20-113 (1993) (must be retained in title insurer's files for at least 15 years after the policy is issued).

Idaho Code § 41-2708 (1994) (must be retained for unspecified length of time in insurer's or agent's files).

Mo. Rev. Stat. § 381.071 (1991) (preserved for 15 years after policy is issued).

Mont. Code Ann. § 33-25-214 (1993) (must be preserved and retained for unspecified time).

Neb. Rev. Stat. § 44-1947 (1993) (must be retained for 15 years after policy issued).

Nev. Rev. Stat. § 692A.220 (1993) (must be retained for at least 5 years after policy is issued).

N.H. Rev. Stat. Ann. § 416-A:6 (1991) (must be retained for 20 years).

N.J. Rev. Stat. § 17:46B-9 (1994) (must be retained for 15 years).

N.M. Stat. Ann. § 59A-30-11 (1994) (must be retained for 15 years).

policy of title insurance may be issued unless it is based on an attorney's examination of the title.<sup>23</sup>

A hotly debated issue is whether the property purchaser or mortgagee can rely on the list of exceptions in a title insurer's preliminary commitment as a report of all the discoverable title defects that the insurance policy will not cover.<sup>24</sup> As to any lien, encumbrance or title defect discoverable from the record that does not fall within the title insurance policy's preprinted exclusions or general exceptions, if the title insurer does not wish to bear the risk, the insurer must type it in a list of special exceptions from coverage in the

Ohio Rev. Code Ann. § 3953.07 (1989) (must be retained for 10 years).

40 Pa. Cons. Stat. § 910-07 (1992) (must be retained for 20 years).

Tex. Ins. Code Ann. art. 9.34 (West 1981 & 1994 Supp.) (must be retained for 15 years).

Utah Code Ann. § 31A-20-110 (1994) (must be retained for 15 years).

Wyo. Stat. § 26-23-308 (1994) (must be retained for 15 years).

<sup>23</sup> Oklahoma Attorney General Opinions state that: (a) the title examination is the key to the entire conveyancing process, it must be based on a thorough knowledge of property law; (b) by definition, a title insurance policy expresses an opinion as to the marketability of title; and, (c) this opinion is relied upon by another, the title insurance applicant. For these reasons, the Attorney General has approved the state insurance commission's practice of permitting title insurers to issue a policy in the state only after an attorney has examined the abstract and issued an opinion. 10 Op. Att'y Gen. 425 (1978) & 83 Op. Att'y Gen. 281 (1984). See 36 Okla. Stat. Ann. § 5001(c) (construed in *American Title Ins. Co. v. M-H Enters.* 815 P.2d 1219 (Okla. App. 1991)).

See also N.C. Gen. Stat. § 58-26-1; N.D. Cent. Code § 26.1-20-05; Wyo. Stat. § 26-23-308.

<sup>24</sup> Citations of cases from all jurisdictions that have decided this question are reported in Joyce Palomar, *TITLE INSURANCE LAW*, § 12.0 (West Group, publisher).

policy's Schedule B. But, if any particular record title defect is of a type that arguably fits within the language of one of the policy's preprinted exclusions or general exceptions, then title insurers will claim they had no duty to disclose the existence of that particular title defect by listing it as a special exception in the policy's Schedule B.

As discussed supra, attorneys give title opinions and title insurers give a preliminary commitment to insure to property purchasers or mortgagees before the closing of the real estate transaction. The buyer or lender then may negotiate with the seller or borrower for the removal of any listed title defects, bargain to pay a lower amount to take subject to those risks, or rescind the transaction. But, if the title insurer is not obligated to disclose an existing, record title defect because it is also subsumed within one of the title policy's preprinted exclusions or general exceptions, then the buyer or lender has neither insurance for the risk nor the opportunity to renegotiate or rescind the deal. The buyer or lender who receives a clear preliminary commitment at this stage of the transaction perceives it to be a representation that the seller or borrower has a clear title to the property and may close the transaction in reliance upon it, unaware that the insurer could have failed to disclose a serious defect in the title because it fell into one of the policy's preprinted exclusions or general exceptions.

