UPDATE ON OKLAHOMA TITLE EXAMINATION STANDARDS: REVISIONS FOR 2004 (effective November 14, 2003)

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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.

§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) (*Rufford G. Patton and Carroll G. Patton, Patton on Titles, 2nd Edition (herein "Patton")

B. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients (notwithstanding Patton's assertion above that: "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."), it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and the limiting language, elsewhere in the opinion, expressly designate the sole person(s) allowed to rely on the opinion.

However, even where the opinion is addressed to a specific person or entity, it is possible that due to the particular circumstances surrounding the transaction, the attorney who is representing one party, such as the lender -- and rendering an opinion directed solely to that lender -- might be held to be liable to 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).
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> 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 [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, 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), wherein it was held that a buyer of real property can sue (i.e., via counter claim) the title insurer for negligence in the preparation of a title policy, even if the title insurance policy was issued only in favor of the buyer's lender. This rule was applied where: (1) no abstract was prepared, (2) an attorney's title examination was not undertaken, and (3) the insurer/abstractor missed a recorded first mortgage. The facts of the case showed that, after the buyer/borrower lost the house through a foreclosure of the missed first mortgage, the insurer paid the insured second mortgage holder to settle under the terms of the title insurance policy and had such lender assign the worthless second note and mortgage to the

insurer who then sued the buyer/borrower under the warranty of title in the second mortgage. The appellate court held that while the buyer/borrower was not a named insured, the insurer's own negligence (i.e., no abstract and no examination) caused the loss, and that it did not buy the note and mortgage as a holder in due course, because (1) no value was paid for the acquisition of the note and mortgage (i.e., the payment was to settle its obligations under the policy) and (2) the note and mortgage were already in default when the insurer took an assignment of them.

The message in these two cases appears to be that a party that conducts the title search and examination can be held liable for an error in such effort to a third party although the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. It appears that this liability might arise even where the attorney or insurer specifically directed his opinion or policy to only one of the multiple participants in the transaction.

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 in 1985 the Oklahoma Supreme Court 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:
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> > 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, 1092 (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.

Oklahoma's set of 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;'" (emphasis added) 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. . .", (emphasis added) 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 above 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% vs. 12%), with the Court's decision being based on the "marketability" of title as measured, where applicable, by the Standards.

However, it should be noted that "It 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 the first step in the examination process, to determine what quality of title is being required by his 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 advertising 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. (§46. Classification of Vendor Titles)

In summary, it appears that "marketable title" means (1) the public record affirmatively shows a solid chain of title (i.e., continuous and uninterrupted) and (2) the public record does not show any claims in the form of outstanding/unreleased liens or encumbrances. This "good record title" can be conveyed and 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 non-record liens/encumbrances surface later.

However, to the extent that a contract provision -- providing that the vendor 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 focus on looking for a defect -- any defect -- whether substantive or merely a technical one, that can cause the system to bog down. If there is more than a single title examiner within a community, there is also the possibility of there being a wide range of examination attitudes resulting in differing conclusions as to the adequacy of the title.

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 resulting from this quest for perfect title can impact the examiner and his 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 other's 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")

Over the years, since 1938, a total of 31 States have adopted statewide sets of Standards. Of these, there are currently 19 States which have sets of Standards which have been updated in the last 5 years (i.e., since 1998). In the last several years, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas (1997) and Louisiana (2001). See the attached National Title Examination Standards Resource Center Report, and see my web site at www.eppersonlaw.com.

III. NEWEST CHANGES TO TITLE STANDARDS FOR 2004 (NOV. 22, 2003)

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 "TES Handbook", containing the updated versions of these Standards, will be printed and mailed to all 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. 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, with the assistance of Jack Wimbish, a Committee member from Tulsa. Note that a “legislative” 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.

2003 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION

Proposed Amendments to Title Standards for 2004, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 14, 2003. Additions are underlined, deletions are by ~~strikeout~~.

The Title Examination Standards Sub-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 Tulsa on Thursday, November 13, 2003.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 14, 2003. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

[PROPOSALS 2, 3, 4 & 6 WERE APPROVED BY THE SECTION AND THE HOUSE OF DELEGATES; BUT PROPOSALS 1 AND 5 WERE NOT APPROVED BY THE SECTION AND ARE BEING RECONSIDERED IN 2004 BY THE COMMITTEE]

Proposal 1. [NOT APPROVED]

The Committee recommends amending Title Standard 3.1 to more clearly organize the Standard and to make clear the circumstances under which the affidavit provided for in 16 O.S. § 76 can be used.

