

# **TITLE EXAMINATION STANDARDS: A STATUS REPORT**

**By Kraettli Q. Epperson and Kevin A. Sullivan**

The American system of conveying real property relies in large part not only on the recording system but also on the title examiner's standards for reviewing and then either approving or disapproving the quality of title reflected in the record. Such standards arise from several sources, depending on the local community and state's practices. [See Sweat, *Race, Race-Notice and Notice Statutes: The American Record System*, 3 Prob. & Prop. 27 (May/June 1989).]

The purposes of this article are twofold. First, it is designed to update lawyers and title examiners on the status of American title examination standards and to suggest some new steps towards establishing additional model standards to cope with new nationwide events that are affecting titles in all states. Second, this article will introduce those real estate lawyers who are relatively unfamiliar with the use of title standards or who are dependent on title insurance companies for title examination work to the standards and will encourage them to take a new look at these important issues.

The information in this article is the result of a three year survey effort by the State Customs and Practices Subcommittee (the Subcommittee) of the Section's Conveyancing Committee in conjunction with the Real Property Section of the Oklahoma Bar Association (OBA) and the Oklahoma City University School of Law (OCU).

## **Beginning of Standards**

In the absence of any officially recognized community or statewide standards, each examiner must individually interpret the applicable law and relevant facts according to the examiner's understanding of the risks involved. This decision-making is sometimes distorted by the knowledge that another examiner- one who is perhaps "overly meticulous"-probably will be re-checking the title and the original examiner's work at a later date when another conveyance or loan is made.

According to 77 Am. Jur.2d Vendor and Purchaser Section 115:

*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 on the part of the vendor to make and convey a good or marketable title to the purchaser...There is authority that the right of the vendee under an executory contract to a good title is 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 synonymous and indicative of the character of title.*

To avoid the tendency toward rejecting almost every title (since there is seldom a perfect title), state bar organizations in about one-half of the states have adopted statewide standards, with several counties and cities adopting local standards as well. It is assumed that in states without statewide standards the standards vary from examiner to examiner or are dictated by the willingness of local title insurers to insure a particular title.

Connecticut was the first state to adopt statewide standards, which were approved by its state bar association in 1938. Nebraska followed suit in 1939. Each set of statewide standards is adopted by each state's bar association, although Nebraska has followed the unique practice of having its standards adopted by the state legislature. Since 1938, 27 states have adopted standards, although seven of these 27 states have allowed their standards to fall into disuse.

When title examination standards are drafted, it is usually from the standpoint of an examiner looking at an existing record, rather than from the perspective of a lawyer who is in the midst of preparing the necessary documents or pleadings. An examiner who is limited to the current record is often forced to forget about what might be done if he or she "had it to do over again" instead of having to decide, "is it good enough as is?"

The issues typically faced by an examiner fall into three categories:

1. Issues on which there is no disagreement within the bar on the status of title because the law is both clear and well known;
2. Issues on which competent lawyers seriously disagree; or
3. Issues on which competent lawyers agree but on which novice examiners might be ignorant and on which overly meticulous examiners might disagree with the majority of examiners.

A set of standards can be the most efficient and effective if it addresses only the issues in category 3. A set of standards is unnecessary for the issues in category 1 and is subject to serious challenge if it ventures into topics falling under category 2. However, standards are often adopted to cover matters included under category 1 because those standards serve the useful educational purpose of discussing the law, from the unique viewpoint of a title examiner, even if restating a statute or case law.

Real estate lawyers who typically do not engage in title examination other than reviewing title commitments and related documents should be aware of the applicable title standards present

in their states or in other states in which they may have occasional transactions. In many states a title standard may be the basis on which a determination is made about which items to list as exceptions in the title commitment being reviewed. In the states without title standards, each local title underwriter typically determines its own tolerable level of risk (with input from the regional or national offices, or both, as appropriate). In an era of occasional title company insolvencies and the inherent difficulty, costs and limitations of pursuing a claim on a title policy, it makes sense that a real estate practitioner at least be aware of title standards and how they may affect a client's resultant title policy. A review of applicable title standards could be used effectively as a tool to limit the title company's attempted inclusion of exceptions that may not be appropriate for a standards-based analysis.

