UPDATE ON OKLAHOMA TITLE EXAMINATION STANDARDS: REVISIONS FOR 2000 (effective November 12, 1999)

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I. EXAMINING ATTORNEY'S RESPONSIBILITIES

A. GENERAL RESPONSIBILITY

The Attorney who undertakes to examine a title to real property as part of a sale or a loan transaction has a significant responsibility. As noted in Patton:

'45. Importance of Title Examination

In distinction from the abstracter's duty to search the records and to merely report the facts as he finds them, it is the province of the attorney to examine these facts either from the abstract or, using it as a guide, from the records themselves, and to formulate a legal opinion thereon. He is therefore commonly called a title examiner (in distinction from a searcher or abstracter of the records, though, if he is a lawyer admitted to practice in the state, he may be both abstracter and examiner). Having received an abstract which he considers to be "good and sufficient," or to otherwise satisfy his client's contract upon the subject, the latter is now ready to examine the title. This is of great importance, for the reason that, aside from covenants of warranty, all questions of title after acceptance of conveyance are at the risk of the vendee. His only protection against defects is to investigate the title beforehand, or to look to the express warranties of his vendor's conveyance afterwards. He wishes to know, therefore, before completing his purchase, that the title is not only free from defects which would be covered by the warranties of his deed, but also free from those minor defects for which he would have no recourse but which would make it unmarketable on a resale. (emphasis added)

'52. Responsibility of Examining Attorney

Though an attorney must be held to have undertaken to use a reasonable degree of care or skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of his duties, and will be held liable to his client for injury resulting as a proximate consequent from the want of such knowledge and skill, or from a failure to exercise such care, he is not a guarantor of the titles which he approves and is only liable for negligence or misconduct in their examination. He cannot be held for damages resulting from an opinion rendered in good faith which proves to be erroneous either as to the law or as to its application to the particular facts involved. He is of course liable for injury arising from his negligence, such as omitting in his report to a purchaser liens shown in the abstract, or in certifying in his report to others as to the subsistence of a lien which has ceased to exist or which never attached. But, unless there are circumstances to take the case out of the general rule, his liability, like that of an abstracter, extends only to those by whom he has been employed.

Aside however from the financial responsibility to a client for any loss resulting from negligence or lack of knowledge and skill, a title examiner feels the same personal responsibility for making a complete and accurate title report which is implicit in the

> *relationship of a lawyer and his client. As in almost no other field of the practice of law, carefulness is the prime requisite. Knowledge of the subject is a close second. Skill then comes with experience. Knowledge alone is not substitute for the latter, the same in title examination as in playing a musical instrument, speaking a foreign language, or using new tools and machines. Given equal knowledge of real property law, an attorney well versed in trial procedure may be as inadequately equipped to examine a title as may an examiner to conduct a jury trial. The two lines of practice require different types of skill; and the latter, in both cases, is acquired mainly from experience.*
>
> *In addition to studying the matters contained infra relating to title in his own state and supra in relation to methods of examination, each reader is urged to supplement his familiarity with this text by reading any local work which may have been prepared for his state and any list of standards which have been adopted by the lawyers of his state or district*. He should procure an index of the curative and limitation acts applicable to titles in his state, either a published list where that is possible, or one prepared and kept up by himself. (emphasis added)

B. "PRIVITY" WITH TITLE EXAMINERS

Obviously both the inside address of the title opinion and the limiting language, elsewhere in the opinion, designating the sole persons allowed to rely on the opinion, are proper places to expressly show to whom the opinion is addressed.

However, even where the opinion is addressed to a specific person or entity, it is possible that under all the circumstances surrounding the transaction, the attorney who is representing one party, such as the lender, and rendering an opinion solely to that party, might also be held to be the attorney for the opposing party, such as the borrower, as well.

As noted in an Oklahoma case considered by the 10th Circuit U.S. Court of Appeals, Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990):

> The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See *Keel v. Titan Constr. Corp.*, 639 P.2d 1228, 1232 (Okla. 1981). The *Bradford* court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "*the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee* TO THE PLAINTIFF OR ONE IN HIS POSITION *in view of all the circumstances of the case* such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).

***

> In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys, Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the title opinion. The record also shows that all parties, including Martin, Morgan, Vanguard, and Glenfed [the lender], were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, *Bradford*, 653 P.2d at 190, and workmanlike performance, *Keel*, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See *Bradford*, 653 P.2d at 190-91; *Keel*, 639 P.2d at 1232. (emphasis added)

An interesting Oklahoma Court of Appeals case was decided in 1991, American Title Ins. v. M-H Enterprises, 815 P.2d 1219 (Okl. App. 1991), and it was held therein that a buyer of real property can sue the title insurer for negligence, even if the erroneous title insurance policy only runs in favor of the buyer's lender. This rule applied where: (1) no abstract was prepared, (2) an attorney's title examination was not secured and (3) the insurer/abstractor missed a recorded first mortgage.

The message in these two cases appears to be that a party that conducted the title search and examination was held potentially liable for an error in such effort to a third party although the title examiner and title insurer had no reason to expect to be held to have a duty. This liability might arise, even though the attorney or insurer specifically directed her opinion or policy to only one of the multiple participants.