3.1 INSTRUMENTS BY STRANGERS

A. An instrument or abstract thereof seen by a title examiner in the course of examination of title, which is executed by any person or other legal entity who, at the time of such execution, did not own some interest in the property as shown by the record, or owned a lesser interest than the instrument purports to convey, charges the examiner and his or her client with knowledge of any interest which such person or entity in fact had which a reasonable inquiry would reveal.

If a reasonable inquiry does not reveal that such person or entity did in fact have some interest in the subject property or as great an interest as such person or entity conveyed, or if it appears from the context of the situation that the person or entity did not in fact have some such interest, then the examiner may waive objection to the defect caused by the said instrument, if the instrument is not such an instrument as is or could become a root of title under the Marketable Record Title Act.

Authority: Tenneco Oil Co. v. Humble Oil & Refining Co., 449 P.2d 264 (Okla. 1969); See Pearson v. Mullins, 369 P.2d 825-829 (Okla. 1962); 25 O.S. § 13.

Comment: Since the decision in *Tenneco, supra*, the standard as it existed prior to *Tenneco* permitting examiners to ignore stray instruments, even with its caveat, and the standard as it was amended in 1976 (see Standard 3.1, 1988 Title Examination Standards Handbook) are not supported by the law and therefore ought not to be continued. While it is true that many stray instruments are the result of a scrivener's error in drafting the description, it is also true that an instrument may appear to be stray because the grantor failed to record the instrument which carried title to said grantor. When the situation is of this latter kind, the case comes under the facts and decision in *Tenneco, supra*. For this reason the examiner who knows of a stray instrument must make such inquiry that will assure the examiner that the grantor in the stray instrument did not have some interest in the property even though it be not of record.

A stray instrument or abstract thereof which is or could be a root of title under the Marketable Record Title Act, 16 O.S. §§ 71-80 may not be disregarded by the examiner, but must be regarded as creating, or potentially creating, a root of title under the Marketable Record Title Act, provided that certain instruments cannot create a root of title as provided by 16 O.S. § 76, as amended effective November 1, 1995.

Authority: Mobbs v. City of Lehigh, 655 P.2d 547 (Okla. 1982); 16 O.S. §§ 71-80.

Comment: See Comment, Standard 30.7 and Comment 4, Standard 30.9; see also 60 O.S. § 515.1, relating to condominium unit instruments involving over conveyances.

B. Pursuant to 16 O.S. § 76, an instrument which is executed by a person or entity, or a decree of distribution entered in the estate of a decedent, who or which does not otherwise appear in the chain of title to the property, cannot be the basis of a root of title under the Marketable Record Title Act, and therefore the examiner may waive any defect caused by such instrument, if: (1) there is apparent from the record an otherwise valid, uninterrupted chain of title traceable to an instrument which is a root of title as defined by the Marketable Record Title Act and (2) a current record owner of the property executes and records an affidavit alleging the current owner or owners are in possession of the property and that the parties claiming under the instrument in question own no interest in the property.

Authority: 16 O.S. §76.

Proposal 2.

The Committee recommends that Title Standard 7.2 be amended to clarify its provisions and to reflect the finding in the case of Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940).

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

A. The body of the instrument contains the grantor's recitation to the effect that the individual grantor is unmarried; or

~~B. An affidavit made and recorded pursuant to 16 O.S. § 82 recites that the individual grantor was unmarried at the date of such conveyance; or~~

~~C~~B. The individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor; or

~~D~~C. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Comments:

1. There is no question that an instrument relating to the marital homestead is **VOID** unless ~~subscribed by~~ both husband and wife subscribe it ~~the word "void" should be emphasized,~~ *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968). It is also settled that husband and wife must execute the same instrument, as separately executed ~~separate~~ instruments ~~being~~ will both be **VOID**, *Thomas v. James*, 84 Okla. 91, 202 P. 499 (1921). ~~Joinder by husband and wife must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute, see 16 O.S. §§ 4, 6, 7 and Okla. Const. art. XII, § 2.~~ It is essential ~~that~~ to make the distinction between a *valid* conveyance and a conveyance vesting *marketable title* ~~be made~~ when consulting this standard. ~~See Title Examination Standard 1.1.~~

   ~~Another rather settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that the property was not in fact homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but cannot be relied upon for the purpose of establishing marketability, *Hensely v. Fletcher*, 172 Okla. 19, 44 P.2d 63 (1935).~~

   ~~Although the distinction may seem tenuous, the examiner may rely upon the grantor's recitation to the effect that the grantor is unmarried. This may have its foundation in Payne v. Allen, 178 Okla. 328, 62 P.2d 1227 (1936), wherein the Court in its syllabus said, "the recitation ... *is conclusive ... in the absence of proof to the contrary*". (Emphasis supplied.) Perhaps the recitation of one's marital status is a recital of that person's identity. See Title Examination Standard 5.3. Or perhaps this recitation must be relied upon due to the lack of any alternative.~~

