I. THE STANDARD AMERICAN LAND TITLE ASSOCIATION (ALTA) FORMS

A. WHY SHOULD CONSUMERS ACQUIRE TITLE INSURANCE?

1. Matters Covered by Title Insurance

"Title insurance is a contract of indemnity intended to protect the insured against 'loss or damage suffered by reason of liens, encumbrances upon, defects in or unmarketability of the title to said property.'... [A]n insurer has three related duties under a title policy: (1) to indemnify the loss upon payment of damages; (2) to cure the title defects if feasible; and (3) to defend the insured in a judicial attack on its title.'... The insurer's primary duty is to vindicate the title.... If there is a question as to the land guaranteed by the title, the company must defend the policyholder's title.... If unsuccessful and the "the insured loses lands as a result, it must pay [the insurer] the value of the land lost.'... Insurance companies do not provide policyholders with a guarantee that there are no 'non-record defects in the title of a parcel of real estate.'... Instead, they issue a policy to protect the policyholder against title defects 'not discoverable from a search of the public records on the parcel, as well as losses caused by errors or mistakes in the search and examination.'"

There are numerous explanations offered to justify title insurance. Some of the essential reasons are (1) title searches and examinations are imperfect; (2) title searches and examinations often do not, even combined with prior searches and examinations, trace title to sovereignty; (3) examinations of public records cannot uncover factors that may make a conveyance or release invalid or defects that are not evident in the public records; (4) public recording systems are not complete and accurate reflections of enforceable real estate transactions; (5) most public recording systems do not provide for conclusive reliability; (6) marketable record title acts, enacted only in a minority of states, include varying exceptions and limitations; (7) ambiguity resides in many instruments and interpretation of the applicable law to real estate transactions; and (8) defense costs, a major expense of title insurers, may be incurred by the owner of superior title.

There are various lists widely available to explain examples of why title insurance is a good product for consumers, whether lenders or owners, to acquire. The following are examples of some of the issues that may be insured against by a title insurance policy:

- A conveyance in the chain of title is recorded after a second deed or other instrument from the same grantor.
- A conveyance is an equitable mortgage or interferes with the borrower's right of redemption.
- A conveyance is executed by a personal representative after the administration or other proceeding is complete.
- A conveyance is executed by an entity after it ceases to exist or its charter is forfeited.
- A devise in a will is void under state law because of conflict of interest by a preparer of the will.
- A devise in a will is void under state law because of murder by the devisee.
- A devise in a will is void under state law because of prior divorce or annulment.
- A federal or state condemnation/ eminent domain proceeding does not appear in the public records.
- A governmental transaction violates the law.
- A grantee or mortgagee fails to comply with the requirements for the recording of an instrument under the appropriate recording act.
- A grantee or mortgagee is required to defend the title or the enforceability of its lien at any time.
- A legal description conflicts with an adjoining description.
- A mechanic’s lien attaches to the title before the current transaction but is evidenced by a claim of lien recorded after the policy is issued.
- A non-judicial foreclosure or judicial sale is avoidable because it is not properly completed.
- A patent contains an erroneous description.
- A power of attorney is forged, invalid, voidable, or terminated, and reliance could not be placed on an affidavit by the agent with respect to matters such as the death or guardianship of the principal or the termination of the power of attorney, as provided in Section 119 of the Uniform Power of Attorney Act by the National Conference of Commissioners on Uniform State Laws (NCCUSL).
- A pretermitted child under a will of the decedent in the chain of title fails to join in a transaction with other devisees under the decedent’s will.
- A prior forfeiture of the title pursuant to a federal or state proceeding does not appear in the public records but would be effective against a bona fide purchaser (BFP), even though it is not recorded in the public records.¹
- A probate occurs in another county and is not disclosed in the public records in the county where the land is located.
- A probate vesting title in a party in the chain of title is set aside.

• A recorded instrument is not discovered in the title search.
• A representative who executes an instrument is not properly qualified.
• A right in the land based on an unrecorded instrument is evidenced by possession of the land.
• A secret estate tax lien is attached to the title.
• A signatory, such as an officer, manager, or partner, exceeds authority.
• A subordination, waiver, or release of lien is unenforceable.
• A tract of land is not patented, resulting in failure of the title.
• A transaction by a tribe does not conform to its tribal documents and is not valid.
• A transaction by a tribe violates the Indian Nonintercourse Act and is void.
• A transaction is invalid because the legal description is not valid and is not reasonably identifiable.
• A transaction is not authorized in a bankruptcy proceeding.
• A transaction is not authorized in a receivership, or the receiver exceeds statutory authority.
• A transaction is undertaken by a Specially Designated National (SDN) without approval by the Office of Foreign Assets Control (OFAC).
• A transaction is void because a legal proceeding is not binding on a person who did not receive adequate notice or for whom there is want of jurisdiction.
• A transaction violates the automatic stay in a bankruptcy.
• A transfer in the chain of title violates the terms of the Servicemembers Civil Relief Act (SCRA), such as a mortgage or trust deed foreclosure in violation of Section 303 of the SCRA.
• A transfer is not valid because the spouse did not join in the transaction as required by law.
• A transfer of tribal trust land, such as a lease, is not properly approved by the Bureau of Indian Affairs (BIA) and does not comply with the National Environmental Policy Act (NEPA), although the policy does not insure against violation of the NEPA.
• An adverse interest in the land is perfected by adverse possession or prescriptive use.
• An easement is abandoned and is no longer enforceable.
• An erroneous interpretation of applicable law is made.
• An error in the recordation of an instrument is made by the recorder.
• An examination does not disclose any other matter, such as a pending suit or probate, that does not appear in the local land records and that may be filed in another county.
• An instrument filed in the public records is not discoverable by an examination of title, such as when a person goes by a new or married name, an heir has acquired the title, or the other owner is not a named grantee in a prior instrument in the chain of title.
• An instrument filed with the recorder’s office is lost and is not disclosed in the public records.
• An instrument in the chain of title is altered after execution.
• An instrument in the chain of title is executed by a minor.
• An instrument in the chain of title is executed by a ward or incapacitated person while subject to a guardianship or other supervised proceeding.
• An instrument in the chain of title is executed by an impersonator.
• An instrument in the chain of title is executed by an incapacitated adult.
• An instrument in the chain of title is executed by an incorrect person, such as a person with the same name as the record owner.
• An instrument in the chain of title is forged.
• An instrument is delivered after the death of the grantor.
• An instrument is executed by mistake.
• An instrument is incorrectly construed or interpreted.
• An instrument is not delivered, although it is recorded.
• An instrument is not properly recorded and is not considered constructive notice.
• An instrument in the chain of title is executed by an heir of the decedent, but the will of the decedent, perhaps unknown at the time, is later probated.
• An instrument vesting title is not in the chain of title.
• An order authorizing a transaction is set aside.
• An unknown heir did not join in an instrument in the chain of title.
• Any ad valorem taxes subsequently reassessed and not evidenced by a search of the tax records, such as a reassessment for improper exemptions previously granted, omitted improvements not previously assessed, or excess acreage not previously included in the calculation of the assessed value.