C. STATUTE OF LIMITATIONS ON TITLE OPINIONS

In terms of the nature of (i.e., tort vs. contract), and the statute of limitations on,

attorneys' errors in examination of title, it should be noted that the Oklahoma Supreme Court in 1985 held:

> In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations at 12 O.S.A. 1981, ' 95 Third. (*Seanor v. Browne*, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (*McCarroll v. Doctors General Hospital*, 664 P.2d 382 (Okl. 1983)). The period may be tolled, however, by concealment by the attorney of the negligent acts which injured the client. This Court has previously held, in *Kansas City Life Insurance Co. v. Nipper*, 174 Okl. 634, 51 P.2d 741 (1935) that:
>
> > One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts. (emphasis added)

(Funnell v. Jones, 737 P.2d 105 (Okla. 1985))

However, in 1993 the Oklahoma Supreme Court "clarified" their holding in Funnell by declaring:

> Appellees argue the instant case should be controlled by *Funnell v. Jones*, 737 P.2d 105 (Okla. 1985), *cert. denied*, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' reliance on *Funnell* is misplaced. The opinion in *Funnell* gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in *Funnell* to the effect an action for malpractice, whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. *Id.* at 107-108. We did not decide in *Funnell* a proceeding against a lawyer or law firm is limited *only* to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do.
>
> We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. *Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc.*, 775 P.2d

> 797, 799-801 (Okla. 1989) (architectural, engineering and construction supervision services). In essence, the holding of *Flint Ridge* is *if* the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. *Id.* at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. *Id.* As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, if this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts. (emphasis added)

(Great Plains Federal Savings & Loan v. Dabney, 846 P.2d 1088 (Okla. 1993))

II. NEED FOR STANDARDS

A. BACKGROUND AND AUTHORITY OF STANDARDS

The first set of Statewide Standards was adopted in 1938 by the Connecticut Bar Association. On November 16, 1946 the General Assembly and House of Delegates of the Oklahoma Bar Association ("OBA") approved 21 Title Examination Standards ("Standards") for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without any specific citation of authority expressly listed. There are currently over 100 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., no citation of supporting Oklahoma statutes or case law).

In Oklahoma, new and revised Standards are developed and considered each year at 9 monthly Title Examination Standards Committee ("Standards Committee") meetings held from January to September. These proposals are then presented annually by the Standards Committee to the OBA Real Property Law Section ("Section") at the Section's annual meeting, usually held in November of each year. Immediately thereafter, the Section forwards to the OBA House of Delegates ("House"), for the House's consideration and approval, on the day following the Section meeting, any new or revised Standards which were approved at the Section's meeting.

These Oklahoma Standards have received acceptance from the Oklahoma Supreme Court which has held:

> While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive. (emphasis added)

Knowles v. Freeman, 649 P.2d 532, 535 (Okla. 1982).

The Standards become binding between the parties:

(1) IF the parties' contract incorporates the Standards as the measure of the required quality of title, for example:

(a) Standard 2.2 REFERENCE TO TITLE STANDARDS provides: "It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: 'It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable;'" and

(b) the Oklahoma City Metropolitan Board of Realtors standard contract provides: "7. TITLE EVIDENCE: Seller shall furnish Buyer title evidence covering the Property, which shows marketable title vested in Seller according to the title standards adopted by the Oklahoma Bar Association. . .", or

(2) IF proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title [52 O.S. 570.10.D.2a; also see: Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990) ("Marketable title is determined under '540 [now '570.10] pursuant to the Oklahoma Bar Association's title examination standards.")].

In these two instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest (i.e., 6% v. 12%), as appropriate, with the Court's decision being based on the "marketability" of title as measured, in part, by the Standards.

However, it should be noted that AIt is, therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature

shall prevail.@ Okl. A.G. Opin. No. 79-230.

B. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

The title examiner is required, as a first step, to determine what quality of title is being sought by her client-buyer or client-lender before undertaking the examination. According to Am Jur 2d:

> *An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser. A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.* (77 Am Jur 2d '115 Title of Vendor: Generally; Obligation to furnish good or marketable title)

> *While, in the absence of any provisions in a contract for the sale of land indicating the character of the title to be conveyed, the law implies an obligation or undertaking on the part of the vendor to convey or tender a good and marketable title, if the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered conform to that stipulation, it is immaterial that it may in fact be a good or marketable title. A contract to convey a specific title is not fulfilled by conveying another and different title. On the other hand, when the title which the vendor offers or tenders conforms to the character of title stipulated in the contract of sale, the vendee is bound to accept it although the title may not be good or marketable within the meaning of the obligation or undertaking to furnish such a title which the law would have implied in the absence of any stipulation. Refusal to accept title tendered in accordance with the terms of sale constitutes a breach by the purchaser of land of his contract to purchase. If a contract for the purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor.* (77 Am Jur 2d '123 Special Provisions as to character of title: Generally.)

The terminology which is used to define the quality of title to real property has apparently changed over time. Patton notes:

> *In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects, which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title." While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertizing these relatively infrequent dangers; and they must remember that a purchaser cannot legally demand a title which is absolutely free from all suspicion or possible defect. He may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the character of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.*
>
> *If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as* ***now*** *located and constructed or hereafter to be constructed, the easement depended on the fact of the* ***then*** *location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make*

plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation, it is not marketable.

