UPDATE ON OKLAHOMA TITLE AUTHORITY: STATUTES, CASES, ATTORNEY GENERAL OPINIONS, & TITLE EXAMINATION STANDARDS: REVISIONS FOR 2006-2007

(Covering July 1, 2006 to June 30, 2007; Plus TES proposed to be adopted Nov. 2007)

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"Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest", 75 The Oklahoma Bar Journal 1357 (May 15, 2004)
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Who's Who In: The World, America, The South & Southwest, American Law, American Education, and Emerging Leaders in America

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I.INTRODUCTION

The determination of the existence and the holder of “valid” title (i.e., enforceable between the parties), and “marketable” title (i.e., determinable “of record”) to a parcel of real property, requires the application of the current law of the State where the land is located. (60 O.S.§21)

The following materials reflect a listing of selected changes in the law of Oklahoma related to real property title issues, arising over the 12 months preceding June 30, 2007, including any (1) statutes enacted during the most recent State legislative session, (2) cases from the Oklahoma Supreme Court or the Court of Appeals, (3) opinions from the Oklahoma Attorney General, and (4) Oklahoma Title Examination Standards proposed for adoption in November 2007.

II. STATUTORY CHANGES

(see: www.lsb.state.ok.us)

A. FENCELINE SURVEYS AND AGREEMENTS, AND ATTORNEY FEES

(HB 1284: Sherrer and Martin (Steve) of the house and Burrage of the Senate; Effective: November 1, 2007—new law: 4 O.S. Section 150.1):

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section ***<Section No.>*** *<150.1> of Title* ***<Title No.>*** *<4>, unless there is created a duplication in numbering, reads as follows:*

A. If a survey obtained by a property owner reflects a property line across an existing boundary or division line fence, said property owner shall not damage or remove the existing fence or authorize the establishment, locating or relocating of any improvements, including utility installation on such property, until the adjacent property owner has been given notice. The notice shall include a copy of the survey, the nature of the relief requested, and notice that the court may award attorney fees and costs to the prevailing party if an action to establish title is filed by the requestor against the recipient. The notice shall be served in the same manner as provided for service of process in Section 2004 of Title 12 of the Oklahoma Statutes.

B. If no agreement has been reached by the adjoining property owners within thirty (30) days from receipt of the notice sent pursuant to subsection A of this section, the property owner may cause an action to be filed against the adjacent property owner in the district court in the county where the property is located to establish title to the parcel of property at issue. The district court shall enter such temporary relief as may be necessary to maintain the status quo during the pendancy of the action.

C. The prevailing party shall be entitled to an award of attorney fees and costs.

SECTION 2. This act shall become effective ***<Enter Effective Date>*** *<November 1, 2007>.*

B. ABSTRACTOR'S BOARD

(SB 909: Crain and Sykes of the Senate and Blackwell, Roan, Coody, Martin (Steve) and Sears of the House; certain sections are Effective: July 1, 2007, and others are Effective January 1, 2008—amending existing law (74 O.S. Sections 227.10, 227.11, 227.12, 227.13, 227.14, 227.15, 227.17, 227.18, 227.20, 227.21, 227.22, 227.23, 227.25,

227.26, 227.27, and 227.28, and creating new law (1 O.S. Sections 22, 23, and 26, and recodifying many sections from Title 74 into Title 1):

1. A 9-person Abstractors Board is established to take over the regulatory responsibilities of the State Auditor and Inspector, as of January 1, 2008;
2. The 9-person Board is composed of 6 abstractors, 1 licensed real estate broker, 1 attorney, and 1 officer of a bank;
3. The Board members are appointed by the Governor and take office effective January 1, 2008, to serve 4-years terms with staggered terms for the initial employees;
4. The Board can hire staff; and
5. The annual certificate of authority fee is increased.

III. CASE LAW CHANGES

1. **FEE SIMPLE DETERMINABLE:**

Ator v. Unknown Heirs, 2006 OK CIV APP 120 (decided 06/15/06; mandate issued 10/30/06): The Oklahoma Court of Civil Appeals affirmed the trial court which held that the language of a deed and a related agreement required the automatic termination of a conveyance of land to a public school district *"solely for the construction and maintenance of said real estate property of a football playing field and stadium for the use and benefit of the students of said School District, for so long as said real property shall be used for such purposed as a part of a regularly organized and fully scheduled program of football practices and playing…and provided further that if at any time after the date hereof , [School District] shall fail to comply with the terms of this deed or said agreement or observe the spirit thereof, this grant shall become null and void and the full fee simple to said property shall revert to and vest in [Thelma and M.D. Ator], their heirs and assigns forever."* The land had not been used for regular public school football games for several years, because a new stadium had been built. The court held that "substantial compliance" would not be the test (district used it for practice football purposes and allowed a private organization to play football games there), and that, unlike a conveyance of fee simple subject to a condition subsequent (granting a right of re-entry), this was determinable fee simple, which reverts to the grantor automatically. The Court rejected a laches challenge to the quiet title action, using a 15-year time frame along with a requirement for detrimental reliance. A portion of the land which had been conveyed by the District to a City that constructed a roadway was left with the City, although the grantor's heir was entitled to compensation through inverse condemnation.

2. EXONERATION OF SURETY:

First Enterprise Bank v. Be-Graphic, Inc., 2006 OK CIV APP 141 (decided 06/16/2006; mandate issued 11/09/2006): Upon mortgage foreclosure, a spouse challenged a mortgage debt for which she was allegedly liable as a surety. The trial Court held and the Oklahoma Court of Civil Appeals affirmed that substantial modifications to the debt were made without her consent, and that a limited waiver by her as to certain specific types of defenses was not broad enough to cover all possible modifications to the obligation. The wife was exonerated from any obligation.