• Any other governmental lien attaching to the title either without recording in the public records or attaching/reaching back to a time prior to the recordation.
• The execution of an instrument is secured by fraud or duress.

2. Patterns of Claims, Risk Categories, and ALTA Risk Codes

It has often been said that title insurers would not have title claims if there were no errors in the search and examination. This view does not reflect an appreciation for many of the losses covered by title insurance and suffered by the title insurers, nor an understanding of the breadth of either real estate law or title insurance.

The various causes of title claims can be categorized in a variety of ways. For example, it would be appropriate to explain the causes as
• abstracting/posting errors for errors by the abstractor;
• examination errors for errors by the examiner;
• survey errors for errors that could have been discovered by a correct survey;
• inspection errors for matters that could have been discovered by an inspection of the land;
• secret liens for liens that are not readily discovered by a search or examination of title; and
• other undiscoverable matters for claims that generally could not be discovered by an examination or other review of the title and land.

In different situations, each of the causes of a title claim can be categorized differently; a cause that is in the chain of title but not involved in the current transaction may not be discoverable because of the lack of access to information readily available only in that closing, but such matter may be discoverable if it occurs in the current closing.

The ALTA Risk Codes elaborate on the types of claims that are seen in the title insurance business. The ALTA Risk Codes list 11 different categories of risks:
(1) A. Basic Risks;
(2) B. Special Risks;
(3) C. Plant, Searching, and Abstracting Procedures;
(4) D. Examination and Opinion Irregularities;
(5) E. Survey-Inspection/Description Matters;
(6) F. Escrow/Closing Procedures;
(7) G. Typing or Policy Review;
(8) H. Taxes and Special Assessments;
(9) I. Apparent Non-Covered Claims;
(10) J. Stakeholder/Interpleader Cases; and

The ALTA explains that “Basic’ or ‘Assumed Risks’ are those undertaken by the insurer as a matter of practice and without underwriting being required, whereas ‘Special Risks’ are undertaken based on an underwriter’s judgment and risk assessment.”

(1) A. Basic Risks (A-1 through 6)
The category of “Basic Risks” includes “the so-called ‘hidden risks’ (often said to be undiscoverable by even the most careful search and examination of public records), plus ‘assumed risks’ (undertaken by the title insurer as a matter of course, generally to speed up the closing process and/or to provide forms of coverage beneficial to owners and lenders). These are ‘built-in’ coverages normally given without specific procedures being required by the insurer (such as an examination of records, inspection of property, or inquiry of parties) prior to issuance of a policy. Risks listed in this category generally correlate to title policy insuring provisions.”
The category of “Assumed Risks” (A-6 of the Basic Risks) are largely associated with special Covered Risks that appear in the ALTA Homeowner’s Policy, ALTA Expanded Coverage Residential Loan Policy—Assessments Priority (04-02-15), and ALTA Expanded Coverage Residential Loan Policy—Current Assessments (04-02-15)—such as post-policy encroachments, post-policy forgery, building permit coverage, and subdivision law violations—and are assumed with minimal levels of underwriting.

(2) B. Special Risks (B-1 through 4)
The category of “Special Risks” relates to the underwriting for specific transactions and is often assumed by deleting an exception or issuing an endorsement. The ALTA explains, “Risks listed here are typically undertaken in reliance on an affidavit or indemnity, an inspection of the property, a survey, and/or a legal opinion.” Examples of endorsements include Access Endorsements, Condominium Endorsements, Creditors’ Rights Endorsements (generally, no longer available), Doing Business Endorsements, Environmental Protection Lien Endorsements, Future Advance Endorsements, Mineral Endorsements, Non-Imputation Endorsements, Truth in Lending Endorsements (rare), and Variable Rate Endorsements.

(3) C. Plant, Searching, and Abstracting Procedures (C-1 through 5)
The category of "Plant, Searching, and Abstracting Procedures" involves the risks relating to title plants, where applicable, public records, and title searches. Those risks include errors in searching or abstracting; proper posting to a title plant, if applicable (although many states do not have title plants); errors in the taking of information from a recorded instrument by a searcher or abstractor; and errors in the public records themselves, including misfilings, errors in preparing the indexes, and lost instruments.

(4) D. Examination and Opinion Irregularities (D-1 through 3)
The category of "Examination and Opinion Irregularities" relates to underwriting and the examination of title. “These include the risk that the examiner did not recognize a problem (that perhaps they should have), made an erroneous or unexplainable decision, or failed to follow established procedures and policies.” The failure to recognize a risk may be the result of a misunderstanding of the facts or law by the examiner or an understanding based on the law, which changes, such as because of later court decisions. The failure to follow the procedures and policies would include those customary in the examination of title for attorneys, special guidelines by the title insurer or the title insurance agent, and memos relating to the manner of dealing with special risks or legal issues.

(5) E. Survey-Inspection/Description Matters (E-1 through 2)
The category of "Survey-Inspection/Description Matters" typically relates to the errors in the surveys, inspections, or legal descriptions. An inspection error is not difficult to expect because of the ambiguity of some use and the lack of clear evidence that an inspection may uncover, particularly if a large parcel of land is involved. Erroneous descriptions are not infrequent and can entail conflicts with adjoining owners, the mislocation of improvements, and fatally defective descriptions.