Recorded muniments form so generally the proofs of title in this country, that the courts of several jurisdictions hold not only that a good or marketable title must have the attributes of that term as used by the equity courts, but also that it must be fairly deducible of record. This phase of the matter will be considered further in the ensuing section.

Determination of questions as to the marketability of titles is peculiarly within the province of counsel for buyer or mortgagee. Counsel for the owner will not only endeavor to remedy the condition of the title as to any requirements which he concedes to be proper, but usually finds it easier to do so than to contest the matter, even as to matters not so conceded. In the main it is only when compliance is impossible or when time for compliance is lacking or has passed that the question reaches the courts. Even then a decision is not always possible. This is because courts usually will not undertake to determine doubtful questions involving the rights of others who are not parties to the action. (Rufford G. Patton and Carroll G. Patton, Patton on Titles, 2nd Edition (herein "Patton"): '46. Classification of Vendor Titles)

In essence, it appears that "marketable title" means (1) the record affirmatively shows a solid chain of title and (2) the record does not show any claims in the form of liens or encumbrances. This "good record title" can be backed up by the delivery of a deed to the vendee containing sufficient warranties to ensure that the vendor must make the title "good in fact", if non-record defects or liens/encumbrances surface later.

However, to the extent a contract provision providing that one must have and must convey marketable title is interpreted to require title to be free from "all reasonable doubt" it opens the door to differences of opinion between reasonable persons. As noted in Bayse:

Time cures certain errors in conveyancing by means of statutes of limitations. The healing effect of curative legislation removes other defects of conveyancing. But operation of these kinds of legislation neither defines nor declares what constitutes a marketable title. The usual definition of a marketable title is one which is free from all reasonable doubt. This negative approach is not now satisfactory, for it is a rare title concerning which an examiner cannot entertain some doubt with respect to some transaction in its history. (Paul E. Bayse, Clearing Land Titles (herein "Bayse"): '8. Legislation)

It is this preoccupation with looking for a defect -- any defect -- whether substantive or merely a technical one, that causes the system to bog down. If there are hundreds or even thousands of potential examiners within a community, there is also the possibility of there being a wide range of examination attitudes and conclusions. In "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953), John C. Payne, (herein "Increasing Marketability") the problems caused by each examiner exercising unbridled discretion are noted:

> *When the examiner, upon the basis of these decisions, has found that the present vendor can convey a title which is good in fact, he must then ask whether the title has the additional characteristic of marketability. What constitutes a marketable title? Here again legal definitions are subordinate to functional meaning. What the purchaser of land wants is a title which not only can be defended but which can be presented to another examiner with the certainty that it will be unobjectionable. It is small comfort to the owner that he has not been disseized if he is unable to sell or mortgage. If one and the same examiner passed all titles in a given locality, the title which the examiner considered good as a practical matter would, of course, also be merchantable. But such is not the case, and the present examiner must anticipate that his client will in the future attempt to either sell or mortgage and that the same title will come under the scrutiny of some other examiner. In each of the decisions which an examiner has made in determining the validity of a title he has had to exercise sound legal and practical judgment. Will a second examiner, vested with the same wide discretion, reach the same conclusion? If his conclusion is different and he rejects the title, the professional reputation of the first examiner will be impaired and his client may suffer substantial financial loss. Faced with this uncertainty, many examiners have adopted a solution which emphasizes individual security rather than the general facility of land transfers. This is the practice known as "construing against title," or more picturesquely, as "flyspecking." These terms indicate that the examiner indulges in a minimum of presumptions of law and fact, demands full search of title in every instance, and places no reliance upon the statute of limitations. As a consequence he considers all errors of record as substantial. The result of even a* ***single examiner*** *in a community adopting this practice is to set up titles which are practically good in fact. Examiner* ***A*** *rejects a title on technical grounds. Thereafter, Examiner* ***B****, to whom the same problem is presented, feels compelled to reject any title presented to him which exhibits a similar defect. Examiner* ***A*** *is thereupon confirmed in the wisdom of his initial decision, and resolves to be even more strict in the future. It is sometimes said that the practice of construing against title reduces an entire bar to the standards of its most timorous member. This is an understatement, for the net effect is an extremity obtained only by mutual goading.*

The consequences of construing against title are iniquitous, and the practice itself is ridiculous in that it is predicated upon a theoretical perfection unobtainable under our present system of record land titles. Many titles which are practically unassailable become unmarketable or the owners are put to expense and delay in rectifying formal defects. Examiners are subjected to much extra labor without commensurate compensation, and the transfer of land is retarded. As long as we tolerate periodic re-examination of the same series of non-conclusive records by different examiners, each vested with very wide discretion, there is no remedy for these difficulties. However, some of the most oppressive results may be avoided by the simple device of agreements made by examiners in advance as to the general standards which they will apply to all titles which they examine. Such agreements may extend to: (1) the duration of search; (2) the effect of lapse of time upon defects of record; (3) the presumptions of fact which will ordinarily be indulged in by the examiner; (4) the law applicable to particular situations; and (5) relations between examiners and between examiners and the public. Where agreements are made by title examiners within a particular local area having a single set of land records, such agreements may extend even further and may embrace the total effect of particular specific records. For example, it may be agreed that certain base titles are good and will not thereafter be examined or that specific legal proceedings, normally notorious foreclosures and receivership actions, will be conclusively deemed effective. Although such agreements may not be legally binding upon the courts, they may go far toward dispelling the fear that if one examiner waives an apparent defect of title it may be deemed a cloud upon the title by a subsequent examiner. The result is an increase in the marketability of land and a reduction of the labor imposed upon the proponent of the title. The obvious utility of such an arrangement has led to the adoption of uniform standards for the examination of titles by an increasing number of bar associations.