Title insurance policies and preliminary commitments to insure do not expressly assume the attorney's responsibility of disclosing all discoverable title defects and explaining their impact to the potential purchaser or lender. Instead, the title insurance commitment states it is simply notifying the applicant of the terms on which they insure the title after the closing of the transaction. Title insurers contend that, as to those types of encumbrances or title defects excluded or generally excepted in the preprinted portions of the policy, since they are not covered by the insurance contract, the title insurer need not search for them or disclose them to the insured.<sup>25</sup>

Nevertheless, as court dockets in many states reveal, title insurance purchasers, especially homeowners, are unaware that their title insurer could have ignored discoverable, record title defects simply because they were of a type encompassed in the language or preprinted exclusions or general exceptions from the policy's coverage. Because the real estate purchase contract often offers the title insurance as "title evidence" and requires the purchaser to examine said title evidence and notify the vendor of any objections by a stated date, purchasers of title insurance expect their title insurer fully searched the title records and disclosed all existing discoverable title defects.

<sup>25</sup> See cases cited in Joyce Palomar, TITLE INSURANCE LAW, § 12.02 (West Group, publisher).

Lawmakers in the various jurisdictions disagree on whether to honor the insureds' expectations by finding a duty of title insurers to fully search for and disclose all record title defects.\* In a little more than half of the jurisdictions that have addressed the issue, either courts<sup>26</sup> or legislatures<sup>27</sup> have

<sup>26</sup> Following are jurisdictions where courts have held that a title insurance company may be liable in tort or contract to one to whom it issues a title insurance policy if it failed to use reasonable care in searching the title and reporting recorded encumbrances.

*Alabama:* Soutullo v. Commonwealth Land Title Ins. Co., 646 So. 2d 1352 (Ala. 1994); Parker v. Ward, 614 So. 2d 975 (Ala. 1992).

*Alaska:* Bank of Cal. v. First Am. Title Ins. Co., 826 P.2d 1126 (1992); Transamerica Title Ins. Co. v. Ramsey, 507 P.2d 492,495 (1973); Breck v. Moore, 910 P.2d 599, 603 (Alaska 1996).

*Arizona:* Title Ins. Co. v. Costain Ariz., 791 P.2d 1086 (Ariz. App. 1990); Moore v. Title Ins. Co., 148 Ariz. 408, 714 P.2d 1303 (Ariz. App. 1985). However, the rule of these cases must be considered in light of the subsequent passage of Ariz. Rev. Stat. Ann. § 20—1562 (Supp. 1993).

*Arkansas:* Bourland v. Title Ins. Co., 627 S.W.2d 567,570 (Ark. App. 1982).

*California:* White v. Western Title Ins. Co., 221 Cal. Rptr. 509, 710 P.2d 309 (1985) was overruled by Cal. Ins. Code §§ 12340.10, 1234.11.

*Connecticut:* Bridgeport Airport, Inc. v. Title Guar. & Trust Co., 111 Conn. 537,150 A. 509, 510 (1930).

*Florida:* First Am. Title Ins. Co. v. First Title Serv. Co., 457 So. 2d 467, 473 (1984); Crawford v. Safeco Title Ins. Co., 585 So. 2d 952, 955 (Fla. App. 1st Dist. 1991); Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc., 544 So. 2d 1070 (Fla. App. 1989); Shada v. Title & Trust Co., 457 So. 2d 553 (Fla. App. 1984).

*Georgia:* Razete v. Preferred Research, Inc., 202 Ga. App. 504, 415 S.E.2d 25 (at. App. 1992) (court found a cause of action existed for negligence in failing to report fully on a title search where faxed commitment to insure omitted page containing a notation regarding an IRS lien).

*Hawaii:* Chun v. Park, 51 Haw. 462, 464, 462 P.2d 905, 906 (1969). See also Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 839 P.2d 10 (1992).