(6) F. Escrow/Closing Procedures (F-1 through 6)
The category of "Escrow/Closing Procedures" encompasses the title claims through the settlement/closing process. “These include the risk that escrow/closing instructions were insufficient or incomplete, instructions were not followed, improper calculations and other payoff errors, and failure of post-closing responsibilities (such as failure to obtain and record releases, failure to timely record documents, failure to record in proper county).” Where resulting from a defacement by the settlement office, the claims can be enormous in the aggregate, and on average larger than other title related claims. If there are payoff errors, the mortgage may not be satisfied and released and therefore may jeopardize the title of the insured. Some facets of this category will be covered by the liability under a closing protection letter or statutory liability of the title insurer in some states. To reform an insurance policy, the party seeking reformation must show that an original agreement (such as may be reflected by a commitment) existed between the parties and that a mutual mistake occurred in reducing the agreement to writing (such as preparation of the policy). A unilateral mistake by one party in reducing the agreement to writing with the knowledge of the mistake by the other party is equivalent to a mutual mistake.8

(7) G. Typing or Policy Review (G)
The category of "Typing or Policy Review" includes the risks relating to typing errors, transcription errors, and miscommunication in the preparation and delivery of the policy and endorsements. Examples of such errors might be the deletion of exceptions, the addition of endorsements, and the inclusion of additional property. The title insurer is sometimes, but not always, able to prevail in reforming or rescinding a policy.

(8) H. Taxes and Special Assessments (H)
The category of "Taxes and Special Assessments" includes taxes and assessments that are not paid or excepted, and may include governmental charges that are separate but secured by a statutory lien similar to that for taxes and assessments. "These include the risk of misreported taxes, erroneous calculation of amounts due, insurance based on indemnity, and/or interest and penalties incurred due to payoff delays."

(9) I. Apparent Non-Covered Claims (I-1 through 4)
The category of "Apparent Non-Covered Claims" includes the matters that appear not to be covered by the policy, such as those covered by exclusions or exceptions, but may result in expenses for the insurer, such as the defense costs when the title insurer defends with a reservation of rights because the matters appear not to be covered, or because the title insurer must, under state law, defend as to non-covered matters if covered matters are also asserted.

(10) J. Stakeholder/Interpleader Cases (J)
The category of "Stakeholder/Interpleader Cases" concerns the litigation or potential litigation when the company is holding money that is or can be claimed by multiple parties. The ALTA 16-06 (Mezzanine Financing) contemplates that the title insurer may interplead any funds potentially payable under the endorsement.

(11) K. Disputed Procedure (Judicial/Non-Judicial) (K-1 through 3)
The category of "Disputed Procedure (Judicial/Non-Judicial)" relates to disputes over the manner of the conveyance of title because of procedural issues, typically in the foreclosure or forfeiture proceedings. The procedures could relate to innumerable judicial proceedings, such as administrations, guardianships, bankruptcies, and receiverships.

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8 Lawyers Title Ins. Corp. v. Doubletree Partners, L.P., 739 F.3d 848 (5th Cir. Tex. 2014).
Typically the most loss and loss-adjustment (defense, etc.) expense will be suffered in (1) Plant, Searching, and Abstracting Procedures (particularly Search Error: Purported Missed Mortgages), (2) then Basic Risks (including Basic Risks—Other, Fraud, and Forgery), (3) then Escrow/Closing Procedures, and (4) then Special Risks Authorized by Company Practice (including Mechanics' Liens Construction Loans Known Lack of Priority, Mechanics' Liens Construction Loans Presumed Priority, and Mechanics' Liens Loan Policy Permanent Loans).

3. Limits of the U.S. Recording Systems

Title insurance is essential in the United States in large part because of the nature of the U.S. recording systems. The state recording systems offer evidence of the nature and history of the transactions but are not conclusive of those matters. Recording constitutes only one leg of the notice system:

1. Properly recorded instruments in the chain of title are constructive notice to the world.
2. Physical possession constitutes notice of what could have been reasonably discovered by inspection.
3. Actual notice includes those facts that could have been discovered by reasonable inquiry based on information held by the purchaser, lender, or those representing them.

The concept of the "chain of title" is often significant for instruments appearing in the public records, although the definition of the "chain of title" will vary in different states. One example of a definition of the "chain of title":

*In a title search, the prospective purchaser or his abstractor assesses the marketability of title to a tract of land by determining the "chain of title." Beginning with the person who received the grant of land from the United States, the purchaser or abstractor traces the name of the grantor until the conveyance of the tract in question. The particular grantor's name is not searched thereafter. As the process is repeated, the links in the chain of title are forged.*

Further, instruments appearing in the public records are not fully reliable. Each of the below matters is a risk assumed by title insurance. For instance, one cannot

- conclusively assume that a recorded instrument was executed by the recited party;
- conclusively assume that an instrument was properly delivered;
- conclusively assume that a grantee or mortgagee under a recorded instrument is a BFP or lender for value, entitling that party to the protection of the recording statutes; and
- disregard any unknown or unrecorded transfer by the grantor, in some states, if the grantee acquired the instrument by a quitclaim.

There are three types of recording statutes in the United States:

1. **Race recording statute**
   A race recording statute protects a subsequent purchaser or lienholder if that party records first, regardless of whether that party has notice of unrecorded matters.

2. **Race-notice recording statute**
   A race-notice recording statute protects a subsequent purchaser or lienholder who acquires an interest without notice of the prior unrecorded interest and files that party's deed or mortgage before the recordation of the prior unrecorded interest.

3. **Notice recording statute**
   A notice recording statute protects a subsequent purchaser or lienholder who acquires an interest without notice of the prior unrecorded interest, regardless of whether the prior party records its mortgage or deed before the subsequent purchaser or lienholder does.

None of these recording systems adjudicates title (with minor exceptions where the Torrens system has been adopted, which is based on the principle of title by registration rather than registration of title). One cannot assume that the purchaser or lender qualifies for protection under the particular recording system. In the Race Recording System, one cannot assume the instrument was properly authorized or executed by the person purporting to transfer the interest. In the Race-Notice Recording System and the Notice Recording System, one cannot assume that the subsequent purchaser or lender took in good faith, and thus reliance on the priority of the recording is flawed. Consequently, title insurance is essential to facilitate loans and purchases, because it is the only credible basis for evaluating title.

Few locations have the historic alternative of the Torrens system, and even where the Torrens system is available, it may be viewed as inefficient because the system is slower and contains inherent vulnerabilities, such as the requirement that the owner assumes defense of the title. The Torrens certification process, similar to that of the Marketable Record Title Acts, has inherent limits built into the statutory procedure, either expressly or because of the applicability of other laws. The certificate may be subject to avoidance for a certain amount of time after it is initially issued, the time for issuance may be excessively slow, and the certificate will be subject to statutorily recognized matters such as federal liens and rights, state claims, bankruptcies, taxes, and certain possessory rights. The registration will not provide defense to the owner, unlike title insurance, and may not be adequately funded.