The problems arising from this search for perfect title impact the examiner and their clients in several ways:

1. The legal fees charged to the public are higher because each examination for a parcel must always go back all the way to sovereignty (or, in some states, back to the root of title);
2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;
3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and
4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

(John C. Payne, "The Why, What and How of Uniform Title Standards", 7 Ala.L.Rev. 25 (1954) (herein "The Why of Standards")).

In addition, friction and lowering of professional cooperation increase between the title examining members of the bar as they take shots at each others work. This process of adopting an increasingly conservative and cautious approach to examination of titles creates a downward spiral. As noted in Bayse:

> *Examiners themselves are human and will react in different ways to the same factual situation. Some are more conservative than others. Even though one examiner feels that a given irregularity will not affect the marketability of a title as a practical matter, he is hesitant to express his opinion of marketability when he knows that another examiner in the same community may have occasion to pass upon the title at a later time and would undoubtedly be more conservative and hold it to be unmarketable. Under these circumstances he is inclined to be more conservative himself and declare the title to be unmarketable. People do not like to be required to incur expense and effort to correct defects which do not in a practical sense jeopardize a title when they have already been advised that their title is marketable. The public becomes impatient with a system that permits such conservative attitudes.*
>
> *If the same examiner passed judgment upon all title transactions, this situation would remain dormant. Unfortunately such is not the case. Or if all examiners would hold the same opinion as to specific irregularities in titles, this complication would not arise. But this also is not the case. The result in many communities has been greatly depressive, sometimes tragic.* (Bayse: '7. Real Estate Standards)

The State of Oklahoma used to have one of the most strict standards for "marketable title" which was caused by the interpretation of the language of several early Oklahoma Supreme Court cases. The current title standard in Oklahoma has been changed, as of November 10, 1995, to be less strict. It now provides:

> ***1.1 MARKETABLE TITLE DEFINED***
>
> *"A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."*

Other states also utilize this "apparently perfect" test as their measuring stick.

In response to this obvious need to avoid procedures that alienated the public and caused distance to grow between examiners, a movement began and mushroomed in a couple of decades throughout the country to adopt uniform title examination standards. Such standards were adopted first in local communities by the practicing bar and then on a statewide basis. Although there is some competition among local bars for the place of honor, it appears that the local bar of Livingston County, Illinois adopted a set of 14 standards on April 7, 1923. Thereafter, in 1933 or 1934, the Gage County Nebraska Bar Association formulated 32 title standards. The Connecticut Bar, in 1938, became the first state to have statewide standards by adopting a set of 50. ("Increasing Marketability")

III. NEWEST CHANGES TO TITLE STANDARDS FOR 2000 (NOV. 12, 1999)

The revised Standards and new Standards, discussed below, are considered and approved by the Standards Committee during the January-September Period. The proposed changes and additions are then published in the Oklahoma Bar Journal in October, and are then considered and approved by the Section at its annual meeting in November. They are thereafter considered and approved by the OBA House of Delegates in November. These changes and additions became effective immediately upon adoption by the House of Delegates. A notice of the House's approval of the proposed new and revised Standards is thereafter published in the Oklahoma Bar Journal. It is expected that the new "2000 TES Handbook", containing the updated versions of these Standards, will be printed and mailed to all 1999 Section members by sometime in January.

The following sections display and discuss the Proposals which are submitted to and approved by the Section and the House of Delegates. The text for the discussion is taken from the Annual Report published in the Oklahoma Bar Journal in October 1999. This text was

prepared by the General Counsel for the OBA Real Property Law Section, Joyce Palomar, a full-time professor of law at the University of Oklahoma. Note that a Alegislative@ format is used below. Additions are underlined,and deletions are shown by ~~strikeout~~.

A brief explanatory note precedes each Proposed Standard, indicating the nature and reason for the change proposed.

1999 Report of the Title Examination Standards Committee of the Real Property Law Section

Proposed Amendments to Title Standards for 1999, to be presented for approval by the House of Delegates, Oklahoma Bar Association, at the Annual Meeting, November 12, 1999. Additions are underlined, deletions are by ~~strikeout~~.

The Title Examination Standards Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Oklahoma City on Thursday, November 11, 1999.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 12, 1999. Proposals adopted by the House of Delegates become effective immediately.

A brief explanatory note precedes each Proposed Standard, indicating the nature and reason for the change proposed.

Proposal 1

The Committee recommends revising Standard 23.4 to reflect statutory changes that were

adopted in 1997 and 1987.