*Illinois:* Notaro Homes, Inc. v. Chicago Title Ins. Co., 1999 WL 1204749 (Ill. App. 2 Dist.); Pohrer v. Title Ins. Co., 652 F. Supp 348, 353—54 (N.D. Ill. 1987), vacated by 882 F. Supp. 114 (1987); Dinges v. Lawyers Title Ins. Corp., 106 Ill. App. 3d 188, 435 N.E.2d 944, 947 (1982); McLaughlin v. Attorneys' Title Guaranty Fund, Inc., 61 Ill. App.3d 911, 916, 378 N.E.2d 355, 359 (1978) ("The purpose of title insurance is to protect a transferee of real estate from the possibilities of loss through defects which may cloud title.").

*Indiana:* Altman v. Circle City Glass Corp., 484 N.E.2d 1296 (Ind. Ct. App. 1985) (insurer might be liable in tort).

*Kansas:* Ford v. Guarantee Abstract & Title Co., 220 Kan. 244, 553 P.2d 254, 266 (1976).

*Michigan:* Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 156 (1974).

*Minnesota:* Quigby v. St. Paul Title Ins. & Trust Co., 60 Minn. 275, 62 N.W. 287, 290 (1895).

*Missouri:* Evinger v. McDaniel Title Co., 726 S.W.2d 468, 472 (Mo App 1987).

*Montana:* Lipinski v. Title Ins. Co., 655 P.2d 970, 974 (1985). After *Lipinski*, the legislature attempted to defeat the court's rule by passing Mont. Code Ann. § 33—25—111 which provides that a title insurance policy is not an abstract of title. Subsequent to that, however, the legislature also passed Mont. Code Ann. § 33—25—214 which prohibits a title insurer from issuing an owner's title policy without listing all outstanding enforceable recorded liens or other interests. This appears to create a statutory duty to search for and disclose all recorded title defects.

*Nebraska:* Tess v. Lawyers Title Ins. Corp., 251 Neb. 501, 557 N.W.2d 696 (1997). Heyd v. Chicago Title Ins. Co., 218 Neb. 296, 303, 354 N.W.2d 154, 158 (1984).

*New Mexico:* Ruiz v. Garcia, 115 N.M. 269, 850 P.2d 972 (1993), citing N.M. Stat. Ann. § 59A—30—11, and overruling Horn v. Lawyers Title Ins. Corp., 557 P.2d 206 (1976).

*New York:* Chrysler First Fin. Servs. Corp.

v. Chicago Title Ins. Co., 156 Misc. 2d 814, 595 N.Y.S.2d 302 (Sup. Ct. 1993) (a prospective mortgagee justifiably relies upon the accuracy of the reported search not only as to the existence of prior encumbrances, but also to amounts thereof); L. Smirlock Realty Corp. v. Title Guar. Co., 52 N.Y.2d 179, 418 N.E.2d 650, 655 (N.Y. Ct. of Appeals 1981); Herbil Holding Co. v. Commonwealth Title Ins. Co., 183 A.D.2d 219, 590 N.Y.S.2d 512, 518 (App. Div. 2d Dep't 1992); Udell v. City Title Ins. Co., 12 A.D.2d 78, 208 N.Y.S.2d 504, 506 (1960); Glyn v. Title Guar. & Trust Co., 132 A.D. 859, 861, 117 N.Y.S. 424, 427—28 (1909); Ehmer v. Title Guar. & Trust Co., 50 N.E. 420 (N.Y. 1898).

Some New York cases that talk about title insurance companies being liable for what would be found in a reasonably diligent title search may be based on the insured having contracted separately for both a title search and a title insurance policy. The courts' statement of facts do not always make clear whether the insured actually contracted separately for the two services or whether the court assumes the insured's purchase of title insurance encompassed both a title search and a title policy. Additionally, a recent Appellate Division opinion attempts to limit such language in *Smirlock* to the context of the insurer's ability to assert the policy's standard misrepresentation clause. See *Citibank*, cited in the next paragraph. The language the court used in *Chrysler* also could be limited to requiring the insurer to indemnify for anything that it did not correctly except as a result of its title search.

Conversely, several New York cases clearly say that an insured has no action for a negligent title search unless a separate contract was entered into for a title search in addition to the title insurance contract. These are cited in the next paragraph.

*Oklahoma:* American Title Ins. Co. v. M-H Enters., 815 P.2d 1219 (Okla; Ct. App. 1991). The court found the title insurer liable for negligence per se where it violated a unique state statute that prohibits the issuance of any title insurance policy without a prior (attorney's) examination of an abstract of the title.

*Pennsylvania:* Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super. 110, 110 A.2d 878, 880 (1955) (claim was for title insurance company's breach of its contract as a conveyancer in failing to inform the insureds of the existence of tax liens, not for breach of the company's contract of title insurance).

viewed the offering of a title insurance commitment before the closing of the applicant's real estate transaction as implying that title insurers assume the duty to conduct a standard title search and disclose all discoverable defects. In these states, title insurers as a matter of course will search for and notify title insurance applicants of all record defects, or at least all that will not be insured against, regardless of whether they are covered by the title insurance policy.

\* Ed. Note: See discussion of Constructive Notice at Item 12, Exhibit 24, in the July Issue of *Title Management Today*, appearing at page 25 and compare this with case recited at Exhibit 15

Conversely, courts in many jurisdictions agree with the title insurer that the insurance contract absolutely defines the limits of the insurer's responsibility to its insured. In these states, either courts<sup>28</sup> or lawmakers<sup>29</sup> have held that issuance

*Virginia*: Marandino v. Lawyers Title Ins. Corp., 156 Va. 696, 159 S.E. 181, 184 (1931).

*Washington*: Shotwell v. Transamerica Title Ins. Co., 91 Wash. 2d 161, 588 P.2d 208, 211 (1978) (court 'declined to impose a duty to search on the title insurer on the facts presented, but stated "such a 'duty' might arise from the combined expectations of a title policy applicant and the service to be performed by title insurance companies."'). Lombardo v. Pierson, 852 P.2d 308 (Wash. 1993) (the court has not decided if a title insurer's issuance of a preliminary commitment to insure imposes the duties of an abstractor).

<sup>27</sup> Ariz. Rev. Stat. Ann. § 20—1567.

Colo. Rev. Stat. § 10—11—106 (1973).

<sup>28</sup> Following are jurisdictions holding that a title insurer owes no duty beyond that assumed in its insurance contract, unless the insurer contracts separately to search the title and disclose all title defects or voluntarily makes representations regarding the status of title.

*California*: Lawrence v. Chicago Title Ins. Co., 192 Cal. App. 3d 70, 76, 237 Cal. Rptr. 264, 268 (1987) *overruling* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 939, 122 Cal. Rptr. 470, 486 (1975). *See also* Cal. Ins. Code § 12340.11.

*Colorado*: Arapahoe Land Title, Inc. v. Contract Fin., Ltd., 28 Col. App. 393, 472 P.2d 754 (1970).

*Delaware*: Ruger v. Funk, 1996 WL 110072 (Del. Super. Ct.).

*District of Columbia*: Union Realty Co. v. Ahern, 93 A.2d 84, 86 (1952); 3307 M Street Partners v. Commonwealth Land Title Ins. Co., 782 F. Supp. 4 (D.D.C. 1992).

*Idaho*: Brown's Tie & Lumber Co. v. Chicago Title Co., 115 Idaho 56, 764 P.2d 423 (1988); Anderson v. Title Ins. Co., 103 Idaho 875, 655 P.2d 82, 85 (1982).

*Maine*: NE Properties, Inc. v. Chicago Title Ins. Co., 660 A.2d 926 (Me. 1995) (unless the insured has contracted for a preliminary title report, the title insurer is not liable for negligent title searching).