   ~~Caveat: The recitation may not be relied upon if, upon "proper inquiry", the purchaser could have determined otherwise, *Keel v. Jones*, 413 P.2d 549 (Okla. 1966).~~

   ~~It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor. Until the matter is clarified, the title examiner must so require. The case of *Melson v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940), so "assumed" but specifically did not so "decide".~~

   ~~Definitions of the word "subscribe" may be found in various sources, but the cases seem to uphold or invalidate the instruments because husband and wife did or did not "sign" or "join", without distinguishing between the two words or reconciling them with the word "subscribe." See *Atkinson v. Barr*, 428 P.2d 316 (Okla. 1967); *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968).~~

   ~~One may convey to one's spouse without the grantee/spouse's joinder as a grantor, but prudence would dictate that the grantor/spouse be identified in the body of the deed as the spouse of the grantee/spouse. This would appear to be a reliable recital and comparable with a recital by a grantor that the grantor is unmarried. See *Brooks v. Butler*, 184 Okla. 414, 87 P.2d 1092 (1939) and Title Examination Standard 5.3.~~

2. While 16 O.S. § 13 states that "The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract," joinder by husband and wife must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute. *See* 16 O.S. §§ 4 and 6 and Okla. Const. Art. XII, §2. A well-settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that property was not the homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but it cannot be relied upon for the purpose of establishing marketability. *Hensley v. Fletcher*, 172 Okla. 19, 44 P.2d 63 (1935).

3. If an individual grantor is unmarried and the grantor's marital status is inadvertently omitted from an instrument, or if two grantors are married to each other and the grantors' marital status is inadvertently omitted from an instrument, a title examiner may rely on an affidavit executed and recorded pursuant to 16 O.S. § 82 which recites that the individual grantor was unmarried or that the two grantors were married to each other at the date of such conveyance.

   Caveat: These recitations may not be relied upon if, upon "proper inquiry," the purchaser could have determined otherwise. *Keel v. Jones*, 413 P.2d 549 (Okla. 1966).

4. A non-owner spouse may join in a conveyance as part of a special phrase placed after the habendum clause, yet be omitted from the grantor line of a deed, and still be considered a grantor to satisfy paragraph B. of this title standard. *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

Proposal 3.

The Committee recommends the adoption of new Standard 14.9 for the purpose establishing the identity of limited liability companies in recorded instruments.

14.9 RECITAL OF IDENTITY, SUCCESSORSHIP OR CONSOLIDATION

Unless there is some reason disclosed of record to doubt the truth of the recital (*e.g.*, the recordation of a conflicting certificate prepared pursuant to 18 O.S.A. §2007), then after September 1, 1993, a recital of identity, successorship or consolidation by limited liability company merger or limited liability company name change (*e.g.*, the limited liability company was formerly known by another name) may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.

Authority: 18 O.S.A. §2019.1 (effective September 1, 1990); 18 O.S.A. §1144 (effective November 1, 1987), §1088 and §1090.2 and 54 O.S.A. §§1-907 and 310.1.

Comment. While there seems to be no exact precedent for this standard, it is justified as a parallel to Standards 5.3, 12.4, 13.8 and as an extension of Standard 12.1.

Proposal 4.

The Committee recommends that Title Standard 23.2 be amended by adding an additional subsection outlining the duration of the various liens which are discussed in the Standard.

23.2 LIEN FOR PROPERTY DIVISION ALIMONY OR SUPPORT ALIMONY ORDERED IN A DIVORCE DECREE

A. LIEN FOR PROPERTY DIVISION ALIMONY ON OR AFTER SEPTEMBER 1, 1991.

An order for the payment of property division alimony in a divorce decree, whither payable in a single sum or periodically, shall be a lien against the real property of the person against whom the property division alimony is awarded ("the debtor spouse") and provide constructive notice to subsequent purchasers and lienors if:

1. The order states the amount of alimony as a definite sum*; *and*

2. the order expressly provides for a lien on the debtor spouse's real property; *and*

3. either

   a. the court's order providing for a lien is recorded in the office of the county clerk for the county in which the real property is situated, *or*;

   b. the debtor spouse acquired some or all of the interest in the real property that is subject to the lien via the divorce decree.