23.4 CHILD SUPPORT ARREARAGE LIENS PURSUANT TO 43 O.S.A. ' 135

A lien against real property, then owned or subsequently acquired by a person owing an arrearage in child support payments, is created under the following circumstances:

Judgments or orders filed on or after October 1, 1985 but prior to May 15, 1986. By filing a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, ~~a lien, relating~~ which lien relates back in time to when the arrearage was reduced to judgment, is created ~~which~~ and is superior to all other liens except the lien of a first mortgage.

Authority: 1985 Okla. Sess. Laws, ch. 297, ' 20.

Comment: The party authorized to release this lien is not identified by the statute creating said lien.

B. **Judgments or orders filed on or after May 15, 1986 and prior to October 1, 1987.** By filing a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, ~~a lien is created~~ which lien shall exist from the time the order is *filed of record.* The priority of this lien is established by the time that the order is filed of record.

Authority: 43 O.S.A. '135, renumbered from 12 O.S.A. ' 1289.1 by 1989 Okla. Sess. Laws, ch. 33, ' 1, effective November 1, 1989.

Comment: Liens for arrearages in child support payments created by orders filed on or after May 15, 1986, may be released by the person entitled to the support or the Department of Human Services on behalf of its clients and recipients. For purposes of identifying the parties on whose behalf the Department of Human Services may release the above-described liens, a "recipient" is defined as a party who has assigned to the Department of Human Services his or her rights to support from another person in consideration of receiving aid to families with dependent children, 56 O.S.A. ' 237(C)(1), and "client" is defined as a party, not receiving aid to families with dependent children, who has applied to the Department of Human Services to collect his or her child support payments, 56 O.S.A. ' 237(D).

~~Caveat: The examiner should be aware that, on or after October 1, 1987, the creation of liens for past due child support in the absence of a judgment or order for arrearage is subject to statutory requirements that notice and the opportunity for a court or administrative hearing be given to the person ordered to make child support payments.~~

C. **Judgments or orders filed on or after October 1, 1987 and prior to July 1, 1997.** By filing:

1. a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, which lien shall exist from the time the judgment or order is filed of record, or

2. a certified copy of a judgment or order, providing for payment of child support pursuant to which a past due amount has accrued, with the clerk of the county in which such property is located, which lien shall exist from the time a past due amount has accrued and notice and opportunity for a court or administrative hearing to determine the amount that is past due has been given to the person ordered to make such payments.

Authority: 1987 Okla. Sess. Laws, ch 230, ' 15.

Judgments or orders filed on or after July 1, 1997. By filing:

1. a certified copy of an order of a district court or an administrative order of the Department of Human Services evidencing an arrearage in child support payments with the clerk of the county in which such property is located, which lien shall exist from the time the judgment or order is filed of record, or

2. a certified copy of a judgment or order, providing for payment of child support pursuant to which a past due amount has accrued, with the clerk of the county in which such property is located, which lien shall exist from the time a past due amount has accrued and, prior to implementation of the central payment registry, notice and opportunity to contest the amount past due has been given to the obligor.

If the payments are made through the central payment registry (as created by 43 O.S. ' 410 *et. seq.*), past due amounts of child support shall become a lien upon real property of the person ordered to make such payments at the time such payments become past due.

Authority: 1997 Okla. Sess. Laws, ch. 402 ' 15.

Note: The examining attorney should be aware of the possibility of undisclosed liens pursuant to the procedures outlined above. *See* First Community Bank of Blanchard v. Hodges, 907 P.2d 1047 (Okla. 1995).

Proposal 2

The Committee recommends revising Standard 34.2 for the purpose of making it more clear, concise and usable.

34.2 BANKRUPTCIES ON OR AFTER OCTOBER 1, 1979

~~With respect to bankruptcy proceedings commenced on or after October 1, 1979, where~~

title to real property is held by a debtor at the time of the commencement of bankruptcy proceedings (and if the proceedings have not been properly dismissed prior to a conveyance or other transfer of title to the property), the title examiner should be furnished with and review duly certified or otherwise reliable evidence of the following matters (in addition to the bankruptcy petition):

A. Where the property is scheduled and claimed by the debtor as exempt, and no objection to such claim of exemption has been sustained by the bankruptcy court:

1. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) and the Schedule of Exempt Property (Schedule "B-4" for cases filed prior to August 1, 1991, or schedule "C" for cases filed on or after August 1, 1991), showing the claim of exemption for the property, or any other such claim of exemption by a dependent of the debtor on behalf of the debtor; and

2. satisfactory evidence that no objections to such claim of exemption have been filed; if such an objection has been so filed, the examiner should also be furnished with and review any order by the bankruptcy court overruling or otherwise resolving such objection.

Authority: 11 U.S.C.A. "521 522 & 541; F.R.B.P. 1002, 1007, 1008 & 4003; 3 L. King, Collier on Bankruptcy &522.26 (15th ed. 1984).

Comment: Title examiners should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay has been obtained as to the debtor (by final order of the bankruptcy court to permit the action), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case or (c), in a Chapter 7 case concerning an individual or in a case under Chapter 9, 11, 12 or 13, the grant or denial of a discharge, 11 U.S.C.A. '362 & F.R.B.P. 4001.