After statewide standards were adopted in 23 states, the University of Michigan Law School and the Section undertook a joint effort to draft model standards. This project resulted in a set of model title standards by Lewis M. Simes and Clarence B. Taylor (1960 Model Title Standards Report). This set, which included 101 separate standards, contained 22 chapters covering such topics as the abstract, the examiner, name variances, marital interests, conveyances by and to trustees and mechanics liens.

This earlier report was based on a review of all existing statewide standards and was predicated on the well-founded conclusion that many factors affecting the marketability of title either cannot be determined from the record (such as proof of delivery, the competence of the grantor or the absence of forgery and fraud) or are only technical in nature and do not expose the examiner's client to any real risk of a third party challenge to the marketability of title (such as abbreviations of names).

### **New ABA Title Standards Project**

"That it is desirable for state bar associations to adopt title standards...has rarely been questioned in recent years," the 1960 Model Title Standards Report stated. "Already such standards are found in 23 states and doubtless other states will be added."

Several recent trends and events suggest it is time to revisit the status of title examination standards in America, including the following:

- The growing number of transactions involving multiple parcels of real property located in more than one state;
- The growing number of nationwide real property issues that lend themselves to a nationwide rather than a state-by-state approach (e.g., Federal Savings and Loan Insurance Corporation (FSLIC), Federal Depositors Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) conveyances, governmental forfeiture procedures and environmental liens); and

-The adoption in 1987 by the title insurance industry of the following definition for unmarketability of the title: "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title."

To evaluate the status of these standards and to determine how to update them to aid transactions and examiners nationwide, the Subcommittee, in association with OBA and OCU, started the following three-stage ongoing project in August 1987:

**1. Collection of Standards.** The Title Examination Standards (TES) Survey was sent to selected real property lawyers in each state, asking questions about the existence and status of statewide standards and about each state's real property related bar committees. This survey process began in August 1987. To date 48 of the 50 states (96%) have completed the TES Survey and statewide standards have been collected from all 20 states that confirmed they have such standards.

**2. Comparison of Standards.** An effort is underway to develop a chart comparing each state's standards so that a lawyer can easily locate comparable standards in each state. This chart will aid lawyers involved in (a) evaluating a potential title problem where the examiner's own state does not have a standard "on point;" (b) reviewing titles involved in multi-state real property transactions; and (c) drafting new standards by allowing lawyers to use another state's version as a model. The 101 standards listed in the 1960 Model Title Standards Report probably will be used as the basis for the "standard" categories in the proposed chart.

**3. Development of Model Standards.** To expand on and update the standards found in the 1960 Model Title Standards Report, the Subcommittee is initiating efforts to promote and coordinate drafting model title standards for newly developing areas of the law. These areas include dealing with (a) titles going through the FDIC, the FSLIC and the RTC in their various capacities; (b) governmental forfeitures, especially drug-enforcement related actions; and (c) environmental liens. This activity will be coordinated with the major title insurance companies, which are already dealing with these new problems on a daily basis, and with appropriate federal agencies.

### **TES Survey Results**

The first step in reviewing the status of title examination standards in each state was to send the TES Survey to each state bar association's real property committee chair or equivalent contact. The TES Survey contained two parts. The first part asked for information on the existence and current status of the state's standard's; the second part asked whether there were any real property-related bar committees in the state.

Although four states (Georgia, Maine, Massachusetts and Rhode Island) have adopted title standards since 1960 and the nominal total is now 27, several states have failed to update their title standards. In fact, according to the 48 TES Surveys that have been received to date,

only 20 of the 27 states that had standards at some time have been confirmed to still have standards, and seven states have abandoned standards. Utah, however, is on the verge of adopting an updated set of standards. Also, one of the 20 sets that was confirmed to exist is at least 10 years old. Because of the constantly changing nature of real estate law, the viability of standards that have not been updated for 10 years is suspect. This leaves 19 "current" sets of statewide standards.

The results of the TES Survey as of May 21, 1990 were as follows:

-48 of 50 states (96%) had responded to the survey (all of the states except Hawaii and Pennsylvania);

-According to the 1960 Model Title Standards Report and the results of the 48 TES Surveys completed and returned to the TES Resource Center, 27 of the 50 states (54%) have had statewide standards at one time;

-20 of 50 states (40%) have active statewide standards and all 20 of these standards are available in the TES Resource Center (see chart);

-19 of the 20 sets of statewide standards (95%) have been updated since 1979 (see chart);

-12 of the 20 sets of statewide standards (60%) apparently are updated annually (i.e., in 1988 or 1989) (see chart);

-42 of the 50 states (84%) have real property sections in their bar associations;

-The states responding to the TES Survey suggested their real estate lawyers would use the TES Resource Center as follows:

-Request a list of available publications: 29

-Communicate with state contacts: 27

-Travel to TES Resource Center: 2

-Photocopy materials: 17

-Borrow original materials: 20

-Use a computer accessible system: 22

-Other: 3

-Not at all: 2

Seven of the 23 states which had statewide standards in 1960 (Idaho, Illinois, Montana, New Mexico, Utah, Washington, and Wisconsin) stated that they currently have no standards at all.

