CONTRACT PROVISIONS, ABSTRACTING, & TITLE EXAMINATION, IN OKLAHOMA

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CONTRACT PROVISIONS, ABSTRACTING & TITLE EXAMINATION

By Kraettli Q. Epperson

TABLE OF CONTENTS

I. CONTRACT PROVISIONS

A. TITLE EVIDENCE

In Oklahoma the Statute of Frauds (15 O.S.§136) provides:

> *"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:*
>
> ***
>
> *5. An agreement for the leasing for a longer period than one (1) year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.*

Hence, it is necessary to have a written contract to have an enforceable agreement.

By statute, 15 O.S. §§ 154 & 155, when there is a written agreement, the parties' rights are determined by a review of the terms of such written agreement, and one cannot look outside such terms for the intent of the parties.

The Oklahoma State Legislature has not yet prescribed a mandatory form for a contract to be used in either a residential or non-residential (e.g., commercial, industrial, agricultural) transaction. However, the Oklahoma Real Estate Commission, which licenses and supervises all real estate licenses, has been directed by the state legislature as follows:

> *14. To create an Oklahoma Real Estate Contract Form Committee by rule which will be required to draft and revise residential real estate purchase contracts and any related addenda for voluntary use by real estate licensees.*
>
> 59 O.S.§858-208

The use of such uniform written agreement will not be mandatory. However, it is apparently intended that the Oklahoma Real Estate Commission will use such standard form in its educational courses to train and test real estate licensees. In addition, due to

the large proportion of residential transactions that involve real estate licensees, it is highly likely that this new form -- once it is developed and approved -- will find its way into normal use across the State. Such standard form, with addendum, is currently under development and should be available sometime in 2005. See Exhibit "C".

In the interim, until such standard form contract is adopted, it is likely that the standard residential form adopted by the Oklahoma City Metropolitan Association of Realtors ("Realtors Contract") will be the agreement used in many if not most residential transactions in and around Oklahoma City.

Such Realtors' Contract contains certain provisions concerning the title evidence required to satisfy the seller's obligation to provide proof of a valid title.

The 2000 version of such Realtors' Contract provides:

> *8. 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.*
> ***(a)*** *Such title evidence shall be in the form of:* ***(check one)***
> ___ ***Commitment for Owner's Title Insurance Policy***. *The premium for such Policy, average abstracting, including the attorney's fees for examination of the abstract, final title report, the Mortgagee's Title Insurance Policy, if any, and a Mortgage Inspection Certificate (a representation of the boundaries of the Property and the improvements thereon), unless otherwise specified in paragraph 7 above, shall be paid_____ by Seller and _____ by Buyer. All abstracting costs in excess of the title insurer's average abstracting costs shall be paid by Seller. The Owner's Policy shall insure Buyer in an amount equal to the purchase price. The Mortgagee's Title Insurance Policy, if any, shall insure Lender(s) to the full extent of the loan(s). Such policies shall insure against unfiled mechanics' and materialmen's liens.*
> ___ ***Abstract of Title.*** *The Seller, at Seller's expense, shall provide an abstract of title certified to date subsequent to the date of Contract (including a current Uniform Commercial Code Certification). Buyer shall at Buyer's expense, obtain a Mortgagee's Title Insurance Policy, if required by the Lender(s), and a Mortgage Inspection Certificate (a representation of the boundaries of the Property and the improvements thereon), unless otherwise specified in paragraph 7 above, along with one of the following: (Check one)*
> ___ *Owner's Title Policy including a final title report and a Title Examination by an attorney acceptable to the Title Insurer.*

OR

___ Attorney's Opinion of Title.

(b) *When a survey or a Mortgage Inspection Certificate, whichever is applicable, satisfactory to the title insurer is furnished showing no encroachment and/or boundary disputes, any title insurance policies shall provide usual encroachment coverage. In the event the survey or Mortgage Inspection Certificate discloses any encroachment(s) and/or boundary dispute(s), such policies shall provide encroachment coverage with exception(s) for matters disclosed by such survey or Mortgage Inspection Certificate, which exception(s) shall be subject to acceptance by Buyer in writing.*

(c) *Seller shall make existing title evidence (base abstract of title or Owner's Title Insurance Policy) available to the escrow closing agent within a reasonable title after the date of acceptance of this Contract.*

(d) *Upon delivery to Buyer of the last of the current Commitment for Owner's Title Insurance Policy, the certified abstract or the certified survey or Mortgage Inspection Certificate, whichever are to be provided under this Contract, Buyer shall have a reasonable time, not to exceed _____ days, to examine same and return to Seller with a written report specifying any objections or defects in the title or such right to object shall be deemed waived. Seller shall have _____ days after receipt of such report to correct such defects and to perfect title unless such time is extended in writing by Buyer. If Seller is unable or unwilling to cure any defects within such period, then unless Buyer waives such defects in writing, this Contract will terminate as provided in Paragraph 11(b) below.*

(e) *The title to the Property shall be conveyed to Buyer by General Warranty Deed in recordable form unless otherwise specified in Paragraph 7 above. Upon Closing, the existing abstract of title shall become the property of Buyer.*

(underling added)

Therefore, the title evidence being required under the terms of this standard contract is either (a) a title insurance commitment for an owner's title insurance policy, or (b) an updated abstract of title which will be examined by the buyer's attorney.

In Oklahoma, the statutes mandate that a commitment for the issuance of an owner's title insurance policy can be issued only after (a) a certified abstract of title is furnished, and (b) such abstract is examined by an Oklahoma attorney. 36 O.S.§5001 (C); AG Opinions 78-151 & 83-281

Such abstract must cover from sovereignty to the present date. A discussion of the contents of an abstract is provided below.

The State Auditor and Examiner licenses the state's abstracters and prescribes how they are to prepare an abstract of title. 74 O.S. §§ 227.10 et seq To be considered sufficiently current, such abstract must be less than 6 months old at the time the examination is conducted. In addition, if the transaction takes more than 6 months to reach closing, after the first title commitment was issued, another abstract search will need to be conducted before the closing can occur. Also, immediately after the closing, there must be a further updating of the abstract to ensure no intervening filings had occurred (i.e., final abstracting).