B. Where the property is affirmatively abandoned by the bankruptcy trustee or by a debtor in possession:

1. If abandoned by a bankruptcy trustee (except where the trustee is the United States Trustee), the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of his official duties), or (if a blanket bond has been filed pursuant to Federal Rules of Bankruptcy Procedure 2010) the trustee's acceptance of election or appointment (except where deemed accepted pursuant to Federal Rules of Bankruptcy Procedure 2008, on or after August 1, 1987); or if, abandoned by a debtor in possession, satisfactory evidence that no trustee was appointed in the case; and

2. either:

a. the notice of intention to abandon the property given by the trustee or debtor

in possession, and satisfactory evidence that no objections to such abandonment have been filed within the time allowed by such notice in accordance with the Federal Rules of Bankruptcy Procedure and/or local court rules; or

b. if the abandonment is pursuant to a request of a party in interest, the order by the bankruptcy court authorizing or directing such abandonment, after such notice and hearing as required by the bankruptcy court, by the Federal Rules of Bankruptcy Procedure and/or by local court rules.

Authority: 11 U.S.C.A. "102, 322 & 554; F.R.B.P. 2008, 2010 & 6007; 4 L. King, Collier on Bankruptcy &554.02 (15th ed. 1984).

Comment: Upon abandonment, control of the property abandoned reverts to the debtor. In such event, unless the automatic stay has terminated as described in the Comment following section A above, a mortgagee or other lien creditor must obtain relief from the automatic stay as to the debtor by final order of the bankruptcy court before either (1) foreclosing the debtor's interest or (2) obtaining a conveyance from the debtor, 11 U.S.C.A. '362 and F.R.B.P. 4001.

C. Where non exempt property is not administered before the closing of the bankruptcy case and, unless otherwise ordered by the bankruptcy court, is therefore deemed abandoned:

1. The order discharging the trustee, if one has been appointed, and closing the estate; and

2. the bankruptcy proceedings showing that the property was scheduled by the debtor and was not administered at or before the closing of the case.

Authority: 11 U.S.C.A. "350 & 554; F.R.B.P. 2008, 2010, 5009 & 5010; 4 L. King, Collier on Bankruptcy &554.02 (15th ed. 1984).

D. Where the property is sold by the bankruptcy trustee or by a debtor in possession (other than in the ordinary course of business of the debtor):

1. If sold by a bankruptcy trustee (except where the trustee is the United States Trustee), the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties), or (if a blanket bond has been filed pursuant to Federal Rules of Bankruptcy Procedure 2010) the trustee's acceptance of election or appointment (except where deemed accepted pursuant to Federal Rules of Bankruptcy Procedure 2008, on or after August 1, 1987); or if sold by the debtor in possession, satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance;

2. the notice of such sale, in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and/or local court rules, or the order of the bankruptcy court authorizing a different form of notice or dispensing with such notice;

3. the bankruptcy proceedings showing that (a) no objections to such sale were raised, or if such objections were raised, the order overruling such objections or otherwise

authorizing the sale, and (b) such sale has not been stayed pending an appeal from such order; and

4. the conveyance by the trustee or the debtor in possession.

Authority: 11 U.S.C.A. "102(1), 322, 363(b), 363(m) & 1107; F.R.B.P. 2002, 2008, 2010, 6004; King, Collier on Bankruptcy &554.02 (15th ed. 1984).

E. Where the property is sold in the ordinary course of business of the debtor, unless otherwise ordered by the court:

1. If the property is sold by the trustee:

a. except where the trustee is the United States Trustee, the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of his official duties), or (if a blanket bond has been filed pursuant to Federal Rules of Bankruptcy Procedure 2010) the trustee's acceptance of his election or appointment (except where deemed accepted in a Chapter 7, Chapter 12 or Chapter 13 case pursuant to Federal Rules of Bankruptcy Procedure 2008, on or after August 1, 1987);

b. if in a Chapter 11 case, satisfactory evidence that the bankruptcy court has not entered an order precluding the trustee from operating the debtor's business; and

c. the conveyance by the trustee.

2. If the property is sold by a debtor in possession, satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance, and the conveyance by the debtor in possession.

Authority: 11 U.S.C.A. "322, 363, 721, 1104, 1105, 1107(a), 1108 & 1304(b); F.R.B.P. 2008 & 2010; 2 L. King, Collier on Bankruptcy &363.04 (15th ed. 1984); 4 L. King, id. &721.04(1); 5 L. King, id. &&1108.03 & 1304.01(3).

F. Where the property is sold free and clear of any interest in such property of any entity other than the bankruptcy estate:

1. The instruments described in Paragraphs (D) and (E) above, as appropriate; and

2. the bankruptcy proceedings showing that such entity's interest in the property attached to the proceeds of such sale, that such entity consented to the sale, or that such entity received notice of such sale (or, for sales on or after August 1, 1987, that such entity was served, in accordance with Federal Rules of Bankruptcy Procedure 6004(c), with notice of the motion for authority to sell the property free and clear of such interest, which notice included the date of the hearing on the motion and the time within which objections may be filed and served upon the trustee or debtor in possession) and raised no objection, or if an objection was raised, the order overruling such objection or otherwise authorizing the sale free and clear of such interest.