B. LIEN FOR PROPERTY DIVISION BEFORE SEPTEMBER 1, 1991.

An order for payment of property division alimony in a divorce decree, whether payable in a single sum or periodically, shall be a lien upon the real property of the debtor spouse and provide constructive notice to subsequent purchasers and lienors if:

1. The order states the amount of alimony as a definite sum*; *and*

2. either

   a. the court's order providing for a lien is recorded as provided under the judgment lien statute (see Title Examination Standard 23.1), *or*

   b. the debtor spouse acquired some or all of the interest in the real property that is subject to the lien via the divorce decree.

C. LIEN FOR SUPPORT ALIMONY ON OR AFTER SEPTEMBER 8, 1976.

An order for the payment of support alimony in a divorce decree, whether payable in a single sum or periodically, shall be a lien upon the real property of the debtor spouse and provide constructive notice to subsequent purchaser and lienors if

1. The order states the amount of alimony as a definite sum*; *and*

2. the court's order expressly provides for a lien on the debtor spouse's property, and

3. either

a. the court's order providing for a lien is recorded in the office of the county clerk for the county in which the real property is situated, *or*

b. the debtor spouse acquired some or all of the interest in the real property subject to the lien via the divorce decree.

D. LIEN FOR SUPPORT ALIMONY BEFORE SEPTEMBER 8, 1976.

An order for the payment of support alimony in a divorce decree, whether payable in a single sum or periodically, shall be a lien upon the real property of the debtor spouse and provide constructive notice to subsequent purchasers and lienors if:

1. The order states the amount of alimony as a definite sum*; and

2. either

a. the court's order providing for a lien is recorded as provided under the judgment lien statute (see Title Examination Standard 23.1), *or*

b. the debtor souse acquired some or all of the interest in the real property subject to the lien via the divorce decree.

E. DURATION OF DECREE-ORDERED LIEN FOR PROPERTY DIVISION OR SUPPORT ALIMONY

An examiner shall disregard a lien for the payment of either property division or support alimony in a divorce decree as extinguished by operation of law within the following time frames:

1. A lien payable in a single lump sum with no stated due date is extinguished five (5) years after the date of pronouncement of the lien by the court in a divorce case;

2. a lien payable in a single lump sum with a stated due date is extinguished five (5) years after the due date of the lump sum obligation as set out in the divorce decree;

3. a lien payable in installments is incrementally extinguished as to each installment five (5) years after the due date of each installment, and the examiner shall disregard the lien, as extinguished, five (5) years after the due date of the final installment; and

4. a lien payable in a single lump sum which is due upon the occurrence of a designated event (e.g., sale of real property) is extinguished five (5) years after the designated event occurs. For constructive notice, evidence of the occurrence of the designated event must appear in the record.

Authority: *First Community Bank of Blanchard v. Hodges*, 907 P.2d 1047 (Okla. 1995); *Record v. Record*, 816 P.2d 1139 (Okla. 1991); 12 O.S. §95; 42 O.S. §23; and 12 O.S. §696.2

Comment: The title examiner should confirm that the divorce decree has been filed with the court clerk in order to determine whether the time for appeal has run. Authority: 12 O.S. § 696.2(E).

F. LIEN FOR ARREARAGE IN THE PAYMENT OF ALIMONY

An arrearage in the payment of property division alimony or support alimony that has been reduced to a judgment may be a lien against the real property of the debtor spouse when such judgment is filed as provided under the judgment lien statute.

Authority: 12 O.S. §§ 181 & 706; 16 O.S. § 15; 43 O.S. § 134 (formerly numbered as 12 O.S. § 1289) and the following prior versions thereof: 1987 Okla. Sess. Laws ch. 130, § 1, eff. June 3, 1987, 1976 Okla. Sess. Laws, ch. 61, § 1, eff. September 8, 1976, and 1968 Okla. Sess. Laws, ch. 161, § 1; the following prior versions of 43 O.S. § 120 (then numbered as 12 O.S. § 1278); 1976 Okla. Sess. Laws, ch. 154, § 1, 1975 Okla. Sess. Laws, ch. 350, § 1, eff. October 1, 1975; Robert G. Spector, 63 O.B.J. 3473-74 (12/5/92)

*Caveat: 1. The statement of a definite sum is not a requirement when the creditor spouse is awarded a specific asset in lieu of alimony, *Mayhue v. Mayhue*, 706 P.2d 890 (Okla. 1985) (percentage of royalties from oil lease); *Frensley v. Frensley*, 177 Okla. 221, 58 P.2d 307 (1936) (interest in proceeds of a trust); *Clark v. Clark*, 460 P.2d 936 (Okla. 1969)(involving an insurance policy).

2. A statement of the amount of alimony as a definite sum is not a requirement in a separate maintenance action. *Hughes v. Hughes*. 363 P.2d 155 (Okla. 1961).

3. It is not necessary to comply with the judgment lien perfection provisions of 12 O.S. §706 (i.e., a "statement of judgment") where the divorced spouse has a decree- imposed lien to secure payment of alimony; the mere filing of the divorce decree with the county clerk, without a "statement of judgment", will establish the lien priority; *First Community Bank of Blanchard v. Hodges*, 907 P.2d 1047 (Okla. 1995).

Comment: For constructive notice purposes, with both property division and support alimony, the court's decree or order should be recorded with the county clerk. Nevertheless, if a lien for property division alimony or support alimony is specifically created in a divorce decree and that divorce decree is a link in the chain of title to the real property, courts have held subsequent *bona fide* purchasers and lienors to have constructive notice of the lien, even though the court's decree or order creating the lien was never recorded in the office of the county clerk, *Watkins v. Watkins*, 922 F2d 1513 (10th Cir. 1991) (purchaser takes real property with constructive notice of what appears in the chain of title: because the divorce decree is what gave the ex-husband title to the property and that divorce decree revealed the existence of the lien in favor of the ex-wife, a *bona fide* purchaser would be on constructive notice of her lien); *United Oklahoma Bank v. Moss*, 793 P.2d 1359 (Okla. 1991). Thus, when the debtor spouse acquires part or all of the title to real property through a divorce decree, language in the decree which creates a specific lien on that property cannot be ignored, even though the decree or order has not been recorded in the office of the county clerk.

Proposal 5. [NOT APPROVED]

The Committee recommends the addition of a comment to Title Standard 24.8 to reflect the amendment of 46 O.S. § 301.

24.8 UNENFORCEABLE MORTGAGES AND MARKETABLE TITLE.

No mortgage, contract for deed or deed of trust barred under the provisions of 46 O.S. § 301 shall constitute a defect in determining marketable record title.

Authority: 46 O.S. § 301.

Caveat: The examiner should be aware that the above Standard may not apply to mortgages, which are part of a nationwide federal program, in which the United States Government, or one of its agencies, is the mortgagee. See *United States v. Ward,* 985 F.2d 500 (10th Cir. 1993).

Comment: As a result of the repeal of 12A O.S. § 3-122, paragraph B of this standard was repealed in 1995. It provided that, for a debt payable on demand, the due date of the last maturing obligation for the purposes of 46 O.S. § 301 was the date of execution of the mortgage.

Comment: <u>If enough information is provided on the face of the mortgage, contract for deed or deed of trust to calculate the final due date of the last maturing obligation of the instrument, even if the final due date is not specifically stated, the title examiner shall rely on 46 O.S.§301.B. to determine that the lien is unenforceable after the expiration of seven (7) years from the date of the last maturing obligation.</u>

Proposal 6.

The Committee recommends that the Title Standard 25.1A, the Caveat preceding the standard and the comments following the standard be amended to reflect certain changes made in federal law and to clarify that under federal general tax lien statutes that the term "security interest" means a lien on real or personal property.

CAVEAT

1. The material in this chapter is subject to comparatively rapid change. Therefore, particular attention should be paid to the date of adoption, as reflected in the standard's history of each standard.

2. Securities and motor vehicles as defined by 26 U.S.C.A. § 6323 (h)(3) &(4) are not within the purview of Chapter 25.

<u>3. In addition, Chapter 25 does not deal with the Federal priority statute, 31 U.S.C. § 3713(a).</u>

25.1 THE GENERAL FEDERAL TAX LIEN

Note: Although the special estate and gift tax liens are treated in Standards 25.2, 25.3 and 25.4, respectively, it is important to remember that such special tax liens are separate liens and are in addition to the general tax lien.

A. SCOPE.

Any federal tax, with any applicable interest, penalties and costs, without notice and from the time of assessment, is a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the person liable to pay the tax. Although the lien is effective as of the time of assessment, an enforceable general federal tax lien arises only when the following three events have occurred: (1) a tax assessment is made; (2) the taxpayer is given proper notice of the assessment and demand for payment; and (3) the taxpayer fails to pay the assessed taxes within ten (10) days after notice of assessment and demand for payment. ~~Until the lien is satisfied or becomes unenforceable by reason of lapse of time, it is superior to most other liens, except that t~~ The lien is not valid as to any purchaser, holder of a security interest (under federal law, "security interest" means a lien on real or personal property), mechanic's lienor or judgment lien creditor until notice thereof has been filed for record in the office of the county clerk in which the land is located.

Authority: 26 U.S.C.A. §§ 6321, 6322 & 6323.

Comment: 1. Property subject to the general federal tax lien includes, but is not limited to, the taxpayer's interest in:

a. After-acquired property: 42 O.S. § 8; *Glass City Bank of Jeanette, Pa. v. United States*, 326 U.S. 265, 66 S. Ct. 108, 90 L.Ed. 56 (1945).

b. Property held in joint tenancy, 60 O.S. § 1961 § 74; *United States v. Brandenburg*, 106 F. Supp. 82 (S.D. Cal. 1952).

c. Homestead property, *Tillery v. Parks*, 630 F.2d 775 (10th Cir. 1980) (federal tax liens arising solely through the tax liability of a tax debtor may attach to the tax debtor's interest in the homestead property owned by the tax debtor) and *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed. 236 (1983).

2. ~~Since November 2, 1966, the general federal tax lien is not prior to the situations outlined in paragraphs 2(a), (c), (d), (e), and 3 of the Comments adopted in 1962 and is not prior to those interests set out in 26 U.S.C.A. § 6323(b) and (c).~~ Title 26 U.S.C.A. § 6323(b)(6) provides, in part, that even if notice of lien has been filed, the general federal tax lien will not be valid against the holder of (1) ~~real property to the extent it that is subject to~~ local liens for real property taxes, special assessments and charges for services provided by a government owned public utility, which under local law are entitled to priority over security interests which are prior in time to such local liens, assessments and charges, (2) mechanic's lien for repairs on a personal residence but only to a maximum amount of ~~$1,000~~ 5,000 and only in a building containing not more than four dwelling units and (3) attorney's liens to the extent an attorney holds a lien or contract enforceable against a judgment or other amount. Title 26 U.S.C.A. § 6323(c) provides, in part, a temporary priority for certain types of commercial financing for 45 days after a tax lien is filed. The relative priority of general federal tax liens against liens securing commercial transactions and financing agreements (including real property construction financing) is fixed by 26 U.S.C.A. § 6323(~~e~~d).

3. The general federal tax lien does not have priority over a purchase money mortgage, *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362, 20 L.Ed. 434 (1870), *Troyer v. Mundy*, 60 F.2d 818 (8th Cir. 1932), and *Slodov v. United States*, 436 U.S. 238 (1978).

4. The general federal tax lien is not ~~effective~~ valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor until notice thereof has been properly filed.

a. From 1913 to 1925, federal tax lien notices in Oklahoma were required to be filed in the office of the United States District Court for the judicial district in which the land was located, Act of March 4, 1913, 37 Stat. 1016, now 26 U.S.C.A. § 6323(f)(1)(A)(I).

b. Subsequent to February 14, 1925, notices in Oklahoma have been and are required to be filed in the office of the county clerk of the county in which the land is located, 26 U.S.C.A. § 6323(f)(1)(A)(~~I~~i) ~~68 O.S. § 24301(a)~~.

c. It is not necessary that the notice contain a description of the land thereby affected, Treas. Reg. § 301.6323(f)-1(c); *United States v. Union Central Life Insurance Co.*, 368 U.S. 291, 82 S.Ct. 349, 7 L.Ed. 2d 294 (1961). Note that 19 O.S. § 298 refers to conveyances, etc., but does not pertain to federal tax liens.

d. Actual knowledge of the assessment of the general federal tax lien does not deprive a purchaser, holder of a security interest, mechanic's lien or judgment lien creditor of priority until the notice of the lien is filed, *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938). Some courts, though, intimate that actual knowledge may take the place of filing of notice. See annotation at 2 L.Ed.2d 1845. However, actual knowledge affects the priorities as to securities, motor vehicles, personal property purchased in casual sales, insurance policy loans, passbook loans and commercial transaction financing under the provisions of 26 U.S.C.A. §§ 6323(b)(1), (2), (4), (9), (10) and 6323(c)(1).

5. A trustee in bankruptcy is a "judgment creditor" under the terms of 26 U.S.C.A. § 6323, *United States v. Speers*, 382 U.S. 266, 86 S.Ct. 411, 15 L.Ed.2d 314 (1965).

6. Note *United States v. McDermott*, 507 U.S. 448, 113 S. Ct. 1526, 123 L.Ed.2d 128 (1993), in which a federal tax lien was held to have priority over a previously filed judgment lien with respect to taxpayer's real property acquired after the filing of both liens.

APPENDICES

1. SCHEDULE OF TES COMMITTEE MEETINGS
2. LATEST TITLE EXAMINATION STANDARDS COMMITTEE AGENDA
3. LATEST OKLAHOMA T.E.S. COMMITTEE MEMBERSHIP LIST
4. LIST OF SELECTED ARTICLES, AUTHORED BY KRAETTLI Q. EPPERSON
5. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

APPENDIX 1
SCHEDULE OF T.E.S. COMMITTEE MEETINGS

OBA REAL PROPERTY LAW SECTION
TITLE EXAMINATION STANDARDS COMMITTEE

2004 Meeting Schedule

The Schedule for the TES Committee meetings with the locations is as follows (NOTE THAT THE PATTERN OF ROTATIONS BETWEEN THE CITIES HAS CHANGED TO ADD ONE MORE MEETING IN TULSA AND ONE FEWER IN OKC)

Saturday, January 17, 2004 – Tulsa

Saturday, February 21, 2004 – Stroud

Saturday, March 20, 2004 – OKC

Saturday, April 17, 2004 - Stroud

Saturday, May 15, 2004 – Tulsa

Saturday, June 19, 2004 – Stroud

Saturday, July 17, 2004 – OKC

Saturday, August 21, 2004 – Stroud

Saturday, September 18, 2004 - Tulsa

APPENDIX 2
LATEST T.E.S. COMMITTEE AGENDA

2004 AGENDA
As Of January 9, 2004

TITLE EXAMINATION STANDARDS COMMITTEE
of the
Real Property Law Section of the O.B.A.

Sub-Comm.	Std.	Status	Description

PENDING

JAN/TULSA

Wimbish?	3.1	Jan Report	INSTRUMENTS BY STRANGERS *There is a need to consider the impact of the use of an Affidavit of Possession to overcome the problem raised by a stray instrument.*

Struckle?	24.8	Jan Report	INDEFINITE MORTGAGE *Due to the change in the statutes shortening the duration of a demand note from 10 years to 7 years, there is the need to add a warning for title examiners who are not aware of the change. The current language of the standard only directs the examiner to the statute and does give the specific number of years.*

Astle?	23.1	Jan Report	JUDGMENT LIENS *There is the need to address the status of judgment liens during the interim period between when the money judgement is signed and the date it is filed with the Court Clerk.*

(Epperson?)	23.1 et seq	Jan Report	JUDGMENT LIENS *(1) The issue has arisen as to how an examiner can determine whether the underlying money judgment is still alive and, therefore, the judgment lien is also alive.* *(2) In addition, the question had arisen, and was on appeal, as to when the judgment lien dies. See U.S. Mortgage v. Laubach, 2003 OK 67.* *(3) A question has arisen as to the practice of Abstractors of including in Abstracts various decrees potentially affecting title which are not filed in the land records but are only filed in the court clerk's office. Is the examiner and his client on notice of the content of such decrees, such as divorce decrees creating a stream of child support payments which is not a lien, has not been reduced to an arrearage, and is not filed in the land records? 12 O.S.§181; 58 O.S.§711*

(Epperson?)	NEW	Jan Report	JOINDER OF O.TC. WITHOUT DATE OF DEATH OF NAMED PERSON *68 O.S. 801 makes OTC an indispensable party, but allows OTC to opt out if name, date and place of death is unknown. OTC is currently succeeding in Motions to Dismiss in such circumstances leaving the OTC lien as a possible unextinguished lien on the title, after a foreclosure or quiet title action.* *Is this a title examination issue?*

(Epperson?)	NEW	Jan Report	BUSINESS TRUSTS *The issue is how to draft a Standard to reflect the new statute that allows a business trust to hold title to real property. (16 O.S. §1)*

(Epperson?)	13.1-13.8	Jan Report	PARTNERSHIP ACT *There is a need to revise the language which was changed last year for clarity especially focusing on (1) whether to look behind the recorded documents and (2) how far back to look.*

(Epperson?)	NEW	Jan Report	RECOGNITION OF OTHER STATES' L.L.C.'S *Due to the possibility of LLC's from other states attempting to deal with real property in Oklahoma, there needs to be an analysis of the issue as to when should another state's LLC be recognized as a legal entity to hold title to real property located in Oklahoma. Also, it needs to be determined whether "officers" can sign deeds in place of "members/managers".*

Struckle	NEW	(Long Range Comm) Report	REAL PROPERTY SECTION LONG RANGE PLANNING AND TECHNOLOGY COMMITTEE

Kennemer	NEW	(Leg) Report	UNIFORM RESIDENTIAL PURCHASE CONTRACT

Epperson	NEW	(Leg) Report	UNIFORM ELECTRONIC TRANSACTIONS ACT

Epperson	NEW	(Leg) Report	REAL ESTATE DEVELOPMENT ACT

Gambill	NEW	(Article) Report	ATTORNEY FEES LIEN EXTINGUISHMENT *The issue is how to when attorney fees come into existence, what lands do they affect and when do they expire, if ever. [5§6 & §8] At Mar. 2002 meeting, decided matter would be best addressed through*

			article. [Gambill agreed to prepare "Section Note" article for OBJ]

Kempf	6.1	(Article) Report	ACKNOWLEDGMENTS AND JURATS ON AFFIDAVITS *The issue is whether on affidavits for termination of joint tenancy or life tenancy under 58 O.S. Section 912 can either an acknowledgment or a jurat be used? Can such an affidavit be filed without either acknowledgment or jurat? Is there a reason why both would be required? (See Standard 8.1 & 6.1B)* [Committee is evenly split on using jurat and/or ack.; Kempf to prepare "Section Note" article for OBJ]

_____APPROVED_____

_____UNSCHEDULED_____

SUB-COMMITTEE CHAIR T.E.S. ASSIGNMENTS (# of Projects):

Member TES

___

TOTAL

COMMITTEE OFFICERS:

Chair: Kraettli Q. Epperson, OKC (405) 840-2470 fax: (405) 843-4436 kqelaw@aol.com

Sec'y: Linda Kulp, Tulsa (918) 583-1777 fax: (918) 592-5809 lkulp@bme-law.com

(C:\MYDOCUMENTS\BAR&PAPERS\TES\Agenda2004jan)

APPENDIX 3
LIST OF SELECTED ARTICLES BY KRAETTLI Q. EPPERSON

KRAETTLI Q. EPPERSON
PROFESSIONAL PUBLICATIONS: PUBLISHED LIST
(Last Revised January 28, 1998)

1997

106. "**Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?**", 68 Oklahoma Bar Journal 1071 (March 29, 1997)

104. "**An Attack by the State Auditor on the '30-Year Abstract'**", 68 Oklahoma Bar Journal 517 (February 22, 1997)

100. "**Mortgage Lenders Must Now Secure Two Judgments to Enforce Their Real Estate Mortgage**", 87 Oklahoma Banker 11 (January 3, 1997)

1995

87. "**Title Examination Standards: A Second Status Report"**, ABA Land Transactions Group (C-Committees) Newsletter, Number 5, July 1995

86. **"Title Examination Standards: Suggestions on Adopting and Maintaining Standards"**, ABA Land Transactions Group (C-Committees) Newsletter, Number 5, July 1995

82. "**Statute, Practices on Tax Sale Notices Raise Concerns**", 85 Oklahoma Banker 9 (June 9, 1995)

1994

68. "**Corporate Attest, Seal Still Needed For Real Estate Documents**", 84 Oklahoma Banker 17 (February 4, 1994)

1993

66. "**Federal Money Judgement Liens Under the Federal Debt Collection Procedure Act: A 40-Year Super-Lien**," Consumer Finance Law Quarterly Report Vol. 47, No. 4 (Fall 1993)

64. "**Federal Money Judgement Liens Under the Federal Debt Collection Procedure Act: A 40-Year Super-Lien**", 64 Oklahoma Bar Journal 3195 (October 23, 1993)

1992

58. "**Local Real Property Recordings Required For Federal Money Judgements**," 63 Oklahoma Bar Journal 2697 (September 30, 1992)

57. "**Local Real Property Filings Required for Federal Matters-or- The Proposed End of Standard 1.3 Federal Court Certificates**", OBA Real Property Section Newsletter (Summer 1992)

1991

52. "**One Step Beyond: Judicial Creation of a Judgement Lien in Divorce Decrees**," 62 Oklahoma Bar Journal 2631 (September 1991)

1990

46. "**Title Examination Standards in America: A Status Report**," 16 Probate and Property Magazine, ABA Real Property, Probate and Trust Magazine, Sept./Oct. 1990

1989

37. "**Oklahoma Title Examination Standards and Curative Acts Relating to Oil and Gas Interests**," 24 Tulsa L.J. 548 (1989) (with David D. Morgan)

1988

32. "**Judgement Lien Creation Now Requires a Judgment Affidavit**," 59 Oklahoma Bar Journal 3643 (December 1988)

1984

9. "**UCC Fixtures Filings Require An Acknowledgment**," 55 Oklahoma Bar Journal 695 (March 1984)

1983

6. "**Abstract Certificate Officially Changed**," 54 Oklahoma Bar Journal 1713 (June 1983)

1982

3. "**Lenders Mineral Title Insurance: A Mini-Primer**," 53 Oklahoma Bar Journal 3089 (December 1982)

1. "**The Title Standards Committee: A Status Report**," 53 Oklahoma Bar Journal 1827 (July 1982)

A:\ADMIN\RESUME\PAPpub.LST
(Last Revised January 28, 1998)

APPENDIX 4

NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

(AVAILABLE ON-LINE AT www.eppersonlaw.com)

APPENDIX 5
DIRECTORY of MEMBERS, TITLE EXAMINATION STANDARDS COMMITTEE