According to the State Auditor's Rules, adopted under the Administrative Procedures Act:

> *365:20-3-2. Satutory requirements: No title insurer shall issue, permit or cause to be issued, either directly or by an agent, a binder, commitment or policy of title insurance until either the title insurance company or its authorized agent shall have obtained an opinion of title by an attorney licensed to practice law in the State of Oklahoma based upon an examination of a duly certified abstract of title prepared by a bonded and licensed abstractor. For purposes of this section, a duly certified abstract means an abstract certified by a licensed and bonded abstractor with a Certificate date of not more than one-hundred eighty (180) days prior to the effective date of the title insurance policy. The above statutory requirements will not be satisfied by an examination or certification merely of copies of documents found in a search of the title record, or of the records of the Court Clerk or County Clerk.*

Therefore, whether the buyer selects either the option of either (a) an abstract and examination alone, or (b) a title insurance commitment, in both instances there will be a current abstract of title and an examination by an Oklahoma attorney.

As noted in the above standard contract language, a Uniform Commercial Code Certificate is called for to disclose whether there are any items of personal property

located on the land which are encumbered by a security interest which are owned by the seller of the land. Such certificate is needed only if the buyer is purchasing items located on the premises that are personal property. Otherwise, such Certificate is of questionable use.

In addition, examiners often request that the abstract include a Federal Court Certificate for the federal district court and federal bankruptcy court located in the district in which the lands are also located. Such federal court districts cover multiple counties. The title examination standards provide that such additional certificate is not necessary, even where the land is located in the same county where the federal court house is situated. TES 30.14 "Federal Court Proceedings" [See an article on this subject by Kraettli Q. Epperson on his website entitled: "Local Real Property Recordings Required for Federal Money Judgments", 63 OBJ 2697 (September 30, 1992)]

Lenders often package up their mortgages and sell them as a collection to other lenders. Such upstream investors (e.g., FNMA and Freddie Mac) do not know the reputations of local title examiners, and, therefore, they have gotten into the routine of asking for the originating lender to provide a lender's title insurance policy from a nationally known title underwriter rather than accepting a local attorneys' opinion. This practice by the lenders has shifted most of the title examination work away from a wide group of title examiners to a smaller set of attorneys who either work in-house as an employee of the title insurer or are outside counsel who work closely with the insurer.

A resulting problem has been the misconception by prospective buyers that somehow they are "protected" by the lender's policy, which the borrower often

purchases. Consequently, the buyers do not perceive that they need their own separate owner's title insurance policy.

As with all kinds of other insurance policies, title insurance policies run in favor of only the named insured. If the lender gets a policy and the buyer/owner does not, then upon the occurrence of a loss only the lender is protected. Many buyers were misled into thinking that "the title must be good, if the lender will make a loan on it". A lender is not as interested as the owner in ensuring that the title is perfect due to the lender's shrinking risk as the loan is paid down and due to the lender's assumption that it has the ability to remedy some title defects in any subsequent foreclosure. In response to this misunderstanding by the consumer, the Oklahoma state legislature enacted a law requiring that if a lender in a transaction is receiving any title protection, such as a mortgage title insurance policy, the lender receiving such protection must advise the buyer whether such protection also protects such buyer. Such notice must be given in writing and must be signed by the party who is not being protected.

46 O.S.§20 specifically provides:

> *§ 20. Issuance of title protection document--Notice--Waiver*
>
> *A. If a title protection document will be issued to the mortgagee, the mortgagee shall give to the buyer at the time of loan application written notice containing the following:*
>
> *1. Whether the title protection document will provide protection to the buyer; and*
>
> *2. That the buyer should seek independent, competent advice as to whether the buyer should obtain any additional title protection document. In the event said additional title protection is desired, it shall be obtained by the buyer in a timely manner in order to avoid undue delay of the closing under the terms of the contract of sale.*

B. The requirements of this section shall not be subject to waiver by the buyer.

C. TITLE CURATIVE

If there are any title defects discovered in the process of the buyer or lender examining the title evidence, it is necessary for the parties to decide how to handle such problems. If there is a written agreement between the parties describing how to treat such defects, such provisions must be adhered to.

If the Realtor's Contract is used by the parties, it contains provisions prescribing how long the seller has to cure such title defects, and then, if such defects are not timely eliminated, the contract becomes null and void unless the buyer waives such title defects. The terms of paragraph 8(d) of the Realtors' Contract, set out above, provides, in pertinent part:

> *Seller shall have _____ days after receipt of such report to correct such defects and to perfect title unless such time is extended in writing by Buyer. If Seller is unable or unwilling to cure any defects within such period, then unless Buyer waives such defects in writing, this Contract will terminate as provided in Paragraph 11(b) below.*

Consequently, the parties must fill in the blank space in the contract with a period of time within which the seller must cure any title defects that are discovered. Many title defects require the completion of litigation in order to eliminate them, such as quiet title suits, partition actions or probates. Such proceedings will usually take at least 41 days, if publication notice is involved.

Both of the parties are usually anxious to get to closing, so that the seller can use the proceeds to buy the house they intend to move into, and so that the buyer can have a place to move after they sold their last home or gave notice to their landlord that they were moving out.

Because both sides do not anticipate any serious title defects, and they are usually right, the parties will often put a short period of time in this blank. Then if a problem arises, the momentum of the transaction will usually prompt the parties to agree in writing to an extension of time to remove the title defects.

It should be noted that the language of this form contract provides that:

> *If Seller is unable or unwilling to cure any defects within such period, then unless Buyer waives such defects in writing, this Contract will terminate as provided in Paragraph 11(b) below.*

Such language appears to unilaterally allow the seller to decide that he is "unwilling" to cure the defect – either for a good reason, such as an excessive expense to cure the problem, or for no reason at all -- and to thereby empower the seller to unilaterally terminate the contract, rather than being obligated to cure such defects. If in fact, the contract is "terminated" by its own terms, each party is free from any liability to the other. This appears to some attorneys to be the clear meaning of the terms of this contract. They reason that by necessary implication, if there is no longer a contract in existence, then there is no right to seek to recover damages from the seller and there is no right to seek specific enforcement of a contract which "terminated" by its own provisions. Because the terms that caused the contract to terminate were agreed to in advance by all the parties, neither party should be able to complain when such terms result in the ending of everyone's obligations.

However, there is another possible interpretation of this provision. The sentence includes this language: "*this Contract will terminate as provided in Paragraph 11(b) below."*

Paragraph 11 provides:

11. ***DEFAULT:***

(a) If Buyer wrongfully refuses to close, Seller and Buyer agree that since it is impractical and extremely difficult to fix the actual damages sustained, the Earnest Money shall be forfeited as liquidated damages to Seller, and one half thereof shall be retained by the Broker(s) to apply on professional services, Seller may, at Seller's option, seek specific performance.

(b) If Seller's title defects cannot be corrected as herein provided, or if Seller wrongfully refuses to close, Buyer's Earnest Money shall be returned and Seller shall be liable for the Broker(s)' commission and any other expenses incurred on Seller's behalf as provided in this Contract. Buyer may, at Buyer's option, seek specific performance.

(c) In the event a suit for specific performance is instituted, the prevailing party shall have the right to recover all of such party's expenses and costs incurred by reason of such litigation including, but not limited to, attorney's fees, court costs, and costs of suit preparation.

The alternative interpretation is that due to the language of 11(b), if the seller fails for any reason to cure the title defects, and if the buyer refuses to waive them, that the contract is still enforceable and that the buyer can either (a) file a specific performance lawsuit and force the seller to cure the title defects, or (b) file a lawsuit for damages against the Seller for wrongful termination of the contract. However, because the word "unwilling" is not found in 11(b) it is unclear that such enforcement options are in fact available. If this second result was intended, the language of paragraphs 8 (d) and 11(b) could and should be clarified to ensure that this is the result.

In a lawsuit wherein the seller sought to have the contract declared terminated and the buyer wanted to force the seller to convey the lands, the Oklahoma Supreme Court held that because the seller could have easily and successfully quieted the title that the seller must specifically perform the contract. Ace Realty, Inc. v. Looney, 1974 OK 96, 531 P.2d 1377

In Ace at ¶ 5 the court was interpreting a contract which provided:

In case of valid objections to the title, seller shall have 60 days or such additional time as may be agreed to in writing to meet same. In the event the title cannot be

perfected and same is not insurable, or seller does not approve this contract, the above part payment on the purchase price shall be returned to the purchaser and this contract shall be of no further force and effect.

The court in Ace was operating in its equitable mode and held that to permit the seller to walk away from the agreement – when the title was easy to fix – would be unfair because it would allow the seller to defeat the contract by his own inaction.

The contract language in Ace is slightly different from the Realtor Contract, quoted above, because, unlike the Ace language, the form contract specifically provides that the contract is "terminated" – presumably with no adverse consequences – "If Seller is unable or unwilling to cure any defects…".

Until this specific language from the Realtor's Contract is interpreted by the Oklahoma Supreme Court, both of the above positions will be arguable.

In addition to the options of handling title defects by (a) having the buyer waive the defects, (b) terminating the contract, or (c) forcing the seller to cure the title before the closing occurs, there is another option. The additional option involves having the seller place some or all of the sales proceeds into an escrow account held by a third party, usually the closing agent. The closing would be completed with the title being transferred to the buyer and with some or all of the sales proceeds being held back from the seller until the title defects are properly eliminated. Because the closing is at least partially completed, this allows the buyer to go into possession, thereby avoiding leaving the buyer "out in the cold" with no place to go. However, such a practice leaves the seller without funds to pay off any outstanding mortgages on the subject property and without the funds that may be needed to pay towards a subsequent or simultaneous acquisition by the seller.

IV. ABSTRACTING

A. CERTIFICATES

The title evidence which is usually used for the sale of land in Oklahoma is a abstract of title prepared by a bonded and licensed abstractor. If title insurance is involved, an abstract is still required by statute.

The statute (36 O.S.§5001) provides, in part:

> *C. 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.*

74 O.S.§ 277.10 et seq is the Abstractor's Law, and according to §227.11 thereof:

> 1. *"Abstract of title" is a compilation in orderly arrangement of the materials and facts of record, in the office of the county clerk and court clerk, affecting the title to a specific tract of land issued pursuant to a certificate certifying to the matters therein contained.*

There are usually three types of abstractor's certificates issued by the abstractor, including the Uniform Oklahoma Land Title Association Uniform ("OLTA") Certificate, promulgated in 1983 through the efforts of a joint OLTA/OBA Real Property Law Committee. [See an article on this subject by Kraettli Q. Epperson on his website entitled: "Abstract Certificate Officially Changed", 54 OBJ 1713 (June 1983)]

As noted on the face of the Uniform Certificate, only those documents that are filed in the particular types of public records which the legislature declared to be records

giving constructive notice of their contents to the public (e.g., the county clerks' land records) are to be included in such abstract.

In addition to the Uniform Certificate which covers the county clerk's records, applicable court clerk records and the county tax sale records, there are also a Federal Court Certificate and a Uniform Commercial Code Certificate.

The Federal Court Certificate covers the subject land and any owners of the title to the land and shows any court cases in the specified District Court and Bankruptcy Court. There is technically no need for a Federal Court Certificate because any pending or completed court proceeding occurring in a District Court or in a Bankruptcy Court must be evidenced by the filing of a Lis Pendens Notice or a Decree or a Money Judgment in the local county land records, to give constructive notice. See TES 30.14 "Federal Court Proceedings" [See an article on this subject by Kraettli Q. Epperson on his website entitled: "Local Real Property Recordings Required for Federal Money Judgments", 63 OBJ 2697 (September 30, 1992)]

In addition, there is a Uniform Commercial Code Certificate that reflects a search of the records of the County Clerk as to any filings which relate to personal property which lists the subject lands or the subject owners of the lands. However, to the extent that the buyer, lender and/or title examiner is only interested in real property, such Certificate is not necessary.

B. CONTENT

The State Auditor and Inspector is responsible for licensing and regulating the abstracting industry. 74 O.S. §§ 227.10 et seq Through its rule-making powers the State Auditor adopted a regulation in 1992 providing a definition, under Rule 80:10-5-3 of the Administrative Code, entitled "Preparation of Abstracts", with subheadings for "Type of

Abstract", "Contents of Abstract", "Federal Court Records" and "Other Services". Such Rule provides:

> *80:10-5-3. Preparation of abstracts: (a) Type of Abstract. A Certificate of Authority holder shall prepare an abstract to cover a fee simple, or upon the request of a customer, a fee simple less and except oil, gas and other mineral interests, and where applicable, coal interests. The Abstract Certificate and/or Caption Sheet shall reflect the nature of the abstract along with an appropriate disclaimer regarding that which is excluded. (b) Contents of Abstract. For the time period covered by the certification, an abstract shall include the following: all instruments that have been filed for record or have been recorded in the Office of the County Clerk which legally impart constructive notice of matters affecting title to the subject property, any interest therein or encumbrances thereon; the records of the District Court Clerk and the County Clerk that disclose executions, court proceedings, pending suits, liens of any kind affecting the title to said real estate; judgments or transcripts of judgments against any of the parties appearing within the chain of title of the abstract, either indexed and docketed prior to October 1, 1978 on the judgment docket of the District Court Clerk or filed for record or recorded on or after October 1, 1978 in the Office of the County Clerk of said county; and all ad valorem tax liens due and unpaid against said real estate, tax sales thereof unredeemed, tax deeds, unpaid special assessments certified to the Office of the County Treasurer, due and unpaid, tax sales thereof unredeemed, and tax deeds given thereon and unpaid personal taxes which are a lien on said real estate. (c) Federal Court Records. For property located in Muskogee, Oklahoma and Tulsa counties, for the time period covered by the certification, an abstract or special certificate shall include the records of the Clerk of the United States District Court and the records of the Clerk of the United States Bankruptcy Court in Muskogee, Oklahoma and Tulsa counties, respectively, that disclose executions, court proceedings, pending suits and bankruptcy proceedings in said courts affecting title to the subject property; judgments or transcripts of judgments against any of the parties appearing within the chain of title of the abstract, either indexed and docketed prior to October 1, 1978 on the judgment docket of the Clerk of the respective United States District Court or filed for record or recorded on or after October 1, 1978 in the office of the County Clerk of the respective county, affecting title to said real estate. (d) Other Services. Any service performed by the holder of a Certificate of Authority that does not meet the standard established in subsection (b) of this section shall not be designated an "abstract" and shall not include an Abstract Certificate. [Source: Amended at 9 Ok Reg 2705, eff 7-13-92]*

The state legislature enacted its version of uniform the Marketable Record Title Act in 1963, 16 O.S.§§71 et seq, which establishes that the examination of title does not need to include certain documents and interests which are over 30 years old. The

Oklahoma Title Examination Standards provide at TES 30.13 “Abstracting” that the abstract being examined will be sufficient when certain documents are shown in the abstract. Some abstractors relied upon such Standard and provided what are referred to as “30-year” or “short” abstracts.

However, in 1996 the State Auditor issued Declaratory Ruling 96-1, which prohibited the future preparation and issuance of such 30-year “short abstracts”. Thereafter, all abstracts must be “full” abstracts”. [See an article on this subject by Kraettli Q. Epperson on his website entitled: “An Attack by the State Auditor on the ‘30-Year Abstract’”, 68 OBJ 517 (February 22, 1997)]

In addition to the usual full abstracts, a practice has developed to save the customer money and to save time in the preparation of an abstract by preparing a “supplemental abstract” which covers the time frame from the date of the last abstract certificate to the current date. This practice is reflected in TES 2.1 “Recertification Unnecessary”. As will be discussed below in the material on Abstractor’s Liability, if the abstract contains several abstractors’ separate certificates covering different distinct periods of time, and if there was an error in an earlier portion of the abstract where the abstractor’s certificate is past any applicable statute of limitation, an argument might be made against the abstractor having any legal liability for such mistake due to the passage of a statute of limitation.

The Oklahoma Land Title Association is a voluntary membership of the abstractors and title insurers in Oklahoma who work together for educational purposes, legislative goals, and adoption of uniform standards for the preparation of abstracts. The

OLTA has an “Abstractor’s Handbook” specifying what documents to include in an abstract prepared under the OLTA Uniform Certificate.

This Handbook includes the following major headings:

I. Operation of County Offices
II. Introduction to Abstracting
III. Legal Description
IV. Title Examination Standards
V. Instuments
VI. Court Cases
VII. Judgment Liens
VIII. Taxes
IX. Transfers of Real Property
X. Oil, Gas & Coal
XI. Compiling
XII. Problems of an Abstract Office

C. LIABILITY

The liability of an abstracter to a person who relies upon an erroneous abstract to their detriment will certainly include the abstracter in any lawsuit to collect for damages suffered as a consequence thereof.

The claim might be characterized in any of four different ways, depending on the circumstances: (a) breach of written contract (5 years), (b) breach of oral contract (3 years), (c) breach of a common law tort duty (2 years), or (d) statutory bond liability, 74O.S. Section 227.29 (5 years). The parenthetical numbers reflect the applicable statute of limitations.

As with any lawsuit, the normal elements must be proven including duty, breach, reliance, and resulting damages.

No Oklahoma case has been decided prescribing the outer limits on to whom the abstracter owes a duty.

There are two Oklahoma cases dealing with identifying the persons who might be owed a duty by a title examiner and by the title company. Both cases will be discussed below in the materials discussing the persons who can rely upon a title examination.

V. TITLE EXAMINATION

A. RESPONSIBILITY

1. GENERAL RESPONSIBILITY

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

§45. Importance of Title Examination

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

§52. Responsibility of Examining Attorney

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

circumstances to take the case out of the general rule, his liability, like that of an abstracter, extends only to those by whom he has been employed.

Aside however from the financial responsibility to a client for any loss resulting from negligence or lack of knowledge and skill, a title examiner feels the same personal responsibility for making a complete and accurate title report which is implicit in the relationship of a lawyer and his client. As in almost no other field of the practice of law, carefulness is the prime requisite. Knowledge of the subject is a close second. Skill then comes with experience. Knowledge alone is not substitute for the latter, the same in title examination as in playing a musical instrument, speaking a foreign language, or using new tools and machines. Given equal knowledge of real property law, an attorney well versed in trial procedure may be as inadequately equipped to examine a title as may an examiner to conduct a jury trial. The two lines of practice require different types of skill; and the latter, in both cases, is acquired mainly from experience.
In addition to studying the matters contained infra relating to title in his own state and supra in relation to methods of examination, each reader is urged to supplement his familiarity with this text by reading any local work which may have been prepared for his state and any list of standards which have been adopted by the lawyers of his state or district. He should procure an index of the curative and limitation acts applicable to titles in his state, either a published list where that is possible, or one prepared and kept up by himself. (emphasis added) (Rufford G. Patton and Carroll G. Patton, Patton on Titles, 2nd Edition (herein "Patton")

2. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients (notwithstanding Patton's assertion above that: "*But, unless there are circumstances to take the case out of the general rule, his liability, like that of an abstracter, extends only to those by whom he has been employed*."), it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and the limiting language, elsewhere in the opinion, expressly designate the sole person(s) allowed to rely on the opinion.

However, even where the opinion is addressed to a specific person or entity, it is possible that due to the particular circumstances surrounding the transaction, the attorney who is representing one party, such as the lender -- and rendering an opinion directed solely to that lender -- might be held to be liable to the opposing party, such as the

borrower, as well.

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

> *The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1981). The Bradford court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191*
>
> (emphasis in original).
>
> ***
>
> *In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, Bradford, 653 P.2d at 190, and workmanlike performance, Keel, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See Bradford, 653 P.2d at 190-91; Keel, 639 P.2d at 1232.*
>
> (underlining added)

An Oklahoma Court of Appeals case was decided in 1991, American Title Ins. v. M-H Enterprises, 1991 OK CIV APP 58, 815 P.2d 1219, wherein it was held that a buyer

of real property can sue (i.e., via counter claim) the title insurer for negligence in the preparation of a title policy, even if the title insurance policy was issued only in favor of the buyer's lender. This rule was applied where: (1) no abstract was prepared, (2) an attorney's title examination was not undertaken, and (3) the insurer/abstractor missed a recorded first mortgage. The facts of the case showed that, after the buyer/borrower lost the house through a foreclosure of the missed first mortgage, the insurer paid the insured second mortgage holder to settle under the terms of the title insurance policy and had such lender assign the worthless second note and mortgage to the insurer who then sued the buyer/borrower under the warranty of title in the second mortgage. The appellate court held that while the buyer/borrower was not a named insured, the insurer's own negligence (i.e., no abstract and no examination) caused the loss, and that it did not buy the note and mortgage as a holder in due course, because (1) no value was paid for the acquisition of the note and mortgage (i.e., the payment was to settle its obligations under the policy) and (2) the note and mortgage were already in default when the insurer took an assignment of them.

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

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. (emphasis added)

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

B. PROCESS

The process of title examination in Oklahoma, whereby an opinion is expressed on the status of title, constitutes the practice of law and, therefore, can be undertaken only by an attorney licensed in the State of Oklahoma. 36 O.S. Section 5001(c); AG OPIN 78-151 & 83-281

Such examination is conducted by reviewing an abstract of title containing a complete set of d0cuments running from sovereignty (i.e., from the first instrument from the sovereign to a third party) through the present day. Such records include all documents constituting the chain of title from the sovereign through successive owners by way of voluntary conveyances such as deeds, and involuntary transfers such through

probate decrees, quiet title judgments, divorce decrees, foreclosure sheriff's deeds, and similar documents. In addition, the abstract includes liens and encumbrances against the land or the owner's interest in the land. Such liens might include mortgages, judgment liens, mechanics liens, and physician's liens. Encumbrances would consist of instruments such as easements, restrictive covenants, and notices of limitations on an owner's ability to convey the land such as would be shown in a trust memorandum.

The process of examination of a title and preparation of an opinion consists of (a) ensuring the presence of a complete abstract, (b) determining whether the Certificate is properly completed, (c) reviewing the individual entries (i.e., deeds, mortgages, assignments, releases, easements, decrees, etc.), (d) writing notes: (i) confirming the chain of title and identifying any defects therein, and (ii) identifying any unreleased liens or encumbrances, (e) listing any required title curative steps to resolve any defects in the chain and to release any liens, (f) explaining any matters which would be of interest to the reader of the opinion but which are not covered by the opinion, and (g), ultimately, stating who are the owners of the land and their type or quantum of interest.

The examiner will want to be sure that there is not a gap in time – not even a single minute -- between the series of abstracters' certificates which follow at the end of a collection of real estate related documents.

The examiner will also want to ensure that the abstracter has either listed on the Certificate the names of the persons who have owned title to the land during the period covered by the Certificate showing that the abstracter ensured that the money judgment records were checked to determine if such names appeared as debtors therein. This is

because under 12 O.S. Section 706 such judgments constitute a lien on the debtor's lands in any county wherein a Statement of Judgment is filed in the county clerk's land records.

Another concern arises where the examiner finds that the abstracter has shown on the Certificate page that the abstract consists of certain numbered pages, such as "Pages 1 – 185", but when the abstract is examined it is noticed that the abstracter was "sloppy" and had to insert one or more pages between pages which were already numbered, giving the inserted pages a modified number. Such modified page number might be "9A" falling between regular pages "9" and "10". If the Certificate fails to specifically list the extra inserted pages, the examiner would need to protect himself against the subsequent disappearance of such un-Certified pages (especially if it is a Release of Mortgage or a Deed) and the resulting negative impact on the examiner's report on the purported chain of title.

The title examiner then reviews the series of documents ("entries") found in the abstract starting either at the front with the oldest documents or at the back with the newest ones. Each document must be studied with the assumption and attitude that it was prepared improperly until such hypothesis is proved wrong. By taking such an approach the examiner ensures that no actual error is overlooked. If the examiner took the opposite attitude, assuming everything was done perfectly correct, there would be no need to examine the records. Instead, the examiner could simply hope everything was done right, that a statute of limitations had cured any defects he should have found and corrected and that, more importantly, the statute of limitations on his liability had run before the error was noticed.

This approach – assuming it was not done right – means that, for instance when you review a deed you (1) check the name of the grantor to ensure it is the exact same as the previous grantee on the immediately prior deed, (2) review the legal description to compare it with the one on the previous deed, and (3) review the signature block to see if the grantor's name is the same as the one in the granting clause and in the acknowledgment. In addition, you would check for the statement of marital status of the grantor, usually found in the granting clause, and, if the grantor is married, observe whether the grantor's spouse joined on the deed.

In the instance of a court proceeding, you would first determine whether the proceeding was one (a) that fell within the list of matters covered by the 10-year Simplification of Land Titles Act (16 O.S. §§ 61-63, 66), and (b) had been in the land records for at least 10 years, in which case the examiner could limit his examination to the final order or decree or sheriff's deed, as applicable. On the other hand, if the proceeding did not come within the parameters of the Act or had not been of record long enough, you would need to see a complete abstract of the proceedings, to at least ensure that the court secured jurisdiction over the parties, gave proper notices during the proceedings and granted no more relief that was asked for initially. This limitation on the relief being granted is really only required where the judgment is given by default. Otherwise, the court can fashion an appropriate remedy after conducting an appropriate hearing and/or trial.

It should be noted that if the person receiving relief through a court proceeding wants to give notice of the results of such action, there is a statute requiring that such decrees be placed in the land records for the county clerk of the county where the land is

located. Prior to 1977 a court decree or judgment affecting real property in more than one county had to be filed in the court clerk's office in the county where the court was located to give notice in that county and, in order to give notice in the other county, it also had to be filed in the county clerk's office in the other county. However, in 1977 the law changed and it became necessary to record the decree or judgment in the land records of the county clerk's office of each and every county where the affected land is located. It was no longer sufficient to file the decree or judgment in the court clerk's office where the court sat. 16 O.S. §31; 12 O.S. §181

The examiner will be seeking to create a chain of title consisting of a series of conveyancing documents such as deeds, decrees and affidavits (e.g., those evidencing the extinguishment of intervening estates, such as joint tenants or life estates). In addition, the examiner will be observing and noting any liens or encumbrances which might have come into existence, but which may not have be released by the passage of time or by affirmative written release by the grantee of the interest. Often an encumbrance, such as an easement or a restrictive covenant, will not be released and, in fact, the grantee may be very interested in the continuation of such interest. The positive aspects of an encumbrance sometimes provide to the grantee the assurance that his land will be serviced by a utility running through an the easement on the back side of his tract, or that his neighbors will all abide by the uniform covenants which create a homogenous community, which in turn helps to maintain the value of the grantee's real property.

The examiner creates a set of working notes that can be in any format that the examiner finds practical. A few samples of the work sheets used for this process are attached hereto as Exhibit "A".

The examiner will keep a running record showing the quantity and type (e.g., life estate, fee, joint tenant, etc.) held by each person or other legal entity. The "accounting" is similar to maintaining an attorney's trust account for multiple clients with multiple projects for each client, with funds in each account being kept track of separately as funds go in and out on a continuing basis.

The result of this title review will usually end up in the form of a letter-formatted title opinion. If the examiner works closely for or is employed by a title insurance company, the title opinion will probably be in the form of the title insurance commitment itself, thereby cutting out the conversion process between the opinion and the commitment.

There is not a standard format or wording required for an opinion. However, a letter format on the attorney's letterhead is usually used, and certain minimum components must be provided, including: (a) the addressee to whom the opinion is addressed and who is therefore entitled to rely on it, (b) the legal description of the tract under examination, with a notation of any special major limitations such as "Surface Only Opinion" or "Lenders Only Opinion", (c) a listing of the records examined, usually specifying the abstracts reviewed, and describing other documents or records studied, (d) stating the owner or owners of the real property with the quantity and nature of their interest noted (e.g., joint tenants, or tenants in common), (e) listing all comments about any gaps in the chain of title (e.g., an apparently missing probate) or defects the documents comprising the chain (e.g., a defective acknowledgment), accompanied by the suggested alternative requirements needed to cure the noted defects (e.g., a corrective deed or a probate), (f) listing any liens or encumbrances which remain unreleased or

unextingushed by the passage of time, and (g) stating any matters which might affect the title but which cannot be discovered by the examination of the records shown in the abstract of title, such as on-site problems that only a survey would disclose (e.g., encroachments of improvements over easement or boundary lines), or "attached" but as yet unrecorded mechanics' and materialmen's liens. Such exculpatory matters can constitute a lengthy list, and the provision of such non-record information suggests that the examiner is wearing his counselor hat instead of his examiner's hat, and such shift might arguably expose the examiner to liability if the list omits a warning about any other possible non-record title problems that a fellow examiner would have disclosed.

At the end of the opinion, the examiner will usually repeat a warning and limitation making it clear as to whom can rely on the opinion and for what purpose it can be relied upon (e.g., "lenders uses only"). Many attorneys indicate that they often choose to omit certain types of minor title defects (e.g., ones that will soon be cured by the passage of time) with the tacit agreement of the client; however, in reality, unless a lesser standard is expressly agreed upon between the parties, the uniform standard for title examination is "marketable title". The title either is or is not marketable. Any risk analysis and assumption of such risks should be considered and chosen by the client and not the attorney. Nevertheless the attorney is obviously an important member of the team, who can explain the curative period remaining or the persons who could raise the claim, and who can estimate the cost of the curative work and the chances of success. A sample surface title exam is attached hereto as Exhibit "B". No effort herein is made to discuss or provide samples of oil and gas opinions, due to their enormous size and the unique nature of the multiple interests involved, compared to a surface opinion.

C. COMMON ISSUES & T.E.S./CURATIVE TOOLS

1. Title Examination Standards

[COPIES OF THE STANDARDS CAN BE FOUND AT "www.eppersonlaw.com]

a) 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 that were approved at the Section's meeting.

Oklahoma's set of Standards have received support 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, 1982 OK 89, ¶16, 649 P.2d 532

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'"* (underlining 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. . ."*, (underlining 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. Section 570.10.D.2a; also see: Hull, et al. v. Sun Refining, 1989 OK 168, ¶9, 789 P.2d 1272 *("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.")]*.

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

However, it should be noted that *"It is, therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature shall prevail."* Okl. A.G. Opin. No. 79-230.

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.*

(77 Am Jur 2d §115 Title of Vendor: Generally; Obligation to furnish

good or marketable title)

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

(77 Am Jur 2d §123 Special Provisions as to character of title: Generally.)

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

In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects,

which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title." While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertising these relatively infrequent dangers; and they must remember that a purchaser cannot legally demand a title which is absolutely free from all suspicion or possible defect. He may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the character of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.

If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as ***now*** *located and constructed or hereafter to be constructed, the easement depended on the fact of the* ***then*** *location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation, it is not marketable.*

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

Determination of questions as to the marketability of titles is peculiarly within the province of counsel for buyer or mortgagee. Counsel for the owner will not only endeavor to remedy the condition of the title as to any requirements which he concedes to be proper, but usually finds it easier to do so than to contest the matter, even as to matters not so conceded. In the main it is only when compliance is impossible or when time for compliance is lacking or has passed that the question reaches the courts. Even then a decision is not always possible. This is because courts

usually will not undertake to determine doubtful questions involving the rights of others who are not parties to the action.

(§46. Classification of Vendor Titles)

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

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

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

(Paul E. Bayse, Clearing Land Titles (herein "Bayse"): §8. Legislation)

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

of the title.

In "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953), John C. Payne, (herein "Increasing Marketability") the problems caused by each examiner exercising unbridled discretion are noted:

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

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

The problems resulting from this quest for perfect title can impact the examiner and his clients in several ways:

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

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

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

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

The State of Oklahoma used to have one of the strictest standards for "marketable title" which was caused by the interpretation of the language of several early Oklahoma Supreme Court cases.

The initial standard was based upon a reading of certain California cases which were initially read to mean that "the title must be perfect in order to be deemed

marketable", but a later re-reading and discussion of those cases led the Oklahoma Title Examination Committee to conclude that the rule was really that "the title will be deemed perfect if it is marketable". The current title standard in Oklahoma has been changed, as of November 10, 1995, to be less onerous. It now provides:

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

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

In response to a 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 that have sets of Standards which have been updated in the last 5 years (i.e., since 1998). In the last seven years, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas (1997) and Louisiana (2001). [See the National Title Examination Standards Resource Center Report, at my web site at www.eppersonlaw.com.]

2. Other Major Curative Acts

In order to facilitate real estate transactions, the States' legislatures have adopted numerous uniform curative acts that reduce the number of stale claims which the prospective buyer or lender must be concerned about. These legislative enactments have withstood constitutional challenges in the states where they have been adopted, and, when used for their proper purposes, they have reduced the need for numerous unnecessary lawsuits and other curative steps. Such potential claims which are being extinguished had almost no chance of being asserted and less chance of succeeding due to equitable principals and due the universal attitude in America that in regard to land rights: (a) possession is 9/10th of the law, and (b) use it or lose it.

In tandem with the title standards, the numerous legislative curative acts in Oklahoma provide a formidable arsenal to use to blast past seemingly numerous but, in reality, miniscule challenges to title.

While there are dozens of title curative acts and over a hundred title standards in Oklahoma, there are a handful that cover the bulk of the usual title problems. In the following sections these selected curative acts and title standards will be briefly presented. A further review by the examiner of these aides will be appropriate to ensure a comprehensive understanding of the application of each statute or standard.

(a) <u>Marketable Record Title Act:</u>

In 1963 the Marketable Record Title Act, 16 O.S.§§71-80, was adopted in Oklahoma (the "MRTA"). See TES Chapter 30 "Marketable Record Title Act" (TES 30.1 –30.14). Its primary result was to reduce and almost eliminate the need to review any documents in the chain of title which were over 30 years old. The examiner must first identify the deed or other decree of conveyance that has been in the local land

records at least 30 years as of the time of examination. Such initiating document is called the "root of title" from which the subsequent chain springs. Each state tailored the national uniform version of the Marketable Title Record Act to fit what are perceived to be local unique factors, which were supposedly not adequately addressed in the uniform version of the Act.

In Oklahoma, in addition to the document representing the root of title and all subsequent documents, the examiner must review and take notice of certain additional documents that predated the root. As stated in TES 30.13:

> ***30.13 ABSTRACTING***
>
> *Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:*
>
> *A. The patent, grant or other conveyance from the government.*
>
> *B. The following title transactions occurring prior to the first conveyance or other title transaction in "C." below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have not expired; instruments or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.*
>
> *C. The conveyance or other title transaction constituting the root of title to the interest claimed, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction; or if there be a mineral severance prior to said conveyance or other title transaction, then the first conveyance or other title transaction prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction.*
>
> *D. Conveyances, title transactions and other instruments recorded prior to the conveyance or other title transaction in "C." which are specifically identified in said conveyance or other title transaction or any subsequent instrument shown in the abstract.*
>
> *E. Any deed imposing restrictions upon alienation without prior consent of the Secretary of the Interior or a federal agency, for example, a Carny Lacher deed.*
>
> *F. Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian, the abstract shall contain all recorded instruments from inception of title other than treaties except (1) where there is an unallotted land deed or where a patent is to a freedman or inter-married white member of the Five Civilized*

Tribes, in which event only the patent and the material under "B.", "C.", "D." and "E." need be shown, and (2) where a patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a Certificate of Competency, only the patent, the conveyance from the allottee, the Certificate of Competency, certificate as to degree of blood of the allottee and the material under "B.", "C.", "D." and "E." need be shown.

The abstractor shall state on the caption page and in the certificate of an abstract compiled under this standard:

"This abstract is compiled in accordance with Oklahoma Title Standard No. 30.13 under 16 O.S. §§ 71-80."

The three primary sets of documents pre-dating the "root" which must be considered are: (a) the patent out of the sovereign, due to the inability of subsequent owners and parties in possession to rely upon the concept of "adverse possession" to extinguish the state's original claim of interest, and (b) interests which by their nature are expected by everyone to continue indefinitely in order to impose order and uniformity on subdivision developments, and (c) severed mineral interests, severed before the "root".

Through the proper application of this MRTA, the examiner can ignore gaps in the chain of title or errors in documents that would otherwise need to be corrected, if such gaps and erroneous documents pre-date the root.

The allowance of a 30-year window of opportunity for the filing of any challenges to the apparent chain of title that followed from the root of title was deemed sufficient by the state legislature.

(b) <u>Simplification of Land Titles Act:</u>

In 1961 the Simplification of Land Titles Act, 16 O.S.§§61-63, 66, was adopted in Oklahoma (the "SLTA"). See TES Chapter 29. "Simplification of Land Titles Act" (TES 29.1 –29.6). According to TES 29.2:

29.2 PROTECTION AFFORDED BY THE ACT

The Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 (§§ 64-65 repealed effective April 10, 1980), protects any purchaser for value, with or without actual or constructive notice, from one claiming under a conveyance or decree recorded or entered for ten (10) years or more in the county, as against adverse claims arising out of:

A. (1) Conveyances of incompetent persons unless the county or court records reflect a determination of incompetency or the appointment of a guardian, (2) corporate conveyances to an officer without authority, (3) conveyances executed under recorded power of attorney which has terminated for reasons not shown in the county records, (4) nondelivery of a conveyance.

B. Guardian's or personal representative's conveyances approved or confirmed by the court as against (1) named wards, (2) the State of Oklahoma or any other person claiming under the estate of a named decedent, the heirs, devisees, representatives, successors, assigns or creditors.

C. Decrees of distribution or partition of a decedent's estate as against the estates of decedents, the heirs, devisees, successors, assigns or creditors. For decrees of distribution or partition which cover land in a county other than the county in which such decrees are entered and recorded, 16 O.S. § 62(c) (2) does not require that they also be recorded in the county in which the land is located.

D. (1) Sheriff's or marshal's deeds executed pursuant to an order of court having jurisdiction over the land, (2) final judgments of courts determining and adjudicating ownership of land or partitioning same, (3) receiver's conveyances executed pursuant to an order of any court having jurisdiction, (4) trustee's conveyances referring to a trust agreement or named beneficiaries or indicating a trust where the agreement is not of record, (5) certificate tax deeds or resale tax deeds executed by the county treasurer, as against any person, or the heirs, devisees, personal representatives, successors or assigns of such person, who was named as a defendant in the judgment preceding the sheriff's or marshal's deed, or determining and adjudicating ownership of or partitioning land, or settlor, trustee or beneficiary of a trust, and owners or claimants of land subject to tax deeds, unless claimant is in possession of the land, either personally or by a tenant, or files a notice of claim prior to such purchase, or within "one year from October 27, 1961, the effective date of 16 O.S. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S. § 62 as amended in 1973." The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with facilities installed on, over, across or under the land are deemed to be in possession.

Through the proper application of this SLTA, the examiner can rely upon deeds and decrees as being valid (e.g., recorded powers of attorney that are invalid according to unknown facts which are outside the official record), which are part of the record being relied upon to establish the continuous chain of title, although there might have been “off the record” defects. Such deeds and decrees must have been recorded for at least 10 years, and the person relying upon such passage of time must be a subsequent purchaser

for value rather than being the grantee under the subject deed or decree. Such 10-year window of opportunity for the filing of any challenges to such recorded deed or decree was deemed sufficient by the state legislature.

(c) Marital Interests:

In 1910 16 O.S.§4 was adopted, and since then amended several times, and it is currently entitled: *§ 4. Necessity of writing and signing--Veterans' loans--Homestead--Joinder of husband and wife--Effect of record for 10 years.* See TES Chapter 7. "Marital Interests" (TES 7.1 –7.2). Also see: OK. CON. Art.12, §2

Oklahoma's history as a "populist" state is reflected in its continuing efforts to protect the family homestead from impecunious acts of one spouse against the interests of the other non-title-holding spouse and any minor children. While several attempts have been made over the years – even as recently as the first Gulf War in the early 1990's – to enact legislation requiring a spouse to take the affirmative step of filing a Declaration of Marital Homestead in order for such homestead to receive legislative protection against the improper conveyance or encumbrance of the family homestead, nothing has been passed. Instead, the buyers, lenders and title examiners are left with the continuing needed to protect themselves. Otherwise they can face the non-joining spouse, or even the joining spouse, attacking the conveyance or mortgage – on the homestead -- as being unenforceable, due the lack of joinder of both spouses. No manner of recitals by the joining spouse claiming that the land is non-homestead binds the non-joining spouse, who may disagree with the joining spouse's claim that the land is non-homestead.

Some people argue that unless the land was listed as homestead with the county assessor as the beginning of the year, it was obviously non-homestead. However, the

public policy favoring the protection of the homestead combined with the factual-based nature of the process of determining what land is the homestead, suggests that it is dangerous to "assume" any land is non-homestead. While the statutes allow the conveyance of a married person's non-homestead without the joinder of the other spouse, such statutes do not take away the other spouse's right to dispute such claim. 16 O.S.§13

The Oklahoma Supreme Court frightens would-be buyers and lenders, and examiners, by declaring such conveyances of the homestead, without the other spouse's signature, to be "void", not just "voidable". However, instead of really being "void", after the questionable document has been recorded for at least 10 years, without being challenged, the conveyance is deemed valid. In order to avoid the threat of a void conveyance, the practice among the title examining bar is to require the marital status of the grantor be disclosed on the conveyance, and to require the spouse, if any, must join thereon. It should be noted that this marital interest is separate from, and addition to, any actual legal (i.e., record) interest that the other non-joining spouse might own and hold.

This 10-year curative statute gives substantial comfort once its time has passed.

(d) <u>Unenforceable Mortgages and Marketable Title</u>

In 1980 46 O.S.§301 was adopted in Oklahoma, and it is entitled: *§ 301. Foreclosure--Limitations--Cessation of lien--Extension agreements--Notice--Record marketable title--Application of act.* See TES 24.8 "Unenforceable Mortgages and Marketable Title".

Under the terms of this act, the lien of a recorded but unreleased mortgage is extinguished by the passage of time – in the absence of a recorded Notice of Extension – of either (a) 7 years (formerly 10 years) from the ascertainable date of maturity, or (b) 30

years from the date of recording, if the date of maturity cannot be ascertained from the face of the mortgage. It has often been impossible to locate the mortgagees on old mortgages to secure a release of mortgage, even though the debt was paid off some time ago. This statute provides a vehicle for disposing of such ancient mortgages.

(e) Other Helpful Curative Acts and Standards

There are many other helpful curative acts and title standards available to ease the title examiner's burden. The above discussion was not meant to be exhaustive but only illustrative with an emphasis on the ones that cure the more numerous defects.