~~Authority: 11 U.S.C.A. '363(f), (g) & (h); F.R.B.P. 2002, 2010, 6004, & 9013; 2 L. King, Collier on Bankruptcy &363.07 (15th ed. 1984).~~

~~G. In a Chapter 11 case, where the property is the subject of a plan of reorganization of the debtor:~~

~~1. The notice (in accordance with the Federal Rules of Bankruptcy Procedure and/or local court rules) of the filing of the disclosure statement, and the order approving the disclosure statement;~~

~~2. satisfactory evidence of the mailing (in accordance with the Federal Rules of Bankruptcy Procedure and/or local court rules) to all creditors and equity security holders, of:~~

~~a. the plan, or a court approved summary of the plan;~~

~~b. the disclosure statement approved by the court;~~

~~c. Notice of the time within which acceptances and rejections of the plan may be filed;~~

~~d. Notice of any date fixed for the hearing on confirmation of the plan; and~~

~~e. such other information as may have been directed by the court;~~

~~together with satisfactory evidence of the mailing of a form of ballot conforming to Official Form No. 30, to creditors and equity security holders entitled to vote on the plan;~~

~~3. the order confirming the plan; and~~

~~4. the plan (or such portion(s) thereof to which the disposition of the property is subject).~~

~~Authority: 11 U.S.C.A. "1123, 1125, 1128, 1129, 1141 & 1142; F.R.B.P. 3016, 3017 & 3020.~~

~~Comment: In some instances it may be appropriate to furnish to the title examiner a duly certified copy of the bankruptcy case docket; while not necessarily conclusive of the issue, the case docket may indicate to the examiner's satisfaction whether certain events have or have not occurred the "satisfactory evidence" referred to in this Standard. (See, F.R.B.P. 5003).~~

EXEMPT ASSETS

Under Section 522 of the Bankruptcy Code a debtor may claim certain property as being exempt from forced sale for the benefit of its creditors. Therefore, a claim of exemption is a tool by which the debtor may retain property and exclude it from administration by the bankruptcy court.

Where the property under examination is claimed as exempt, the abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The Petition and Order for Relief. 11 U.S.C. "301, 302 or 303.

B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. '521(1) and Fed. R. Bankr. P. 1007(b) & 4002(3).

C. The Schedule of Exempt Property (Schedule "B-4" for cases filed prior to August 1, 1991, or Schedule "C" for cases filed on or after August 1, 1991), showing that the subject property was claimed as exempt by the debtor(s). 11 U.S.C. "522(b) & (l). Fed. R. Bankr. P. 4003(a).

D. The docket sheet indicating whether the claim of exemption was subject to an objection by any party in interest.

NOTE: An objection to the claim of exemption must be filed within thirty (30) days of the conclusion of the meeting of creditors held pursuant to 11 U.S.C. '341 and Fed. R. Bankr. P. 2003(a). Fed. R. Bankr. P. 4003(b).

1. If the docket sheet indicates that no objection was timely filed, the property is deemed exempt. 11 U.S.C. '522(l) and Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).

2. If the docket sheet indicates that an objection was timely filed, the examiner should review a copy of the bankruptcy court's order disposing of the objection.

ABANDONMENT

Abandonment of an asset can take place at any time during the pendency of the bankruptcy proceedings. The procedure can be initiated by a debtor-in-possession or case trustee via the filing a notice of abandonment with the bankruptcy court and the service of a copy of the notice on each of the parties in interest in the case.

Abandonment is also a creditor's remedy. Any creditor holding an interest in the subject property has the right to file a motion with the bankruptcy court requesting that its collateral be abandoned from the estate. Once its collateral is abandoned from the estate, and the automatic stay imposed by 11 U.S.C. '362 is lifted, the creditor is free to pursue any of the remedies available to it in accordance with applicable law.

Where the property under examination is abandoned from the bankruptcy estate, the abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The Petition and Order for Relief. 11 U.S.C. "301, 302 or 303.

B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. '521(1) and Fed. R. Bankr. P. 1007(b) & 4002(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States trustee within five (5) days of receipt of the notice of selection. 11 U.S.C. '322(a) and Fed. R. Bankr. P. 2008; or

2. If the trustee has filed a blanket bond pursuant to Fed. R. Bankr. P. 2010, evidence that the trustee did not reject the appointment within five days of receipt of notice of the appointment. 11 U.S.C. '322(a) and Fed. R. Bankr. P. 2008; or

D. If no trustee has been appointed in the case, evidence of that fact.

NOTE: The elements indicated above regarding the qualification of a trustee to act in a particular case may be conclusively evidenced through a certificate from the clerk of the bankruptcy court in which the proceedings are pending certifying that either: 1) the debtor is acting as a debtor-in-possession, and thus retains the powers, duties and obligations of a trustee, or 2) that a trustee has qualified. Fed. R. Bankr. P. 2011(a).

E. If the property was affirmatively abandoned by either the case trustee or a debtor-in-possession:

1. The notice of intent to abandon required by Fed. R. Bankr. P. 6007(a).

NOTE: The notice of intent to abandon property of the estate may be contained within the notice of the meeting of creditors (the "341 meeting") which is mailed to each party in the case at the outset of the proceedings. If the court file contains an order of abandonment, but no pleading specifically labeled as being a notice of abandonment, the examiner should review the notice of meeting of creditors to determine if it contains a general notice of the trustee's ability to abandon property at the 341 meeting.