These seven states are treated in this article as if the standards for their states were abandoned and no longer exist.

Sample copies of the TES Survey are available from the authors on request. A more detailed summary of the survey results is also available.

### **Conclusions and Recommendations**

It is obvious that statewide title examination standards play an active role in the 19 states that update their standards annually and play a less prominent role in the remaining state with older standards.

In the 1990s, title companies will have to continue using and accommodating each state's title examination standards as the companies seek a working definition to match their 1987 ALTA Form policy's formal definition of "unmarketability." New model title standards can lead the way in accommodating new nationwide title phenomena, such as FSLIC/FDIC/RTC titles, governmental forfeitures and environmental liens.

The ABA has the opportunity to provide a worthwhile service to the real property bar by the building on this initial effort and encouraging the widespread use of the TES Resource Center for research, analysis and education; and by supporting efforts to develop new model title standards to meet the needs of the 1990s.

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Kraettli Q. Epperson is a partner with Ames, Ashabranner, Taylor, Lawrence, Laudick & Morgan, Oklahoma City, Oklahoma.

Kevin A. Sullivan is a shareholder with Winstead, Sechrest & Minick, Dallas, Texas.

OCU has volunteered to serve as the depository for the collection of each state's title examination standards. The purpose of the TES Resource Center project is to "[c]ollect, review and analyze existing state, local and model standards while seeking to encourage the updating of existing individual state's standards, and to prepare model standards, and to promote the use of such model standards through cooperative research, drafting, publication, educational and other efforts."

The TES Resource Center currently has copies of title standards from 20 states (see chart). These materials may be examined at OCU. Partial or whole sets of the materials are also available by mail or telecopy. To request copies or a list of materials available, call (405) 521-5062. The TES Resource Center has a nominal charge for this service.

Joint ABA/OBA/OCU Title Examination Standards Resource Center Project

# **Index for Title Examination Standards Materials Available at OCU**

(As of May 21, 1990)

**Effective Date**

**Total Partial**

**Book No.\* State, Materials Revision Revision**

- 1. 6A1 Colorado, TES 1/1/87**
- 2. 7A1 Connecticut, TES Fall 1987**
- 3. 9A1 Florida, TES 1981 11/89**
- 4. 10A1 Georgia, TES 1972**
- 5. 15A1 Iowa, TES 9/85 8/89**

- 6. 16A1 Kansas, TES 1986**
- 7. 19A1 Maine, TES 12/7/83 1985**
- 8. 21A1 Massachusetts, TES 1989**
- 9. 22A1 Michigan, TES 1988**
- 10.23A1 Minnesota, TES 1988**
- 11.25A1 Missouri, TES 1970 1980**
- 12.27A1 Nebraska, TES 1987 1989**
- 13.29A1 New Hampshire, TES 1/1/88**
- 14.32A1 New York, TES 1/30/76**
- 15.34A1 North Dakota, TES 12/88 12/7/89**
- 16.35A1 Ohio, TES 1/89**
- 17.36A1 Oklahoma, TES 11/89**
- 18.39A1 Rhode Island, TES 11/85**
- 19.41A1 South Dakota, TES 7/1/88**
- 20.49C1 Wisconsin, Other**  
**materials pertaining**  
**to 1979 Abstracting**  
**Standards 1979**
- 21.50A1 Wyoming, TES 7/1/80**

**\*Key: The first character is a number that represents the state- e.g., "6" equals Colorado, which is the sixth state alphabetically. The second character is a letter that represents the source of the material (A-state, B-local, C-other). The third character is a number that represents the order of receipt- e.g., "35A1" means the material is from Ohio, is from the state level and is the first item received from that source in that state.**

**For More Information, Contact:**

**Librarian Judy Morgan (405) 521-5062**

**Project Chairman Kraettli Q. Epperson (405) 840-2470**

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