3. INADEQUATE SERVICE:

Mortgage Electric Registration Systems, Inc. v. Crutchfield, 2006 OK CIV APP 95 (decided 07/20/2006; mandate issued 08/24/2006): A New York resident was sued in Oklahoma district court for the *in rem* foreclosure of residential mortgage. The green card for the service of the Petition was signed and returned, and a default judgment taken. The defendant filed a Petition to Vacate the default judgment, because (a) it was not served on his residence (but on a commercial mail box), and (b) he did not sign it, and (c) it was not signed by an authorized agent. The trial court held that because the defendant included a non-jurisdictional ground in his Petition (fraud in the procurement), that he had entered a general, rather than a special limited appearance. Consequently, the trial court denied the attempted vacation, leaving the judgment intact. Upon appeal, the Oklahoma Court of Civil Appeals reversed and held the trial court did not have jurisdiction and further held that the current law does not punish someone for joining

such non-jurisdiction claim for relief with a challenge to personal jurisdiction. Questions raised by the defendant concerning (a) the homestead nature of the house, and (b) whether "MERS, acting in its individual capacity, does not have standing to sue," due to its failure to register with the Oklahoma Secretary of State, are to be decided by the trial court.

4. FAILURE TO RELEASE MORTAGE:

Thaxton v. Beneficial Mortgage Co. of Oklahoma, 2006 OKCIV APP 101 (decided 08/01/2006; mandate issued 08/24/2006): The statutes (46 Section 15) require a lender to file a release of a paid off mortgage within 50 days. The statute provides that upon failure to file such release, within such 50-day time period, and upon passage of an additional 10-days after a demand for such release, the lender is strictly liable for a penalty of 1% of the face amount of the original mortgage, up to $100.00 per day. A lender failed to file the releases for two mortgages which were admittedly paid off. Upon multiple occasions when the borrower was seeking to secure a loan on his house and later to refinance such later mortgage, the first lender reassured the borrower that the releases would be forthcoming. When upon one such occasion, the borrower was unable to secure refinancing due to such unreleased mortgages, the borrower went into default and the later lender refused to accept a deed in lieu of foreclosure due to such unreleased earlier mortgages. The borrower sued the first lender to recover both statutory damages and additional damages for the infliction of emotional distress. The trial court granted a summary judgment in favor of the lender. The lender advanced 4 arguments, of which the appellate court remanded as to one, accepted one, and denied two. The appellate court held first, in regard to the lender's assertion that the one-year statute of limitation

on a borrower's right to file an action to recover such penalty had passed, that the matter had to be remanded for the trial court to determine whether the doctrine of equitable estoppel prevented the lender, which repeatedly gave unfulfilled assurances that the releases would be promptly forthcoming, from relying on such limitation. The appellate court rejected the two arguments claiming (a) that the abstract company was not the borrower's agent and (b) that the second of the two mortgages was not in fact paid off. As to the ability of the borrower to seek recovery beyond the statutory damages, the appellate court agreed with such bar.

5. FORECLOSURE DURING TAX SALE:

Clark v. Fragomeni, 2006 OK CIV APP 111 (decided 08/08/2006; mandate issued 09/14/2006): After the issuance of a tax certificate due to the failure of the land owner to pay ad valorem taxes, a mortgage foreclosure action was initiated and a *lis pendens* notice of the foreclosure was filed of record. Once the required 2-year redemption period passed, without redemption from the taxes, a notice of application for the Certificate Tax Deed was given to the former land owner, but not to the lender or the purchaser at the sheriff's sale under the mortgage foreclosure. When the buyer under the sheriff's deed sought to quiet title, the trial court granted the tax deed holder judgment. Upon appeal, the court affirmed such trial court decision but modified it to the extent that such title in the tax deed holder was subject to the mortgage which mortgage interest had been purchased by the sheriff's deed holder. A separate finding of adverse possession in favor of the tax deed holder by the trial court was overturned on appeal as being contrary to the record.

6. EMINENT DOMAIN PROCEDURES:

Public Service Company of Oklahoma v. Willis, (approved for publication by order of the Supreme Court), 2007 OK CIV APP 18 (decided 09/19/2006; mandate issued 02/16/2007): A landowner challenged the right of a utility, Public Service of Oklahoma, to use condemnation to take a easement over his land to build a spur railroad line to serve its own facility. The trial court denied the landowner's claims, and, after a successful state court appeal by the landowner which resulted in a trial as to the adequacy of the public purpose, the trial court again sustained the taking. The landowner initiated another appeal which was denied on all points by the Oklahoma Court of Civil Appeals. The arguments that were rejected included: (1) PSO was a trespasser from the time it paid the Commissioners' award into court and promptly took possession of the land, until the second trial court order was issued finding there was a public purpose, (2) the trial court was without jurisdiction because PSO was regulated, in its construction of a railroad, by the federal Surface Transportation Board, (3) PSO was guilty of fraud and abuse and oppression, and (4) the Commissioners were improperly selected and the value was improperly determined and any improvements built during the first appeal belonged to the landowner. The case provides, under the headings: "Standard of Review" and "Discussion", a concise summary of the rules for determining whether the right of eminent domain was properly exercised.