2. Evidence that there was no objection to the notice of abandonment filed

within 18 days of the date of mailing of the notice. Fed. R. Bankr. P. 6007(a) and 9006(f); or

3. The bankruptcy court's order abandoning the property.

F. If the abandonment is by virtue of a motion filed by a creditor having an interest in the subject property:

1. The motion filed pursuant to 11 U.S.C. '554(b) and Fed. R. Bankr. P. 6007(b) requesting that the subject property be abandoned from the estate;

2. The bankruptcy court's order ruling on the motion.

G. If the subject property is disclosed on the schedule of real property filed in conjunction with the Petition, but is not otherwise disposed of during the pendency of the bankruptcy proceedings, it is deemed abandoned to the debtor upon the closing of the case. 11 U.S.C. '554(c). In that event, the examiner should review the order discharging the trustee, if one has been appointed, and closing the estate. Fed. R. Bankr. P. 5009 and 11 U.S.C. '350(a).

NOTE: If the subject property is not disclosed on the schedule of real property filed in conjunction with the Petition, it remains unadministered property of the estate upon the closing of the case. 11 U.S.C. '554(d). In that event, the examiner should require that the bankruptcy proceedings be re-opened in accordance with 11 U.S.C. '350(b) so that the property can be scheduled and administered by the bankruptcy court.

SALES

Sales of realty held by a bankruptcy estate are governed by Section 363 of the Bankruptcy Code and Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure. In the event a bankruptcy trustee is selling an interest in realty that is subject to an ownership interest by someone that is not a debtor, the sale may be conducted only after the successful prosecution of an adversary proceeding within the bankruptcy case. See, Fed. R. Bankr. P. 7001(3). In the event an examiner encounters such a situation, the entire adversary proceedings should be reviewed.

Where the property under examination is sold by a bankruptcy trustee or a debtor-in-possession (other than in the ordinary course of business), the abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The Petition and Order for Relief. 11 U.S.C. "301, 302 or 303.

B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. '521(1) and Fed. R.

Bankr. P. 1007(b) & 4002(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States trustee within five (5) days of receipt of the notice of selection. 11 U.S.C. '322(a) and Fed. R. Bankr. P. 2008; or

2. If the trustee has filed a blanket bond pursuant to Fed. R. Bankr. P. 2010, evidence that the trustee did not reject the appointment pursuant to Fed. R. Bankr. P. 2008; or

D. If no trustee has been appointed in the case, evidence of that fact.

NOTE: The elements indicated above regarding the qualification of a trustee to act in a particular case may be conclusively evidenced through a certificate from the clerk of the bankruptcy court in which the proceedings are pending certifying that either: 1) the debtor is acting as a debtor-in-possession, and thus retains the powers, duties and obligations of a trustee, or 2) that a trustee has qualified. Fed. R. Bankr. P. 2011(a).

E. Evidence that the debtor, the trustee, all creditors and indenture trustees, any committees formed pursuant to Sections 705 or 1102 and the United States trustee received at least twenty (20) days notice of the proposed sale. Fed. R. Bankr. P. 2002(a)(2), (i) and (k).

F. Evidence that the notice of sale served upon each of the parties delineated above contained at least the following information regarding the transaction:

1. Either

a. The time and place of any public sale; or

b. The terms and conditions of any private sale;

2. The time fixed for filing objections to the proposed sale; and

3. A description of the property being sold. Fed. R. Bankr. P. 2002(c)(1).

G. Evidence that either:

1. No objection to the proposed sale was filed and served more than five (5) days before the date set for the proposed action or within the time fixed by

the court. Fed. R. Bankr. P. 6004(b); or

2. If an objection was filed, the order of the bankruptcy court disposing of the objection.

H. A properly executed conveyance from either:

1. The debtor-in-possession; or

2. The duly appointed and acting trustee in his capacity as trustee of the bankruptcy estate. Fed. R. Bankr. P. 6004(f)(2).

SALES FREE AND CLEAR OF LIENS

Section 363(f) of the Bankruptcy Code allows a movant to conduct a sale of estate property free and clear of certain specified interests that may encumber the interest being sold. In a chapter 12 case, that authority is supplemented by Section 1208. If a sale free and clear of interests is encountered, in addition to the materials indicated in the immediately preceding section, the abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The notice of sale discussed in TES 34.2.III.E. and F. should also contain the date of the hearing on the motion and the time within which objections may be filed and served on the debtor-in-possession or trustee. Fed. R. Bankr. P. 6004(c).

B. Evidence that the motion filed with the bankruptcy court requesting that the subject property be sold pursuant to Section 363(f) was properly served on the parties who held liens or other interests in the property to be sold. Fed. R. Bankr. P. 6004(c).

C. The order of the bankruptcy court disposing of the motion.

TRANSFERS PURSUANT TO A CONFIRMED CHAPTER 11 PLAN

In the Chapter 11 context transfers of interests that are part of the bankruptcy estate may be effectuated through the provisions of a confirmed Chapter 11 plan of reorganization. Where the property under examination is transferred through the terms of a confirmed plan of reorganization, the abstract being examined should contain, or the examiner should review certified copies of, the following: