

AN ATTACK BY THE STATE AUDITOR ON THE
"30-YEAR ABSTRACT"
By Kraettli Q. Epperson

According to Declaratory Ruling 96-1, issued by the State Auditor and Inspector of the State of Oklahoma, effective September 18, 1996:

Abstracts prepared pursuant to the Oklahoma Bar Association's Title Examination Standard 19.13 do not conform to the requirements of Oklahoma Administrative Code, Rule 80:10-5-3(b) which became effective July 13, 1992.

In effect, this ruling prohibits the preparation of a "30-Year Abstract" A 30-Year Abstract is an abbreviated abstract of title which provides full documentation for the most recent 30-years -- to the 30-year-old "root of title" -- and then shows selected instruments filed of record before the "root of title", back to the initial "Patent" issued by the government.

As the Chair, or Co-Chair, of the Title Examination Standards Committee, for the Oklahoma Bar Association, since 1990, I am more than a little bit surprised that our Committee was neither consulted with, nor advised of, the proposed 1992 Rule 80:10-5-3 ("Rule 80") and the Declaratory Ruling 96-1 that allegedly resulted in the apparent invalidation of a professional standard (TES 19.13, 30.13) that was expressly based on the Marketable Record Title (16 O.S. § 71 et seq. and which standard has been in place since 1969. However, it is now the best use of our time to determine first why Rule 80 and Declaratory Ruling 96-1 were adopted and then what is the practical impact of these two edicts on consumers and title examiners.

Under the Oklahoma Abstractors Law "Abstractors Law" the

State Auditor and Inspector was empowered:

1. "To prescribe rules and regulations and make such orders as deemed necessary to implement the Oklahoma Abstractors Law" (§ 227.13(1) , and

2. "To establish minimum standards to be followed in the preparation of abstracts" (§ 227.13(11

Therefore, to the extent that it becomes "necessary" to "prescribe rules and regulations and make orders" in order "to implement the Oklahoma Abstractors Law", and so long as such pronouncements do not contradict the other existing provisions of the Abstractors Law, or other laws, then the State Auditor and Inspector is indeed empowered to issue such "rules", "regulations" and "orders".

The Abstractors Law itself defines -- in a general sense -- what is an "abstract of title" at 74 § 227.11(1), by declaring:

"Abstract of title" is a compilation in orderly arrangement of the materials and facts of record, in the office of the county clerk and court clerk, affecting the title to a specific tract of land issued pursuant to a certificate certifying to the matters therein contained.

Thereafter, and apparently pursuant to the Abstractors Law, the Auditor established Rule 80:10-5-3(b) as of July 13, 1992, which provides in Paragraph (b) the following expanded definition for the "Contents of Abstract":

Contents of Abstract. For the time period covered by the certification, an abstract shall include the following: all instruments that have been filed for record or have been recorded in the Office of the County Clerk which legally impart constructive notice of

matters affecting title to the subject property, any interest therein or encumbrances thereon; the records of the District Court Clerk and the County Clerk that disclose executions, court proceedings, pending suits, liens of any kind affecting the title to said real estate; judgments or transcripts of judgments against any of the parties appearing within the chain of title of the abstract, either indexed and docketed prior to October 1, 1978 on the judgment docket of the District Court Clerk or filed for record or recorded on or after October 1, 1978 in the Office of the County Clerk of said county; and all ad valorem tax liens due and unpaid against said real estate, tax sales thereof unredeemed, tax deeds, unpaid special assessments certified to the Office of the County Treasurer, due and unpaid, tax sales thereof unredeemed, and tax deeds given thereon and unpaid personal taxes which are a lien on said real estate.

Paragraph (d) of Rule 80 further provides this definition:

"(d) Other Services. Any service performed by the holder of a Certificate of Authority that does not meet the standard established in subsection (b) of this section shall not be designated an 'abstract' and shall not include an Abstract Certificate

It should be noted that a comparison of the language of the definition of the "Contents of Abstract" -- found in the language of Paragraph (b) above -- with the language of the Oklahoma Land Title Association's Uniform Certificate shows no substantive differences. (See this article: "Abstract Certificate Officially Changed", 54 OBJ 1713 (June 1983) by Kraettli Q. Epperson)

In passing it should also be noted that contrary to the provisions of Paragraph (c) of Rule 80, there is no longer any legal need for a Federal Court Certificate, even if the subject

property is located in one of the three Counties containing a Federal District Court (i.e., Oklahoma, Tulsa and Muskogee) or a Federal Bankruptcy Court (i.e., Oklahoma, Tulsa and Okmulgee [See this article: "Local Real Property Recordings Required for Federal Money Judgments", 63 OBJ 2697 (September 30, 1992) by Kraettli Q. Epperson; and see TES 2.4 (old 1.3 Federal Court Certificates.)]

It is interesting to note that the Abstractors Law, at § 227.1, does not specify whether there is only one "kind" of abstract or several "kinds". Instead the statute allows the abstractor to specify in the certificate what are "the matters therein contained". This allows the customer to request and for the abstractor to provide, what the customer decides she needs

However, among all of the possible "kinds" of abstracts, the Auditor decided for undisclosed reasons that it would recognize and allow "combined surface/mineral" or "surface only" abstracts, so long as "The Abstract Certificate and/or Caption Sheet shall reflect the nature of the abstract along with an appropriate disclaimer regarding that which is excluded." (Rule 80:10-5-3(a) If the customer can be expected to understand a certificate stating that it is a "surface only" abstract, it is difficult to comprehend why they could not also recognize the nature of a certification on a 30-Year Abstract, saying "This abstract is compiled in accordance with Oklahoma Title Standard No 19.13 under 16 O.S.A. §§ 71-80." It should be recognized that it is usually a title examiner who examines and interprets an abstract

and not a layperson. Such a professional will obviously know what is the nature of a "30-Year Abstract". In fact, title insurance cannot be issued in Oklahoma unless it is an attorney who examines the abstract.

While the Declaratory Ruling 96-1 attempts to point to Rule 80 as already expressly prohibiting the preparation of an abbreviated "30-Year Abstract", such Ruling 96-1 is clearly not supported under any reasonable interpretation of Rule 80

Paragraph (b) of Rule 80, which describes the "Contents of Abstract", does not say that an abstract must contain "all instruments", but says it must contain "all instruments...which legally impart constructive notice of matters affecting title" Therefore, under Rule 80, if an instrument does not "affect title" because -- for instance -- it has been deemed extinguished by a legislative act, such as Oklahoma's Marketable Record Title Act the abstractor has no obligation to include such an ineffective instrument in the abstract. In fact, the abstractor could be subject to criticism for "padding" (i.e., unnecessarily enlarging) the abstract in order to charge the customer for more entries/instruments

As noted in the Caveat to TES 30.1 (old 19.1):

"the Oklahoma Supreme Court held in Mobbs v. City of Lehigh, 655 P.2d 547, 551 (Okla. 1982) that the Marketable Record Title Act was not a statute of limitations. The court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had as its target the right itself."

Therefore, the Marketable Record Title Act "extinguishes" the

interest.

This unexplained Declaratory Ruling 96-1 will undoubtedly cause measurable increases in abstracting charges and examination fees to customers, while providing no discernible benefit. Both abstractors and title examiners are professionals, and they exercise their skills on a regular basis with the obvious intent to avoid making any errors. When such infrequent errors occur, and if professional was clearly wrong, then such professional, or more usually, their liability carrier, will be required to compensate the customer for any resulting damages.

However, until a court case, legislative enactment, or further administrative rule-making, corrects this erroneous Declaratory Ruling 96-1, customers will be forced to pay for, and then title examiners will need to wade through, numerous unnecessary instruments

This matter is being considered by the Oklahoma Title Examination Standards during its 1997 work year. Comments on this 80, Declaratory Ruling 96-1, this article and the practical impact of this Ruling are hereby actively solicited, and should be directed to any of the members of the Committee