7. RATABLE SURETY MORTGAGES:

Bank of the Wichitas v. Ledford, 2006 OK 73 (decided 10/10/2006; mandate issued _____): There were three mortgages given, the first two from a parent to secure a debt of a child (Tommie), with the two mortgages ultimately determined to be "surety

mortgages" (i.e., to secure the debt of a third person). The two mortgages were signed by the three children of the parent (including Tommie) using a durable power of attorney from the parent Then after the parent died and the subject mortgaged property was devised in three separate parcels to the three children, including Tommie, Tommie gave another note to the same bank and mortgaged his separate parcel. Upon default by Tommie on both notes, and after the two other siblings paid off the first note, being substituted by subrogated into the lenders' position as to the first note and the related first two mortgages, the two other siblings attempted to foreclose and to satisfy the assigned first note and first two mortgages by selling Tommie's sole parcel leaving their own lands unaffected. The trial court granted summary judgment allowing the other two siblings to follow this procedure, and, due to the value of Tommie's separate parcel being insufficient to satisfy both the first and second notes, the lender was left with no collateral and no proceeds to apply on its second note debt. On appeal by the lender, Justice Opala wrote that the two siblings did not have to marshal assets combining their own land into the available collateral to satisfy the two debts, because there were not two separate funds, because the other two siblings' interests in their own land (not Tommie's), acquired by devise, merged into that portion of the mortgage interest acquired from the lender, as to their own tracts. In other words, you cannot foreclose on yourself. However, the Supreme Court remanded the matter to the trial court to determine what prorata portion of the first debt (Tommie's debt) was greater than the two siblings' share of the debt, with such excess payment by the co-sureties being satisfied from Tommie's sole parcel, with any remaining funds from the sale of Tommie's separate parcel being available to the lender to apply towards the lender's second note, which was secured

solely by Tommie's parcel. [If anyone has a different understanding of this complicated case, please contact this author.]

8. STREAM WATER ALLOCATION:

Heldermon v. Wright, 2006 OK 86 (decided 11/21/2006; mandate issued _____): A trial court held that an upstream riparian land owner – who was building a dam to detain water to be used for recreational purposes -- must release a specified amount of water regularly to the downstream side. The Court of Civil Appeals held that the 1993 amendments to the Oklahoma Stream Water Use Law, which attempted to overcome constitutional infirmities identified in an earlier Supreme Court case, did not remedy the unconstitutional defects in the law, but affirmed the trial court on other grounds. On Cert. the Supreme Court remanded the case to the trial court on procedural grounds, concluding that there was no evidence that the Oklahoma Water Resources Board was given notice of the suit, so that the Attorney General could be instructed to intervene in the case to protect the public interest.

9. AD VALOREM VALUATION INCREASE:

Matthews v. Funck, 2007 OK CIV APP 15 (decided 01/09/2007; mandate issued 02/09/2007): The Court of Civil Appeals affirmed the trial court's determination in a summary judgment that a senior citizen could freeze the value of his homestead but only as of January 1 of the next year after he acquired the land. Therefore, the 5% per year limitation on the permissible increase in the assessment for tax purposes, was pre-empted by the "revaluation on transfer" provision of the statutes. Hence, the valuation at which the land was frozen was the fully increased value (up to true market value), without application of the 5% per year limitation rule.

10. SURFACE DAMAGES VALUATION:

Chesapeake Operating, Inc. v. Loomis, 2007 OK CIV APP 55 (decided 03/05/2007; mandate issued 06/01/2007): The trial court's determination that a majority report by 2 of 3 appraisers was allowed and was the appropriate measure of surface damages was affirmed by the Court of Civil Appeals. Chesapeake's appraiser -- the third and dissenting appraiser – produced a lower value which did not include several items of damage considered by the majority, including Chesapeake's use of off-site lands for parking, damages for a water spill off-site causing erosion problems, and diminution in value of the off-site tract due to the "stigma" of having an oil and gas operation on an adjacent tract.

11. CONDOMINIUM ASSOCIATION RIGHT TO CONDEMNATION PROCEEDS:

City of Tulsa v. Raintree Estates I, Inc. v. Raintree Estates I, Inc., 2007 OK CIV APP 41 (decided 01/23/2007; mandate issued 05/25/2007): A trial court enjoined the condominium home owners association board from making a special assessment against the members who had directly received all of the compensation from a condemnation of a portion of the common elements. The debate turned on whether the anticipated use of the funds being collected through the special assessment was for a property repair or for an addition or improvement. If the work was an addition or improvement, then the bylaws required a 90% vote of the membership, but if the work was a repair, the Board could make the assessment without such a super-majority vote. By relying upon a Florida Court of Appeals case, the Oklahoma Court of Civil Appeals found the work to be for

repairs, based upon the uncontradicted testimony of the Board president. Therefore, on appeal, the trial court was reversed and the permanent injunction against the assessment was vacated.

12. TAX DEED NOTICE DEFECTS:

Franks v. Noble, 2007 OK CIV APP 39, (decided 04/06/2007; mandate issued 05/03/2007): The Court of Civil Appeals affirmed the trial court which quieted title in certain record title owners against a certificate tax deed holder. The tax certificate sale process was deemed defective because: (1) two of the four record title holders were erroneously omitted from the tax rolls, and consequently no attempt was made to give them notice of the upcoming certificate sale, thereby depriving the county treasurer of authority to conduct the sale as to their interests, and (2) the notice to the other two record title holders, which was mailed (by certified mail) to one directly and also mailed to the same person "care of" the second person at the same address as the direct mailing, both came back with the "return receipt green cards" unsigned and the notices unclaimed but with a forwarding address noted on each of the envelops, and yet rather than seek to follow up by using the new forwarding address the county relied solely on publication notice. Such failure to send anything to two record owners rendered such notice constitutionally invalid as to those parties, and such failure to pursue follow up addresses as to the other two owners rendered such notice constitutionally infirm as to them.