*Massachusetts*: Somerset Sav. Bank v. Chicago Title Ins. Co., 649 N.E.2d 1123 (Mass. 1995). But, if evidence shows title insurer made a separate agreement to search title, it may be liable for negligence in title searching. Dorr v. Massachusetts Title Ins. Co., 238 Mass. 490, 131 N.E. 191 (1921).

*Nevada*: Pioneer Title Ins. Co. v. Cantrell, 71 Nev. 243, 286 P.2d 261, 263 (1955).

*New Jersey*: Walker Rogge v. Chelsea Title & Guar. Co., 116 N.J. 517, 562 A.2d 208 (1989). *Compare* Mezzaluna v. Jersey Mortgage & Title Guar. Co., 109 N.J. 340, 162 A. 743, 745 (1932).

*New York*: Citibank v. Chicago Title Ins. Co., 214 A.D.2d 212, 632 N.Y.S.2d 779 (1st Dep't 1995); Chu v. Chicago Title Ins. Co., 89 A.D.2d 574, 452 N.Y.S.2d 229 (1982); Maggio v. Abstract Title and Mortgage Corp., 277 A.D. 940, 941, 98 N.Y.S.2d 1011 (1950); Inavest Enters. v. TRW Title Ins., 151 Misc. 2d 402, 573 N.Y.S.2d 239 (Sup. Ct. 1991); Trenton Potteries Co. v. Title Guar. & Trust Co., 176 N.Y. 65, 68 N.E. 132 (1903).

*Rhode Island*: Focus Inv. Assocs., Inc. v. American Title Ins. Co., 992 F.2d 1231 (1st Cir. 1993) (title policy is not a representation of title and cause of action for negligent misrepresentation cannot be brought without a showing of a separate agreement to search title; however, no preliminary title report had been issued in this case and the court did not rule on whether the preliminary title report

or commitment could form the basis for a claim of negligent misrepresentation.)

*Texas:* Chicago Title Ins. Co. v. McDaniel, 875 S.W.2d 310 (Tex. 1994); Tri-Legends Corp. v. Tigor Title Ins. Co. of Cal., 889 S.W.2d 432 (Tex. App. 1994); Southern Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 158 (1973); Houston Title Co. v. Ojeda de Toca, 733 S.W.2d 325, 327 (Tex. App. 1987). *But see* Great Am. Mortgage Investors v. Louisville Title Ins. Co., 597 S.W.2d 425 (Tex. Civ. App. 1980) (*wrIt of error to Texas Supreme Court denied*) (though title insurer has no duty to search and disclose, if title insurer voluntarily makes representations as to status of title, it may be held to standard of reasonable care and may be liable in tort pursuant to Restatement (Second) of Torts § 552 (1977) for damages caused by a negligent misrepresentation); and Dixon v. Shirley, 558 S.W.2d 112, 117 (Tex. 1977). *See also* First Title Co. of Waco v. Garrett, 860 S.W.2d 74 (Tex. 1993) (title insurer may be liable for affirmative misrepresentation of the status of title under the Deceptive Trade Practices Act) and Joyce Palomar, TITLE INSURANCE LAW § 12.02[4] (West Group publisher).

*Utah:* Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302 (Utah 1983) (issuance of title policy and preliminary title report do not alone impose a duty to the insured to reasonably search and examine the title, but title insurance company can assume that duty expressly or impliedly); CULP Constr. Co. v. Buildmart Mall, 795 P.2d 650 (Utah 1990).

*Wisconsin:* Greenberg v. Stewart Title Guar. Co., 492 N.W.2d 147 (1992).

<sup>29</sup> A state whose judicial decision was frequently cited for the rule that title insurers have a duty in tort to diligently search and to disclose all record defects (California) subsequently mandated by statute that no duty to search will be implied. Calif. Ins. Code § 12340.10-11. *See also* Southland Title Corp. v. Superior Ct. of Calif., 282 Cal. Rptr. 425 (App. 1991); Fidelity Nat'l Title Ins. Co. v. Miller, 264 Cal. Rptr. 17 (App. 1989); Lawrence v. Chicago Title Ins. Co., 192 Cal. Rptr. 264, 268 (App. 1987).

*Accord* Mont. Stat. Ann. § 33-25-111 (*but see* Mont. Stat. Ann. § 33-25-214(3)).

of a title insurance commitment does not imply that the title insurer provided a standard chain of title search or disclosed title defects of a type excluded or generally excepted from the policy's insurance coverage. Nevertheless, even in these latter jurisdictions, title insurance companies can be liable for negligence if they contract separate to search the title or give a title report or if they voluntarily make representations about the status of the title. Investors in real property in such states may be well advised to purchase (1) title insurance for the protection it provides against nonrecord title defects not excluded or excepted from the policy and (2) either a guaranteed title search from the title insurance company or an abstract and attorney's title opinion in order to obtain a full search of the chain of title and disclosure of all discoverable defects.<sup>30</sup>

The contrast in the protection offered by title insurance and the abstract/attorney opinion method of title assurance may be briefly summarized as follows:

---

Ariz. Rev. Stat § 20-1562(5).

Nev. Rev. Stat. §§ 692A.015, 692A.023, 692A.035.

<sup>30</sup> For a more complete analysis of the case law on whether title insurers have a duty to perform a standard title search and disclose all discoverable title defects, see Joyce Palomar, TITLE INSURANCE LAW §§ 12.02[1] – 12.06. The preceding sections of Palomar on TITLE INSURANCE LAW also consider parties to whom the title insurer may be liable for failure to search or disclose; damages available; title insurer's defenses; and title insurers' liability under consumer protection and unfair trade practice laws.

SUMMARY: ABSTRACT/ATTORNEY OPINION  
PROTECTION compared to TITLE INSURANCE  
PROTECTION

ABSTRACT/ATTORNEY OPINION

1. Protection is in informing client of record defects so client may have them cleared or reject transaction.
2. Records searched are probably county grantor and grantee indices (tract index in a few states), state district court, probate court, and tax lien records, though abstract co. could have own title plant & tract index.
3. Informs only of title defects discoverable from a standard record search.
4. Client only recovers loss after expense of bringing a lawsuit against abstractor or attorney.
5. Client only recovers if abstractor or attorney was negligent in searching or appraising recorded instruments.
6. Recovery is limited by existence and solvency of abstractor or attorney, though abstractor's bond and/or errors and omissions policy and attorney's malpractice insurance may provide a deeper pocket.
7. In some states, only the client may sue the abstractor or attorney for negligence; in some states anyone reasonably foreseen to rely on the abstract can sue.
8. Negligence damages are value of client's loss in property interest at time of suit.
9. Expense of defending attack on title must be borne by client until client can sue and win against abstractor or attorney.

TITLE INSURANCE

1. Protection is in (a) informing insured of record defects EXCEPT INSURER MAY NOT ALWAYS DISCLOSE RECORD DEFECTS EXCEPTED OR EXCLUDED FROM POLICY COVERAGE IN STATES WHERE NOT JUDICIALLY OR STATUTORILY MANDATED, and insurer has no duty to explain listed exceptions to insured; and (b) insuring against loss from undiscoverable defects not excluded from policy coverage.
2. Will generally have own title plant with tract indices and computerized state district court, probate court and tax records.
3. Insures against all unexcepted record defects plus unexcluded hidden defects in title.
4. Insured can recover under title insurance policy only if the record or nonrecord defect causing the loss was not excepted or excluded from the policy.
5. Recovery is based on the contract so negligence need not be shown. May have additional cause of action in tort for negligent search in some states, but no recourse for negligent record search in others.
6. Recovery is supported by solvency and capital reserves of title insurance corporation plus reinsuring and coinsuring title insurers.
7. Only the insured, certain successors of owners by operation of law, or successors of mortgagees may recover under the policy.
8. Amount stated in policy as value of insured interest will only increase to keep up with inflation if particular policy or endorsement is purchased.
9. Title insurer should bear expense of any attacks on insured title within policy's coverage. Title insurer may bring and bear expense of affirmative action against insured's grantor or other parties responsible for title defect, depending on jurisdiction.

### Marketable Title Discussion

**Take note that Insuring Clause (3) of the ALTA Policies talk about loss or damaged by reason of the fact that title is determined to be unmarketable. The ALTA policies do not insure title is marketable. They insure against the consequences in the event title is determined to be unmarketable.**

**Annotation:** 31 ALR4th 11, *Construction and Effect of Marketable Record Title Statutes*; See also 18 ALR4th 1311; **Defects Affecting Marketability of Title Within Meaning Of Title Insurance Policy**

**Other reference sources:** *Gosdin*, supra., page 56; Bayse, *Clearing Land Titles*, Chapters 2 and 22; Maupin, *Marketable Title to Real Estate*, 3d Ed.; Cribbet & Johnson, *Principles of the Law of Property*, pp 174-176 (3d ed. 1898); *3 American Law of Property*, sec. 11.48 et seq. (Casner ed. 1952); Palomar, *Title Insurance Law*, 5-18.1; Burke, *Law of Title Insurance*, 2<sup>nd</sup> Ed. Sec 5.14, 3d Ed. Sec. 3.07, pp. 3-102 et seq.

**Comment:** Differences of opinion as to what exactly constitutes a marketable varies among attorneys astute in such matters and may in fact be dependent upon some personal piccadillo's and claims experience of a given practitioner. While the definition of marketable title may vary from state to state, most authorities will agree that a marketable title is a title legally free from doubt, or free from the treat of potential litigation [Smith, supra., 18 ALR4th 1311, 1313; In Pennsylvania marketable title is usually said to be title which does not expose the purchaser to the hazard of a lawsuit. see *LaCourse v. Kiesle*, 366 Pa. 385 (1951). Other definitions of marketable title may be found in *Bayse*, supra, Chapter 22, section 371. Therein the Author also suggests "the Modern Concept of Marketability" at section 374.

For a *list of specific matters* and points to consider which have formed the basis of litigation when determining the question of marketability see *Thompson of Real Property*, Thomas Ed., Chapter 93.03(a)(4) at paragraph 1, page 370.

The concept of exactly what constitutes a "Marketable Title" is the subject of various treatise including one devoted entirely to that subject, *Maupin*, supra., Harold L. Reeve, the former SVP of Chicago Title and Trust Company wrote a text in 1951 entitled *Guaranteeing Marketability of Titles to Real Estate*, wherein he suggested there are four (4) types of title to real property:

1. Perfect Title;
2. Marketable Title;
3. Insurable Title, and
4. Uninsurable Title

Therein, he defined Perfect title as "record title without fault, defect or omission."

*Title Management Today Title Gram*

Marketable Title was defined as "an indefeasible title in fee simple, whether had by deed, devise or by Statutes of Limitations . . . evidence by an abstract, together with explanatory affidavits".

Insurable Title was identified as "a sound title which is subject to defects which prevent it from being technically marketable, but which is not subject to being defeated, is defensible and insurable and which in fact is covered by a title policy generally acceptable to purchasers and lenders". He emphasized that the concept of insurability is a test of much greater value and flexibility. And that is the type of title which we, as title insurers, frequently insure.

**Discussion:** While it is important to keep the concept of insurability in mind, as underwriters we must distinguish between the concept of insurability and marketability. Insurable and marketable title are not synonymous. When a title insurance policy covers unmarketability of the insured title, the insured will be indemnified for loss if it is later determined by a court of competent jurisdiction that the title is not marketable because of a defect which existed prior to the title insurance policy's effective date. And that is precisely our concern as underwriters. More to the point, almost any claim tendered under insuring clauses 1, 2, 5 and 6 is going to include a count for unmarketability. In 1987 the ALTA added to C&S 1 (g) a definition of unmarketability of title.

Paragraph 1(g) of the Conditions and Stipulations defines unmarketability of title as "*an alleged or apparent matter affecting the title to the land, not excluded or exception from coverage, which would entitle a purchaser or the estate or interest described in Schedule A to be release from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.*"

**NB** Take note that the policy does not insure that title is marketable. Under the Preamble it only insurers the insured for loss or damage in the event it is later determined not to be marketable. There is difference. *The coverage is conditional to the extent that the insured must both suffer a loss and be damaged in some manner.* Furthermore, the definition does not state what is or is not the delivery of marketable title. One must review state law to determine how marketability is defined.

The policy definition encompasses any "*alleged or apparent matter affecting title to the land*". This language establishes the fact that the insured is not required to first obtain a judicial determination that the title is unmarketable before requesting defense of the title. Failure to provide such a defense (with or without a reservation of rights) subjects the insurer to potential claims of bad faith and extra-contractual tort theories based on damages for breach of such duty. Furthermore, the added language would more likely than not entitle a prospective purchaser to rescind under a contract of sale on the basis that title is unmarketable unless the contract of sale addresses the

character of the title to be conveyed as either marketable or insurable.

*Many states (19) have marketable title record title acts that purportedly clear away old claims and make it easier to establish marketable title if there is a muniment or "root of title" and a search of the record discloses there a no adverse claims filed within the specific time frame. Approximately 30 states have Bar Title Standards as guides to marketability. However, the latter do not have the same force and affect as the former, i.e., they have not been sanctioned by the state legislature and passed into law. They are merely a guide to recommended practice.*

**TITLE MANAGEMENT TODAY**

Lewis Laska (Founding Editor)  
**William C. Hart**  
EDITOR IN CHIEF.

**Title Law Associates**  
PUBLISHER

**Charlotte R. Wagner Hart**  
MANAGING PARTNER

**Cindy Shaffer**  
MARKETING DIRECTOR

Published at 612 Boyer Road, Cheltenham, PA. 19012  
EDITORIAL OFFICES : 215.379.3195. Please visit our web site  
Located at [www.titlelawannotated.com](http://www.titlelawannotated.com) .  
MARKETING OFFICES: 800.743.7472. Please visit our web site located at  
[www.createsolutions.com](http://www.createsolutions.com) .

For subscription and address changes or to report recent cases and provided Reader's Exchange notices contact:

**Title Management Today**  
William C. Hart, Editor  
P.O. Box 56690  
Philadelphia, PA 19111  
Telephone: 800.220.3901 Ext. 132  
Email inquiries, articles or press releases to [titlelaw@comcast.net](mailto:titlelaw@comcast.net)

Copyright 2002, William C. Hart. All Rights Reserved. Photocopying or reproduction in any form in whole or in part, without the publishers written consent is a violation of federal copyright law and is strictly prohibited.

Annual Subscription Rate is \$185

**Title Management Today Title Gram** is a service of **Title Management Today**, a quarterly news magazine that supplements materials presented on the Title Law Associates web site located at [www.titlelawannotated.com](http://www.titlelawannotated.com) . As successor by reason of merger with **the Title Law Associates Newsletter**, it is the one publication that presents to both the land title industry and the Real Estate Bar those cases selected by ALTA title underwriting counsel as significant to the industry for inclusion in the Spring and Fall ALTA Title Counsel Meeting Agenda. This publication is designed to provide title company employees, officers, agents, approved attorneys and real estate lawyers general information prepared by professionals with regard to the subject matter covered. It does not include full legal analysis of the matters presented. It is distributed with the express understanding that the Publisher and the Editor are not engaged in rendering legal opinions or advice. We recommend a full review of the cases listed. This publication should not be utilized as a substitute for specific legal services. As circumstances warrant, if legal advice or other expert assistance is required, the services of a professional should be sought.