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Additionally, there are many exceptions upholding rights or interests in the land that are not recorded at all. For example, a party in possession under an unrecorded deed will typically prevail because possession is equivalent to recording a notice. In addition, if the purchaser has actual notice of some unrecorded rights, or has sufficient notice to lead to an inquiry and discovery, the purchaser will not be entitled to rely on the recording laws. If the purchaser does not pay current consideration, then once again the purchaser will not be protected under the recording laws.

There are also numerous exceptions to recording requirements, not least of which are a number of rights arising under federal law, such as condemnation and forfeiture. Consequently, the recording system suggests that the purchaser or lienholder needs further protection because of the many gaps in the reliability of recording, and that need can be satisfied only by title insurance.

Several states have adopted title registration laws, inspired by the Torrens system. These title registration laws are consistent with some other nations that have generally conclusive registration systems. However, other states previously maintaining a title registration system have subsequently repealed the registration law.

Those states that have maintained a registration system include:

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<th>STATE</th>
<th>TITLE REGISTRATION LAWS MAINTAINED</th>
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<tr>
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<td>Georgia</td>
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<td>New York</td>
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<td>Virginia</td>
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<td>WASH. REV. CODE ANN. §§ 65.12.005 to 65.12.900 (Chapter 65.12—Registration of Land Titles (Torrens Act))</td>
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The Torrens system was attractive because it could avoid (1) a long title examination, (2) unknown matters that would not be clearly reflected in a search and examination, (3) errors in the search or examination, and (4) off-record matters that would not be shown in the public records.

The following are examples of key features of a Torrens system:

**Procedures in rem**

The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land and vest and establish title thereto in accordance with the provisions of this chapter.\(^{10}\)

**Examiners of title appointed by judges**

The judges of the district court shall appoint a competent attorney in each county within their respective districts to be an examiner of titles and legal adviser to the registrar in said county, to which examiner all applications to register title to land are referred without further order, and may appoint attorneys to serve as deputy examiners who shall act in the name of the examiner and under the examiner's supervision and control, and the deputy's acts shall be the acts of the examiners.\(^{11}\)

**Protection against fraud**

In all cases of registration procured by fraud, the owner may pursue all his/her legal and equitable remedies against the parties to such fraud, without prejudice however to the rights of any innocent holder for value of a certificate of title. After the transcription of the judgment of registration on the original complaint, any

\(^{10}\) N.C. GEN. STAT. § 43-2.

\(^{11}\) MINN. STAT. § 508.12.
subsequent registration procured by the presentation of a forged deed or other instrument shall be null and void.12

• **Recovery against special funds**
  
  Any person entitled to notice who had no actual notice of any registration under this article depriving him/her of any estate or interest in land and who is without remedy under this article may, within two years after accrual to him/her or to some person through whom he/she claims the right to bring such action, bring an action against the state treasurer in the superior court in the county in which such land is located for the recovery of any damages to which he/she may be entitled by reason of any such deprivation.13

• **Conclusive effect of registration**
  
  If the court, after hearing, finds that, the applicant has title, whether as stated in his/her application or otherwise, proper for registration, a decree of confirmation of title and registration shall be entered. Every decree of registration shall bind the land and quiet the title thereto, except as otherwise provided in this article, and shall be forever binding and conclusive upon all persons, whether mentioned by name in the application or included in “all other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein”, and such decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees, except as especially provided in Colorado Revised Statutes Section 38-36-131. An appeal may be taken as provided by law and the Colorado appellate rules within the same time and upon like notice, terms, and conditions as are provided for the taking of appeals from the district court to the appellate court in civil actions.14

• **Exceptions to title to matters noted in the certificate of title and certain matters excluded from the effect of registration**
  
  Every person receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all incumbrances except only such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar’s office, and except any of the following rights or incumbrances subsisting—namely:

  1. any existing lease for a period not exceeding three years, when there is actual occupation of the premises under the lease;
  2. all public highways embraced in the description of the land included in the certificates shall be deemed to be excluded from the certificate, and any subsisting right-of-way or other easement, for ditches or water rights, upon, over, or in respect to the land;
  3. any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title;
  4. such right of appeal, or right to appear and contest the application, as is allowed by this chapter; and
  5. liens, claims, or rights, if any, arising or existing under the constitution or laws of the United States, and which the statutes of this state cannot or do not require to appear of record in the office of the county clerk and county auditor.15

The registration system has not proved particularly viable in the United States. The Torrens system does not prevent the necessity for judicial review, the assurance funds have proved inadequate, and the process has proved cumbersome because of the necessity for judicial review.

### 4. Marketable Record Title Acts and Title Examination Standards

Marketable Record Title Acts have been designed to

• clear the title of old defects;
• reduce the period of searches;
• enhance the reliability of the title offered by the grantor who has a good root of title;
• reduce the number of lawsuits; and
• reduce the cost of searches and real estate transactions.

In 1919, Iowa became the first state to enact such law, and now at least 19 states have enacted Marketable Record Title Acts that clear away old claims and make it easier to establish marketable title if there is a “root of title” and no adverse claims are filed within a specified time (e.g., 20 to 50 years). As explained by Lewis M. Simes:

**Sometimes the modern American marketable title act is phrased like a statute of limitations; sometimes it may be analogized to a curative act. But in fact, it is neither; and indeed, it is definitely unique. Instead of interests being cut off because a claimant failed to sue, as would be the case if a statute of limitations were involved, the claimant’s interest is extinguished because he failed to file a notice. The essence of the Model Marketable Title Act ... is simply this: if a person has a record chain of title for forty years, and no one else has filed a notice of**

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12 MASS. GEN. LAWS ANN. ch. 185, § 62.
Claim to the property during the forty-year period, then all conflicting claims based on any title transaction prior to the forty-year period are extinguished.\textsuperscript{16}

Marketable Record Title Acts extinguish the rights and interests that existed before the root of title, using the concept of "root of title."

A "root of title" is defined, for example, in Florida as "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded."\textsuperscript{17} As noted in Table 10 (Marketable Record Title Acts), the time varies from 20 to 50 years under the state regimes.