13. PERSONHOOD FOR AD VALOREM TAX INCREASE:

In The Matter Of The Assesments For The Year 2005 Of Certain Real Property, 2007 OK 25, (decided 04/24/2007; mandate issued _____): There is an internal exception to the constitutional limitation of 5% per year in the permissible increase in

valuation of land for tax assessment purposes, whereby such limitation is removed whenever "title to the property is transferred, changed or conveyed to another person". (OKLA. CONST. art. 10, Section 8) The title was held by two trustees of a revocable trust (who were also the sole beneficiaries) who transferred title to the land to a limited liability company who had as its two sole members, the same trustees who were the trustees and beneficiaries of the trust making the conveyance. The trial court supported the assessor's efforts to increase the valuation without limiting it to the 5%. The Supreme Court reversed the trial court and instead held that the legislative language was constitutional which implemented such constitutional provision by specifically providing in such statute that a conveyance to an LLC was not a conveyance to another person if the members of the grantee LLC were the same persons as the grantors. Such appellate ruling overturned an earlier Attorney General Opinion (2003 OK AG 39) which held the statute to be unconstitutional.

14. IMPLIED ROAD DEDICATION:

Bowen v. Tucker, 2007 OK CIV APP 57, (decided 05/31/2007; mandate issued 06/22/2007): A permanent injunction was granted by the trial court and affirmed by the Oklahoma Court of Civil Appeals. Such injunction was requested by a property owner who sought to establish the existence of a public road by implied dedication. The construction and maintenance of the road by the county, along with testimony that such construction and maintenance was requested by all of the opposing parties, provided sufficient evidence to support equitable estoppel.

C. ATTORNEY GENERAL OPINIONS

(NONE)

D. TITLE EXAMINATION STANDARDS CHANGES

A. EXAMINING ATTORNEY'S RESPONSIBILITIES

1. GENERAL RESPONSIBILITY

According to the Oklahoma Attorney General, only a licensed attorney can issue an "opinion on the marketability of title" regarding title to real estate. This issue arose during the process of interpreting the Oklahoma Statute requiring the examination of a duly-certified abstract of title before a title insurance policy can be issued. 36 O.S. § 5001 (C) provides:

> *Every policy of title insurance or certificate of title issued by any company authorized to do business in this state shall be countersigned by some person, partnership, corporation or agency actively engaged in the abstract of title business in Oklahoma as defined and provided in Title 1 or by an attorney licensed to practice in the State of Oklahoma duly appointed as agent of a title insurance company, provided that no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein.* (underlining added).

The Attorney General opined (1983 OK AGG 281, ¶6-7) as follows:

> *Your second question raises the issue of whether the title examination for purposes of issuing a title policy must be done by a licensed attorney. A previous opinion of the Attorney General held:*
>
> > *"All such examinations of abstract .. . shall be conducted by a licensed attorney prior to issuance of the policy of title insurance." A.G. Opin. No. 78-151 (June 6, 1978).*
>
> *This opinion was based on the assertion that a title insurance policy "expresses an opinion as to the marketability of title." A.G. Opin. No. 78-151, supra. In reality, title insurance simply insures the policyholder against defects in the title. It does not express an opinion that the title is marketable. Land Title Company of Alabama v. State ex rel. Porter, 299 So.2d 289,295 (Ala.1974). While the rationale of the previous opinion is incorrect, we adhere to the conclusion expressed in that opinion that the examination of the abstract pursuant to 36 O.S. 5001(C) (1981) must be done by a licensed attorney. We reach this conclusion because the examination required by*

> *statute would only be useful if the examiner expressed an opinion on the marketability of the title. This constitutes the practice of law by the examiner. Land Title Company of Alabama v. State ex rel . Porter, supra at 295; Kentucky State Bar Association v. First Federal Savings & Loan, 342 S.W.2d 397 (Ky.App. 1961). The theory that the corporation is actually examining the title for itself through an agent or employee and thus not engaged in the practice of law is invalid since laypersons or nonprofessionals cannot perform legal services for their employers. Kentucky State Bar Association v. Tussey, 476 S.W.2d 177 (Ky.App. 1972). There is no prohibition, however, against licensed staff attorneys furnishing title opinions for the company as long as these opinions are not sold or given to third parties. The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio Com.Pl. 1953).* (underlining added)

As noted above, under the discussion of new Statutes, 36 O.S. § 5001 was amended, effective July 2007, to specifically require the examination described in that Section to be conducted by a licensed Oklahoma attorney, thereby prohibiting laymen and non-Oklahoma licensed attorneys from undertaking title exams for title insurance purposes.

2. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients, it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and limiting language, elsewhere in the opinion, expressly designate the sole person or company expected 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).

***

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[the borrower] 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. (underlining 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). Therein 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. The insurer 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 the insurer 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 either the examination or insures the title, can be held liable for an error in such effort to a third party. This is true even where the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. Based upon these two cases, 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.

3. 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:

> *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.*

(underlining 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*. (underlining added)

(Great Plains Federal Savings & Loan v. Dabney, 846 P.2d 1088, 1092 (Okla. 1993))

B. NEED FOR STANDARDS

1. 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.

All Oklahoma Supreme Court opinions are binding and must be followed by all trial court judges, meaning that such decisions are “precedential”. However, an opinion of one of the multiple intermediate 3-judge panels of Courts of Civil Appeals is only “persuasive” on future trial judge’s decisions, and not binding.

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.* (underlining 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 instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest on the withheld proceeds (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.

2. 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.*

(underlining added)
(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. (underlining added)
(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. (underlining)

(§46. Classification of Vendor Titles)

Title insurance, like most types of insurance, insures against loss due to certain conditions. One of these conditions which triggers liability is “unmarketability of title”. Such term is defined in such policy as: “an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which could entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.” (ALTA Owner’s Policy (10-21-87)) Such definition is sufficiently circular to require the interpretation of the applicable State’s law in each instance to determine whether specific performance would be enforced in such jurisdiction.

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 and 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 persons of “reasonable prudence”. 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.* (underlining added)
> (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. (underlying added)

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.* (underlining added)

(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."

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. In the recent past, 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 for more details in the status of

Standards in other States.

C. NEWEST CHANGES TO TITLE STANDARDS

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 to 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 where an existing standard is being revised, a “legislative” format is used below. Additions are underlined, and deletions are shown by [brackets].

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

2007 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION

Proposed Amendments to Title Standards for 2007, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 9, 2007. 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 8, 2007.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 9, 2007. Proposals adopted by the House of Delegates become effective immediately.

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

[NOTE THAT THE FIRST TWO PROPOSALS ARE FOR TOTALLY NEW STANDARDS AND THE THIRD ONE IS FOR A REVISION]

Proposal 1.
The committee recommends adding a new Standard 24.13 to clarify to examiners what parties have standing to bring a mortgage foreclosure action.

Standard 24.13. Standing of Nominee or Agent:

An agent or nominee has standing to bring a cause of action to foreclose the lien of a mortgage, if the agent or nominee remains the record holder of the mortgage lien.

Comment: An examiner's opinion of the adequacy of such foreclosure proceedings shall be formed in the same manner as in a review of any other foreclosure action.

Authority: 12 O.S.Section 2017A; *Mortgage Electronic Registration Systems, Inc. v. Azize*, Case No. 2D05-4544 (Fla. App. 2/21/2007) (Fla. App., 2007); *Greer v. O'Dell*, 305 F.3rd 1297 (11th Cir. 2002).

Proposal 2.

The committee recommends adding a new Standard 29.2.1. to give examiners guidance on when a Certificate Tax Deed or Resale Tax Deed may be relied upon without further requirement.

Standard 29.2.1. Reliance on Certificate Tax Deed or Resale Tax Deed:

A title examiner may rely, without further requirement, on a certificate tax deed or resale tax deed as a conveyance of the real property described in such deed, provided:
A. title to such real property is, or has been, held of record by a purchaser for value who acquired such title from or through the grantee in such tax deed; and,
B. such certificate tax deed or resale tax deed has been of record in the county in which the land is situated for a period of not less than ten years.

Authority: 16 O.S. Section 62 (d)

Caveat: The title acquired via a certificate tax deed or resale tax deed may be subject to the interest of any person in possession of the land claiming title adversely to the title acquired through such deed. 16 O.S. Section 62(d). Also see the following unpublished case: Johnson v. August, 2005 OK CIV APP 97.

Proposal 3.

The committee recommends amending Standard 35.2 to reflect the change in the title of the applicable legislation and to update the citations of authority for this standard.

Standard 35.2 [Soldiers and Sailors] <u>Servicemembers</u> Civil Relief Act

The [Soldiers and Sailors' Civil Relief Act of 1940] <u>Servicemembers' Civil Relief Act</u>, and amendments thereto, are solely for the benefit of those in military service; and, if the court has presumed to take jurisdiction and there is nothing in the record that would affirmatively indicate that any party affected by the court proceeding was in military service, the form of the affidavit as to military service or its entire absence from the record does not justify the rejection of title.

Authority: Hynds v. City of Ada *ex rel.* Mitchell, 195 Okla. 465, 158 P.2d 907 (1945), <u>1945 OK 167</u>; Wells v. McArthur, 77 Okla. 279, 188 P.322 (1920), <u>1920 OK 96</u>; State *ex rel* Commissioners of the Land Office v. Warden, 197 Okla. 97, 168 P.2d 1010 (1946), <u>1946 OK 155</u>; Snapp v. Scott, 196 Okla. 658, 167 P.2d 870 (1946), <u>1946 OK 114</u>.

APPENDICES

1. SCHEDULE OF TES COMMITTEE MEETINGS FOR THE CURRENT YEAR
2. LATEST TITLE EXAMINATION STANDARDS COMMITTEE MEETING AGENDA
3. LIST OF ARTICLES AVAILABLE ON-LINE, BY KRAETTLI Q. EPPERSON
4. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT
5. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

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

OBA REAL PROPERTY LAW SECTION
TITLE EXAMINATION STANDARDS COMMITTEE

2007 TES Committee Meeting Schedule
(Third Saturday: January through September)

January 20 - Tulsa

February 17 - Stroud

March 17– OKC

April 21- Stroud

May 19 - Tulsa

June 16- Stroud

July 21- OKC

August 18- Stroud

September 15 - Tulsa

APPENDIX 2

LATEST T.E.S. COMMITTEE AGENDA

2007 AGENDA
(As of September 10, 2007)

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

Sub-Comm.	Std.	Status	Description

==========PENDING==========

_____*SEP 15/TULSA*_____

Epperson	Leg	Sep Report	LEGISLATIVE UPDATE *Any recently enacted legislation, or bills likely to be introduced, will be discusses.*
McEachin Durbin Rheinberger Sullivan	24.12	Sep Draft	MORTGAGES TO NOMINEES/AGENTS (MERS: FORECLOSURE PARTIES) The question was raised as to whom are the appropriate parties to a foreclosure involving a MERS mortgage. See 12 O.S.Section 236A [raised by OLTA Board]
Astle Rheinberger McEachin Sharp Orlowksi Carson Anderson	29.2	Sep Draft	PROTECTION AFFORDED BY THE ACT (SLTA: FOR TAX DEEDS) The question was raised as to (a) whether the protection of the act is effective to validate Tax Deeds (to avoid a quiet title suit after 10 years), and (b) whether the 10-year period is measured from the filing of the tax deed or from the filing of the deed from the tax deed holder. [raised by Monica Wittrock]
Wimbish Durbin Hardwick Shirley	15.2	Sep Draft	TITLE TO TRUST HELD UNDER AN EXPRESS PRIVATE TRUST (INTO TRUST BUT OUT OF TRUSTEE) The question was raised as to whether to pass title where the title has been held in the name of the trust (not in the name of the trustee) and then the title is conveyed, or encumbered, not by (i.e., not in the name of) the trust but by the trustee (as if the trustee is the owner/grantor). This determination is being conducted several transactions later. *[raised by Cory Hicks, attorney in Guymon]*
Carson Wimbish Rheinberger Stafford Reid Ademuyiwa	12.2	Sep Draft	REBUTTABLE PRESUMPTIONS CONCERNING CORPORATE INSTRUMENTS EXECUTED IN PROPER FORM ("ASSISTANT" VICE PRESIDENT) The question was raised as to whether an "assistant" vice president is presumed to have authority to execute corporate real property documents.. [raised by OLTA Board]

==========APPROVED==========

Avery Rheinberger	35.2	Jun APP'D	SOLDIERS AND SAILORS CIVIL RELIEF ACT The question was raised as to whether the enactment of the 2003 Service Members Act would require any changes in this existing Standard.. [raised by Dale Astle]

==========UNSCHEDULED==========

Wimbish Durbin Hardwick Shirley	15.2	Unsched	TITLE TO TRUST HELD UNDER AN EXPRESS PRIVATE TRUST (TRUST AS PRIOR GRANTOR WITHOUT FILING A MEMORANDUM) The question was raised as to whether to pass title where the title has been held in the name of the trust (not in the name of the trustee) and, although no "memorandum of trust" was ever filed, the title was subsequently conveyed from the Trust by a purported trustee. This determination is being conducted several transactions later. *[raised by OLTA Board]*

(Epperson) ???	NEW	Unsched	MRTA (self-executing?) *Does the decision in the recent Rocket case impact the assumption that the MRTA is "self-executing" and whether the MRTA is applicable to severed minerals? Also see the earlier Anderson case and Bennett cases.*

Wimbish Doyle	25.5	???	OKLAHOMA ESTATE TAX LIEN *The question was raised as to how to reflect the legislated end of State Estate Taxes and the resulting liens.*

(Epperson) ???	New	???	MARSHAL/COMMISSONERS FEDERAL SALES The question was raised as to what the title examiner should require to support a marshal/commissioner's federal sale (see Rules 201 and 202, and 69). [raised by several people including Jerry Risling]

(Epperson) ???	NEW	???	MRTA AND STRAY DEEDS *Does the stray deed language of the MRTA, as it was recently amended, destroy the use of the MRTA by making "root of title" documents unreliable if they fail to come from the correct prior root of title?*

Epperson	NEW	???	JUDGMENTS/DECREES & CONSTRUCTIVE NOTICE *Under the MRTA, the SLTA, and under the terms of the Uniform Abstractors Certificate, do documents that are not filed with the County Clerk (e.g., probate proceedings) constitute constructive notice and become part of the official chain of title. Also, if a judgment or decree – affecting title to real property -- is required by statute to be placed in the county clerk's land records in order to*

			constitute constructive notice, but has not been filed there, does the inclusion of such document in an abstract give to the examiner and the client actual notice of the same liens and ownership changes? If so, as of what date? Can you rely upon a decree as part of a chain of title, if it was never recorded in the land records?

==========DORMANT==========

Rheinberger	6.7	Apr Dormant	VALIDITY OF INSTRUMENTS EXECUTED BY ATTORNEYS-IN-FACT The question was raised as to whether the language of 10 USC. Section 1044B, which expressly "exempts" "a military power of attorney" "from any requirement of…recording that is provided for powers of attorney under the laws of a State." should be reflected in our existing Standard on powers of attorney?. [raised by Michael Shanbour]

(Epperson)	NEW	Apr Dormant	LLC *Is there a title question (record or validity), if an LLC executes and delivers a deed or other conveyance while it is cancelled for non-submittal of its annual report?*

Astle Brown Stafford Hardwick	15.4	Mar Dormant	ESTATE TAX CONCERNS OF REVOCABLE TRUSTS The question was raised as to what happens when (a) title is held in a revocable trust and the sole settler dies with all assets, pursuant to the terms of the trust, flowing to the benefit of the surviving spouse, with the result that no estate taxes are due, but what if (b) the surviving spouse trust beneficiary (who is not a settler of the trust) dies while title remains of record in the trust? The concern is whether there is a taxable event via the second death while title remains vested in the trust. [raised by Dale Astle]

Rheinberger ???	13.8	Feb Dormant	RECITAL OF IDENTITY, SUCCESSORSHIP OR CONSOLIDATION The question was raised as to: "Title standard 12.4 lets you disregard 18 O.S.1144 on recording cert. of merger, etc. Title standard 13.8 requires recording under 54 O.S. 1-907(d) after 11-1-97. The only difference in statutes are Sec. 1144 say '…shall be filed…'. Sec. 1-907 say '…upon recording...' . What is the difference? I believe the last two sentences of Standard 13.8 should be deleted. Remember these are Title Standards not transactional standards." [raised by Henry Rheinberger]

(Epperson) ???	???	Feb Dormant	UNKNOWN SUCCESSORS The question was raised as to whether it is necessary when determining heirs and quieting title under title 84 O.S. 257 and 12 O.S. 2004(c)(3)(b)(2) to name both the unknown successors and the unknown heirs. [raised by Kraettli Epperson]

COMMITTEE OFFICERS:

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(C:\MYDOCUMENTS\BAR&PAPERS\OBA\TES\2007\Agenda2007sep)

APPENDIX 3

LIST OF PUBLISHED ARTICLES (ON-LINE),
AUTHORED BY KRAETTLI Q. EPPERSON

KRAETTLI Q. EPPERSON:**{**PRIVATE **}**
PROFESSIONAL LECTURES & PUBLICATIONS: SELECTED LIST
ORGANIZED BY TOPIC
(Last Revised September 22, 2006)

ABSTRACTING

160. "Contract Provisions, Abstracting, & Title Examination in Oklahoma", Title Examination in Oklahoma, Lorman Education Services, Oklahoma City, Oklahoma (December 3, 2003)

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

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

CORPORATE EXECUTION

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

ENVIRONMENTAL ISSUES

FUTURE OF REAL PROPERTY

176. "A Status Report: On-Line Images of Land Documents in Tulsa and Oklahoma Counties and Beyond", The Oklahoma Bar Association Real Property Law Section Title Examination Standards Committee: Richard Cleverdon Roundtable Seminar, Tulsa, Oklahoma (June 24, 2005), Oklahoma City, Oklahoma (June 30, 2005)

171. "A Status Report: On-Line Images of Land Documents in Tulsa and Oklahoma Counties and Beyond", The Oklahoma City Commercial Lawyers Association, Oklahoma City, Oklahoma (December 21, 2004)

164. "A Status Report: On-Line Images of Land Documents in Oklahoma County", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (June 11, 2004)

159. "A Look at Selected Future Changes Likely to Affect the Oklahoma Real Estate Attorney", Emerging Topics in Real Estate Law, OBA Real Property Law Section, Oklahoma City, Oklahoma (November 6, 2003) and Tulsa, Oklahoma (November 7, 2003)

132. "The Changing Face of Real Property With an Emphasis on Title Examination, and Title Assurance", Southern Nazarene University, Bethany, Oklahoma (February 17, 2000)

129. "Technology In Today's Real Estate Practice", Commercial Real Estate Seminar, OBA Real Property Section, Oklahoma City, Oklahoma (December 15, 1999) and Tulsa, Oklahoma (December 16, 1999)

HOMESTEAD ISSUES

162. "**Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest**", 75 The Oklahoma Bar Journal 1357 (May 15, 2004)

HOMEOWNERS ASSOCIATIONS & CONDOMINIUMS

184. "Amending the Governing Documents for Condominiums and Homeowners' Associations", Lorman Education Systems, Special Issues for Condominiums and Homeowners' Associations in Oklahoma, Oklahoma City, Oklahoma (February 24, 2006)

17. "Pets, Parking and Pools: Association Rules and Regulations," Representing Homeowners Associations: Condominiums, Townhomes and Other PUDs, Oklahoma City University Law School, Oklahoma City, Oklahoma (September 9, 1986)

LEASES

95. "Residential Leases—The Landlord's Perspective", Oklahoma Bar Association, Tulsa, Oklahoma (February 23, 1996) and Oklahoma City, Oklahoma (March 1, 1996)

8. "Landlord's Lien," Landlord-Tenant Remedies (also Program Chairman), Oklahoma Bar Association, Tulsa, Oklahoma (March 16, 1984), Oklahoma City, Oklahoma (March 25, 1984)

LIENS: FIXTURES, JUDGMENTS, MATERIALMEN, MORTGAGES

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

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

67. "A Brief Analysis of USA v. Ward, 985 F.2d 500 (10th Cir. 1993): The Federal Loan Programs' Inextinguishable Mortgage Lien", Presented to the Oklahoma City

Commercial and Banking Lawyers Group, Oklahoma City, Oklahoma (January 20, 1994)

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

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

52. "**One Step Beyond: Judicial Creation of a Judgment Lien in Divorce Decrees**," 62 Oklahoma Bar Journal 2631 (September 14, 1991)

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

13. "Mechanics' and Materialmen's Lien: An Overview With A Discussion Of Selected Problems," Real Estate Titles And Conveyancing, Oklahoma City University Law School, Oklahoma City, Oklahoma (January 18, 1985); and Oklahoma City Title Attorney's Association, Oklahoma City, Oklahoma (February 8, 1985)

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

OIL & GAS ISSUES

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

RESIDENTIAL PROPERTY CONDITION DISCLOSURE

148. "Oklahoma Residential Property Condition Disclosure Act: An Overview", Churchill-Brown Realtors Training Meeting, Oklahoma City, Oklahoma (June 18, 2002)

TAX SALES

92. "Tax Resales: Invisible and Invincible Liens that may be Surviving the Sale -- A Forum for Input for Possible Solutions", Oklahoma City Title Attorney's Association, Oklahoma City, Oklahoma (October 13, 1995)

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

TITLE EXAMINATION: SELECTED ISSUES

175. "Selected Title Examination Issues", Examining and Resolving Title Issues in Oklahoma, National Business Institute, Oklahoma City, Oklahoma (June 7, 2005)

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

78. "The History and Direction of Title Examination Standards in America", Presented at: The Arkansas Bar Association 1995 Real Estate Seminar, Hot Springs, Arkansas (March 31-April 1, 1995)

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

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

TITLE EXAMINATION STANDARDS: UPDATES

182. "Update on Oklahoma Title Examination Standards: Revisions for 2006 (November 4, 2005)", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 13, 2006)

172. "Update on Oklahoma Title Examination Standards: Revisions for 2005 (November 12, 2004)", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 10, 2005)

161. "Update on Oklahoma Title Examination Standards: Revisions for 2004 (November 14, 2003)", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (February 13, 2004)

152. "Update on Oklahoma Title Examination Standards: Revisions for 2003 (November 22, 2002)", The Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 10, 2003)

144. "Update on Oklahoma Title Examination Standards: Revisions for 2002 (November 16, 2001)", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 11, 2002)

137. "Update on Oklahoma Title Examination Standards: Revisions for 2001 (November 17, 2000)", Oklahoma City Real Property Attorneys (Lawyers) Association, Oklahoma City, Oklahoma (January 12, 2001)

136. "Update on Oklahoma title Examination Standards: Revisions for 2000 (November 12, 1999)", The Conference on Consumer Finance Law, Oklahoma City, Oklahoma (November 2, 2000)

TITLE INSURANCE: SELECTED ISSUES

183. "Favorite Title Examination Standards Relating to Title Insurance", Oklahoma Land Title Association Advanced Title Insurance Seminar, Oklahoma City, Oklahoma (February 8, 2006)

126. "An Overview of Selected Title Insurance Issues In Oklahoma", The Oklahoma Association of Professional Mortgage Women, Oklahoma City, Oklahoma (February 9, 1999)

123. "Avoiding Title Pitfalls" & "Title Insurance", Oklahoma Association of Realtors/Real Estate Seminar, Stillwater, Oklahoma (October 8, 1998)

TRUST ISSUES

115. "Can Bankers Trust Trusts? Or A Brisk Walk Thru 'Never-Never' Revocable Trust Land", Oklahoma City Commercial Law Attorney's Association, Oklahoma City, Oklahoma (April 21, 1998)

APPENDIX 4
NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

(MORE INFORMATION AVAILABLE ON-LINE AT www.EppersonLaw.com**)**

THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER

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ANNUAL HANDBOOK

(Effective July 31, 2007)

STATUS REPORT

State		Last Revised		Standards		
		Pre-2002	2002+	#Ch.	#Stands.	#Pgs.
1.	Arkansas	12-20-00	-	22	110	65
2.	Colorado	-	07-01-06	15	134	71
3.	Connecticut	-	12-31-04	28	140	440
4.	Florida	-	11-00-03	22	152	187
5.	Georgia	-	08-00-05	39	194	144
6.	Idaho[1]	c. 1946	-	-	-	-
7.	Illinois	01-00-77	-	14	26	35
8.	Iowa	-	10-00-05	15	99	75
9.	Kansas	-	00-00-05	23	71	122
10.	Louisiana	00-00-01	-	25	233	99
11.	Maine	-	02-13-07	09	71	88
12.	Massachusetts	-	11-07-06	NA	73	101
13.	Michigan	-	05-00-04	28	252	442
14.	Minnesota	-	06-23-06	NA	96	84
15.	Missouri	05-15-80	-	NA	26	17
16.	Montana	c. 1955	-	NA	76	78
17.	Nebraska	-	01-30-04	16	98	115
18.	New Hampshire	-	07-15-07	13	179	36
19.	New Mexico	00-00-50	-	06	23	05
20.	New York	01-30-76	-	NA	68	16
21.	North Dakota	-	12-00-06	18	190	229
22.	Ohio	-	11-07-03	NA	53	44
23.	Oklahoma	-	11-17-06	23	116	109
24.	Rhode Island	-	07-00-03	14	72	72
25.	South Dakota	-	06-21-03	NA	66	58
26.	Texas	-	06-22-07	16	89	88
27.	Utah	06-18-64	-	NA	59	13
28.	Vermont	-	04-04-03	28	38	31
29.	Washington	09-25-42	-	NA	29	09
30.	Wisconsin	02-00-46	-	NA	15	08
31.	Wyoming	07-01-80	-	22	81	99
Total		***12***	***19***			

[1]The Title Standards for this state are not available due to the fact that the standards are too old to find in print.

Prepared by Kraettli Q. Epperson, Attorney-at-Law, OKC, OK
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APPENDIX 5
OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

2006 Title Examination Standards Committee

Kraettli Q. Epperson, Oklahoma City, *Chair*
Scott McEachin, Tulsa, *Secretary*

Dale L. Astle, Tulsa

Rickey Avery, Oklahoma City

Barbara L. Carson, Tulsa

William Doyle, Tulsa

Alan C. Durbin, Oklahoma City

Kraettli Q. Epperson, Oklahoma City

Larry Evans, Tulsa

James Folsom, Broken Arrow

Toney Foster, Tulsa

Martha M. Hardwick, Tulsa

John J. Mackey, Jr., Norman

Randolph Marsh, Ardmore

John L. Myles, Oklahoma City

Daniel Ogunbase, Oklahoma City

D. Faith Orlowski, Tulsa

O. Saul Reid, Oklahoma City

Henry P. Rheinburger, Oklahoma City

Jack Sargent, Oklahoma City

Michael Shanbour, Edmond

John B. Wimbish, Tulsa

2003 Real Property Law Section Board of Directors & Committee Officers