Marketable Record Title Acts extinguish prior rights, such as under Iowa law:

Subject to the matters stated in section 614.32, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interest, claims or charges are asserted by a person able to assert a claim on the person’s own behalf or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.\textsuperscript{18}

A person whose interest would otherwise be extinguished may preserve an interest by a preservation notice, such as allowed in Ohio:

Any person claiming an interest in land may preserve and keep effective the interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in compliance with section 5301.52 of the Revised Code.\textsuperscript{19}

Each state includes its own exceptions to the application of the Marketable Record Title Act, such as under Oklahoma law:

Sections 71 through 80 of this title shall not be applied to bar any lessor or his successor as a reverter of his right to possession on the expiration of any lease; or to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title of the land; or to bar or extinguish any easement or interest in the nature of an easement, or any rights granted, reserved or excepted by any instrument creating such easement or interest; or use restrictions or area agreements which are part of a plan for subdivision development or to bar any right, title or interest of the United States by reason of failure to file the notice herein required.\textsuperscript{20}

Other examples of exceptions to the application of the Marketable Record Title Act are established in South Dakota:

This chapter shall not be deemed to affect the right, title, or interest of the state of South Dakota, or the United States in any lands in South Dakota.\textsuperscript{21}

This chapter shall not apply to the right, title, or interest in any land owned by any railroad or other public utility corporation or any lessee, trustee, or receiver thereof; nor shall it apply to claims, liens, titles, or rights of action founded upon mortgages or trust deeds executed by any such corporations or the lessees, trustees, or receivers thereof.\textsuperscript{22}

In Rhode Island, the exceptions to the application of the Marketable Record Title Act are:

1. all interest and defects which are created by or arise out of the muniments of which the chain of record title is formed; provided a general reference in the muniments, or any of them, to easements, use restrictions, encumbrances or other interests created prior to the root of title are not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction, encumbrance or other interest;

2. all interests preserved by the recording of proper notice or by possession by the same owner continuously for a period of forty (40) years or more, in accordance with § 34-13.1-5;

3. the rights of any person arising from a period of adverse possession or use, which was in whole or in part subsequent to the effective date of the root of title;

4. any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record started; provided such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of § 34-13.1-4;

5. the exceptions stated in § 34-13.1-17 as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States, this state and public subdivisions thereof, public service companies and natural gas companies; and


\textsuperscript{17} F.L.A. Stat. § 712.01.

\textsuperscript{18} Iowa Code § 614.33.

\textsuperscript{19} Ohio Rev. Code Ann. § 5301.51.

\textsuperscript{20} Okla. Stat. tit. 16, § 76.

\textsuperscript{21} S.D. Codified Laws § 43-30-13.

\textsuperscript{22} S.D. Codified Laws § 43-30-14.
the rights or interests arising out of any conservation or preservation restriction and or easement, created either:

(i) if executed and recorded subsequent to the effective date of chapter 39 of this title entitled "Conservation and Preservation Restrictions on Real Property", any conservation or preservation easement or restriction granted or reserved in accordance with and pursuant to the terms and provisions thereof; or

(ii) if executed and recorded prior to the effective date of chapter 39 of this title, a conservation and/or preservation easement or restriction granted or reserved for the same, or substantially the same, stated purposes as those set forth in § 34-39-2, although executed and recorded prior thereto, and which is held by a entity duly recognized in chapter 39 of this title to hold such restrictions and/or easements.27

Marketable Record Title Acts were explained in Marshall v. Hollywood:

"The Marketable title concept is simple, although it has fathered many variations in draftsmanship. The idea is to extinguish all claims of a given age (thirty years in the Florida Statute) which conflict with a record chain of title, which is at least that old. The act performs this task by combining several features, which generally, are simply labeled as 'statutes of limitations,' 'curative acts,' and 'recording acts.' The new act is in fact all of these: It declares a marketable title on a recorded chain of title which is more than thirty years old, and it nullifies all interests which are older than the root of title. This nullification is subject to a group of exceptions— including interests, which have been filed for record in a prescribed manner.... The chief purpose of the act is to extinguish stale claims and ancient defects against the title to real property, and, accordingly, limit the period of search. The act is different from a statute of limitations. In a statute of limitations, a claim of a vested, present interest is cut off because of the claimant's failure to sue. If suit is not filed, the claim is lost. By the Marketable Record Title Act, any claim or interest, vested or contingent, present or future, is cut off unless the claimant preserves his claim by filing a notice within a 30-year period.... If a notice is not filed, the claim is lost. The act also goes beyond a curative act. Curative legislation only corrects certain minor or technical defects through the passage of time, whereas under the Marketable Record Title Act, most defects or clouds on title beyond the period of 30 years are removed and the purchaser is made secure in his transaction."

Marketable Record Title Acts do not universally extinguish interests prior to a "root of title." For example, the California Marketable Record Title Act was designed to simplify and facilitate real estate transactions by "enabling persons to rely on the record title to the extent provided," but it does not generally deal with title defects; instead, it provides a more limited curative mechanism for ancient mortgages and deeds of trust, mineral rights, unexercised options, powers of termination, unperformed contracts for sale of real property, and abandoned easements.

Marketable Record Title Acts, in applying to pre-existing interests and requiring a notice to be recorded to preserve such interests, are not unconstitutional if the party is provided a reasonable time to record the notice preserving such interests (such as nine months, one year, or five years, according to cited cases).28

Although only a minority of the states have adopted Marketable Record Title Acts (identified in Table 10), a majority of the states, such as Colorado, Connecticut, Florida, Georgia, Iowa, Maine, Massachusetts, Michigan, Minnesota, Ohio, Oklahoma, Rhode Island, Texas, and Vermont, have at one time developed Bar Title Standards as guides to marketability and the examination of title. The standards have been developed by Real Property or Real Estate Sections alone or in

23 R.I. GEN. LAWS § 34-13-1.3.
24 USLTA § 3-306; Simplification of Land Transfers, NCCUSL; http://uniformlaws.org/Act.aspx?title=Simplification%20of%20Land%20Transfers ("This Act deals with conveyances, recording, priorities, construction and other liens, and public land records. In each of these areas, it provides comprehensive provisions designed to unify and modernize the law to further the security and certainty of land titles, the reduction of the costs of land transfers, the balancing of the interests of all parties in the construction lien area, and the creation of a more efficient system of public land records.").
27 CAL. CIV. CODE §§ 880.020 et seq.
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collaboration with other sections of the State Bars, and, while not having the force of law as do Marketable Record Title Acts, the standards establish guidance for title examinations in minerals and other matters and may substantiate an attorney’s practices in the issue of malpractice. Standards frequently allow reliance on presumptions, such as the genuineness of the document and signatures, the competence of the parties, the delivery of the recorded documents, the passing of consideration, the good faith of the parties, the authority of the persons acting on behalf of another in a recited authority or position, and the continued effectiveness and validity of a power of attorney when signed by an agent.

The Colorado Real Estate Title Standards discusses the scope of matters not covered by the examination: Various matters may affect title to real property that are not likely to be disclosed by an examination of the recorded documents affecting title to that property. While it is possible to investigate these matters, it is not customarily done by the examining attorney. Instead, the examining attorney usually makes the title opinion subject to certain matters not of record that may affect title to the real property. Those matters outside of the real property records to which title opinions are commonly made subject include rights of parties in possession or occupancy of the real property; matters that may be disclosed by an accurate survey of the real property; statutory mechanics’ liens; easements, or claims of easements, not shown by the public records; liens for the payment of taxes, assessments, rates, fees, tolls, charges, or penalties imposed by governmental or quasi-governmental entities; the effect of zoning, land use, environmental and other governmental laws and regulations; and applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws in effect from time to time.29

Topics covered by some Title Examination Standards include capacity, name variances, actions and proceedings (such as quiet title), liens, pendents, judgment liens, acknowledgments, recording laws, affidavits and recitals, condominiums, powers of attorney, receiverships, limitations, co-tenancy, legal descriptions, marital rights, future interests, bankruptcies, periods of search, ad valorem taxes, tax liens, child support liens, mechanics’ liens, easements, mortgages and deeds of trust, foreclosures, decedents’ estates, homesteads, trusts, guardianships, and entities (e.g., limited liability companies, corporations, or partnerships).

Both the Marketable Record Title Acts and the Title Examination Standards deal with title matters and marketable title. But “insurable titles” and “marketable titles” are not synonymous: a title may be insurable by a title insurer or subject to agreement by a title insurer to insure, and yet not be marketable.30 The agreement of a title company to insure over an encroachment in present and future conveyances does not satisfy a contractual requirement to furnish merchantable title (generally, merchantable title is synonymous with marketable title).31

5. Advice to Purchasers

The U.S. Department of Housing and Urban Development (HUD) Settlement Cost Booklet “Shopping for Your Home Loan” emphasizes the importance of title insurance for the homeowner:

Many lenders require a lender’s title insurance policy to protect against loss resulting from claims by others against your new home. A lender’s title insurance policy does not protect you. If a title claim occurs, it can be financially devastating to an owner who is uninsured. If you want to protect yourself from claims by others against your new home, you will need an owner’s policy. To save money on title insurance, compare rates among various title insurance companies. If you are buying a newly constructed home, make certain your title insurance covers claims by contractors. These claims are known as “mechanics’ liens” in some parts of the country. In many states, title insurance premium rates are filed with the state and may not be negotiable, but other title service related charges may be. Be sure to ask your title agent about any available discounts such as a reissue rate or a simultaneous issue discount. Title services also include the services of a settlement agent. Settlement practices vary from locality to locality, and even within the same county or city. Depending on the locality, settlements may be conducted by lenders, title insurance companies, escrow companies, or attorneys for the buyer or seller. In some parts of the country, a settlement may be conducted by an escrow agent. Unlike other types of settlement, the parties may not meet around a table to sign documents. Ask how your settlement will be handled.... Lenders or title insurance companies may require a survey to disclose the location of the property. The survey is a drawing of the property showing the location of the house and other improvements on the property. You may be able to avoid the cost of a new survey if you determine the company who previously surveyed the property and request an update. Check with your lender and title insurance company on whether an updated survey is acceptable.... Title Insurance: insurance that protects your lender against any title dispute that may arise over your property. Through a title search, the lender verifies who the actual property-owners are and whether the property is free of liens. The title search company then issues title insurance which protects the title of the property against any unpaid mortgages and judgments. In case a claim is made against the property, the title insurance provides legal protection and pays for court fees and related costs. You may also purchase Owner’s title insurance, which protects you as the homeowner.

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29 Colo. Real Estate Title Standards no. 1.1.5 (Colo. Bar Ass’n 2013).
In many states, the seller pays the cost of the Owner’s Policy for the purchaser. The policy may not include extended coverage (including survey and mechanic’s lien coverage), which the purchaser could separately request. The policy to be purchased may be the ALTA Owner’s Policy or the ALTA Homeowner’s Policy, which provides substantial additional coverage. Customary “seller pay” jurisdictions, where the seller typically pays for the Owner’s Policy for the purchaser, include Alabama (varies upon buyer and seller contract negotiations), Alaska, Arizona, Arkansas, California (varies from county to county, from seller paid—particularly in Southern California—to buyer paid to split 50-50), Colorado, Florida (varies throughout the state, depending on the county where the property is located), Idaho, Illinois, Indiana (seller pays the cost in most but not all areas of the state), Kansas (seller pays the cost unless contract specifies otherwise), Michigan, Missouri (seller pays the cost in western Missouri; buyer pays the cost in eastern Missouri), Montana, Nebraska (the cost is often split by seller and buyer), Nevada, New Mexico, North Dakota (seller pays for the Owner’s Policy and for satisfaction), Ohio (varies throughout the state, subject to the terms of the sales contract), Oklahoma (varies; buyer typically pays for the Owner’s Policy and seller provides the abstract), Oregon, South Dakota (the cost may be split between buyer and seller), Tennessee (generally, seller pays the cost, but varies throughout the state from county to county), Texas, Utah, Washington, Wisconsin, and Wyoming. In other locations, the frequency of obtaining Owner’s Policies varies greatly from less than 20 percent to more than 80 percent. Simultaneous Owner’s Policy and Loan Policy transactions reflect about 33 percent of all transactions. Loan transactions constitute the majority of the remaining policies.

In several states, the title company must provide a full disclosure to the proposed insured before the transaction is complete that discusses the availability of an Owner’s Policy where only a Loan Policy is expected to be issued. A typical example:

(a) A title insurer or title agent that issues a mortgagee’s policy of title insurance on a loan made simultaneous to the purchase of all or part of the residential property securing the loan, if no owner’s policy has been ordered, shall inform the borrower in writing that the mortgagee’s policy is to be issued, that the mortgagee’s policy does not protect the borrower and that the borrower may obtain an owner’s title insurance policy for his protection. This notice shall be provided before disbursement of the loan proceeds and before issuance of the mortgagee’s policy. The notice shall be on a form the commissioner prescribes.

(b) If the borrower elects not to purchase an owner’s title insurance policy, the title insurer or title agent shall obtain from him a statement in writing that the notice has been received and that the borrower waives the right to purchase an owner’s title insurance policy. If the buyer refuses to provide the statement and waiver, the title insurer or title agent shall so note in the file. The statement and waiver shall be on a form the commissioner prescribes, and shall be retained by the title insurer or title agent for at least five (5) years after receipt.33

Under Real Estate Settlement Procedures Act (RESPA) Section 9, the seller may not require the buyer to purchase an Owner’s Policy from any particular title company:

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.34

RESPA Section 9 does not prevent the seller from requiring that an Owner’s Policy be issued by a particular title company if the seller pays for that policy and does not require that other title insurance to be paid by the buyer also be issued by that company.35 Economic coercion, such as providing that the seller will pay transfer taxes only if the seller chooses the title company, has been rejected, but the offering of discounts or packages is lawful.35

The general advantages of a title policy over the reliance on a warranty or simple title examination should be obvious and clear:

- Title insurers are regulated by their state of domicile and each state in which they do business in order to assure proper business conduct and continued solvency of the title insurer (although some title insurers do become insolvent).

- Warrantors may cease to exist or die, in which case the idea of relying on the grantor’s warranty may be illusory.

- Warranty deeds may include broad exceptions to the warranty (e.g., matters of record).

- Title examinations are only rarely based on sovereignty searches (alone or in combination with starter files, such as a base file, Owner’s Policy, Loan Policy, in some cases, a commitment, but not a Junior Loan Policy or a Trustee’s Sale Guarantee), whereas the title insurer insures against any outstanding defects, liens, or encumbrances on the title, regardless of when created.

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Title examinations may or may not be backed by an Errors and Omissions Policy, but that coverage may lapse as well.

- Title insurance will provide a defense to the insured and indemnity against loss; defense is likely not to be provided by a warrantor or title examiner.

Significantly, the mortgagor is not a third-party beneficiary of a Loan Policy issued to its lender, even if the borrower paid for the policy. Buyers of land and borrowers often do not understand the nature of title insurance or what title insurance can do for them. They often do not realize that there are many off-record matters, such as surveys, mechanics’ liens, and unrecorded easements that can affect their title and can be covered by an Owner’s Policy. They often do not appreciate the significant value of the obligation of the title insurer to defend them and their title if they are sued on an insured title matter and they are an “Insured” under the Owner’s Policy. Borrowers sometimes misunderstand the Loan Policy and assume that the title insurer will protect them if the lender is sued, even though the reality is that typically will not occur, and the borrower will have to hire separate counsel. The reality also is that the title insurer may be subrogated to the rights of the lender if the title insurer makes payments to the lender. In some cases, the title insurer may resolve a claim in a way that benefits the borrower, but often that is not the case and it cannot ever be assumed. Buyers also wrongly believe that an existing Owner’s Policy issued to the seller when the seller acquired title will protect the buyer. However, absent being named as an Insured, the buyer is not entitled to defense by the title insurer or to indemnity from the title insurer. Although the Owner’s Policy issued to a seller contains warrantor’s coverage, that coverage is for the direct protection of the seller, and it is not for the benefit of the buyer. Any warranty liability will have multiple limitations:

1. If the deed is a limited or special warranty deed, the warranties will not be matters for which the seller is protected since those matters will arise after the prior policy or be caused by the seller and, in either case, will not be covered by the Owner’s Policy issued to the seller.
2. Many general warranty deeds, the type of deeds that will maintain warrantor coverage under the Owner’s Policy, will incorporate additional exceptions or limitations on the warranties that will potentially eviscerate the warranties (e.g., matters of record, easements of record).
3. Warranty deeds are limited to the consideration paid by the buyer, so that if the buyer adds improvements, the buyer is fully protected only if the buyer has an Owner’s Policy for the full cost or value of the land.
4. Sellers may not be available or in existence so that the buyer can sue them and indirectly attempt to force the title insurer to benefit the buyer.

The buyer also may wrongly assume that the title company resolves all of the outstanding title issues when the sale occurs. It is true that many title matters are often resolved through the satisfaction of the requirements under a title commitment—proof of the seller’s authority is provided, the deeds are executed to the buyers, the mortgages are often released, the liens are frequently cleared, and the outstanding title matters are satisfied. However, this is not always true: some title matters may not be correctly understood, the seller may not have title, the lien may not be released, and the mortgage may be missed in an examination of the title.

A number of states require the title insurer or the title insurance agent that will issue the Loan Policy to insure a purchase money mortgage or a deed of trust to notify the borrower of the availability of an Owner’s Policy at a simultaneous issue rate, which is significantly less than if an Owner’s Policy were issued on its own.

Similarly, it would appear that, because of the materiality of title insurance as protection for the borrower, the attorney also must explain to the Loan Policy will not protect the borrower and that the borrower or purchaser should secure title insurance for his or her protection. However, violation of such law may not create a private cause of action.

The attorney’s duty reaches further and should require the attorney to explain the risks that will be covered by the title policy. The Louisiana Court of Appeals held in Sherwin-Williams Company v. First Louisiana Construction, Inc., that “[w]hen an attorney’s performance fails below the standard of competence and expertise usually exercised by other attorneys in handling such matters, the attorney is liable for any damage to the client caused by his substandard performance.” Thus, even though the buyers in the Sherwin-Williams Company case signed a waiver of an owner’s title insurance policy, the attorney who conducted the closing was guilty of legal malpractice because the buyers were not advised of the hazards related to possible mechanics’ liens on the recent construction.

It has been asserted that an attorney will be guilty of malpractice in representing a home purchaser if the attorney does not require the client to obtain a title commitment and a title insurance policy, absent a full and complete disclosure to the client of the risk in not securing title insurance. The duty of the attorney would extend to available coverage and would compel the attorney to explain the coverage and consequences of failure to secure such coverage. The cautious

27 MD. CODE ANN., INS. § 22-102.
The attorney would then decline to represent a purchaser who does not acquire title insurance.\(^4\) The attorney is obligated, as reflected by Rule 1.1—Competence of the ABA Model Rules of Professional Conduct, to provide competent representation to the client, which requires sufficient legal knowledge, skill, thoroughness, and preparation. In real estate transactions, that should include advice relating to

1. policy forms that are best suited for the client;
2. appropriate and objectionable exceptions, such as the standard exceptions and special exceptions that may give rise to substantial risks for the client;
3. endorsements;
4. affirmative insurance where available; and
5. other specialized title insurance products.

It is particularly important that the attorney be familiar with the lesser-known title insurance products (such as those discussed in Section IV of this book) in order to explain and advise on the risk of failure to secure the best title insurance coverage.

A claim for legal malpractice must establish the following elements: \("(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence."\(^2\)

An attorney may owe a duty of care to a person who is not a client if the attorney knows or should know that such person will rely on the attorney's representations and the person is not too remote.\(^5\) The effect of this principle is to discard the former privity requirement and permit recovery against an attorney by a non-client for negligent misrepresentation. "A lawyer may also avoid or minimize the risk of liability to a non-client by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself."\(^6\)

An attorney who holds himself/herself out as an expert or specialist in a field is subject to the standard of the reasonably prudent expert attorney in that field.\(^6\)

However, the attorney is not strictly liable for an unfavorable result. "If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith."\(^6\)

Given these responsibilities of the attorney, it is reasonable to assume that the duty of care includes the recommendation that the client acquiring a residence secure

- an Owner's Policy, which would be an ALTA Homeowner's Policy where available;
- extended coverage;
- a closing protection letter (CPL); and
- available and relevant endorsements, such as
  - ALTA 9.2-06 (Covenants, Conditions, and Restrictions—Improved Land—Owner’s Policy),
  - ALTA 28.2-06 (Encroachments—Boundaries and Easements—Described Improvements), and
  - ALTA 35.1-06 (Minerals and Other Subsurface Substances—Improvements).

On commercial transactions, the attorney faces an even greater burden in adequately representing the client and should recommend

- an Owner’s Policy or a Loan Policy, as applicable;
- extended coverage;
- a CPL, with verification of issuance and continued validity;
- available and relevant endorsements, such as
  - endorsements relating to covenants, survey issues, minerals and subsurface substances, loss determination, taxes, special use (e.g., zoning), special mechanic’s lien coverage, project use, and unusual loan document issues (e.g., shared appreciation, swaps, and re-characterization);

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\(^{7}\) McCormish v. F. E. Appling Interests, 991 S.W.2d 787, 784 (Tex. 1999) (rehearing of cause overruled).


\(^{9}\) Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989).
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6. Secondary Market Demand
A title insurance policy insuring a mortgage is generally required by the Fannie Mae Single Family Selling Guide (first mortgage, Section B7-2-01), the Fannie Mae Multifamily Selling and Servicing Guide (Section 323), the Freddie Mac Single-Family Seller/Servicer Guide (a mortgage title insurance policy or an attorney’s title opinion or certification, Section 39.1), and the Freddie Mac Multifamily Seller/Servicer Guide (Section 29.1).

B. WHAT DOES TITLE INSURANCE DO AND NOT DO?

1. Statutory Definition of Title Insurance
Title insurance is an obscure line of insurance. Title insurance insures with respect to the title to real property. Title insurance may insure various rights in and uses of the land, such as fee simple, easement, profit a prendre, some licenses, surface rights, air rights, subsurface rights, mineral rights, covenants running with the land, and liens. Title insurers may operate within all jurisdictions of the United States except in Iowa (but title insurers may insure title to land in Iowa from other locations), Guam, Northern Mariana Islands, Puerto Rico, U.S. Virgin Islands, and numerous foreign countries (either by doing business in the foreign countries or insuring in the United States).

The standard title insurance policy insures against
• defects in the title;
• liens and encumbrances on the title;
• adverse ownership of or rights in the title;
• lack of legal right of access to the land;
• unmarketability of the title;
• validity of the lender’s insured mortgage; and
• priority of the lender’s insured mortgage.

Title insurance agrees to provide defense as to insured matters, which may constitute 30–40 percent of the aggregate claims related expenses of the title insurer.

Title insurance also may insure with respect to the security interests and other rights in the personal property in approximately half of the states, including Arkansas, California, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin, as well as in Puerto Rico. Uniform Commercial Code (UCC) insurance as a casualty product may be available for issuance in some other jurisdictions.

Title insurance insures the title to the land and generally does not insure as to the physical condition of the land. There are widespread exceptions to this generalization; in some cases, title insurance does insure with respect to the physical condition of the land, such as the types of improvements located on the land (ALTA 22 Series (Location) endorsements), the location of the improvements (ALTA 9 Series (Covenants, Conditions, Restrictions; Encroachments; Minerals; and Private Rights) endorsements and ALTA 28 Series (Encroachments and Easements) endorsements), and the nature of physical access (ALTA 17 Series (Access) endorsements). Each of these coverages is facilitated by a survey or inspection of the land. Similarly, title insurance may insure as to the physical occupancy of the land by deleting any exception for the rights of the parties in possession or the rights that would be discovered by an inspection or survey of the land.

The following is an example of a definition of title insurance established by the Nebraska Revised Statutes and derived from the National Association of Insurance Commissioners (NAIC) Title Insurers Model Act:

Title insurance business or business of title insurance means:
(a) Issuing as a title insurer or offering to issue as a title insurer a title insurance policy;
(b) Transacting or proposing to transact by a title insurer any of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of a title insurance policy:
   (i) Soliciting or negotiating the issuance of a title insurance policy;
   (ii) Guaranteeing, warranting, or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units, and proprietary leases and for all liens or charges affecting the same;
   (iii) Handling of escrows, settlements, or closings;
   (iv) Executing title insurance policies;
   (v) Effecting contracts of reinsurance; or
Many states, such as in South Carolina, statutorily authorize well within the general scope of any definition of title insurance, given that the lack of access might result in an

Some states, such as Alabama, do not explicitly address the rights of access to the land, but this coverage of access is listed in this subdivision in a manner designed to evade the provisions of the Title Insurers Act;...

The Nebraska definition is consistent with the prevailing understanding of title insurance, which includes a guarantee of a search, a warranty of a search, and the insurance of other rights in the title to the land, such as the rights arising out of the zoning or building permits.

Another example of a law authorizing the insurance of a broad set of rights relating to real property is Michigan law, which authorizes the insurance against matters “adversely affecting the rights of use, enjoyment, or disposition of the real estate”:

"Title insurance" means the insuring, guaranteeing, or indemnifying of designated owners of real estate or any interest in real estate against loss or damage that may result because the title is vested in a manner otherwise than as stated in the title insurance policy, because the title is unmarketable, or because the title is subject to liens, encumbrances, or other matters adversely affecting the rights of use, enjoyment, or disposition of the real estate, and not excepted in the policy, all in accordance with the terms of a title insurance policy approved as to substance and form, or doing anything equivalent in substance to any of the foregoing in a manner designed to evade the provisions of this chapter....

"Title insurance policy" means any policy or contract insuring, guaranteeing, or indemnifying against loss or damage suffered by owners of real estate or by other persons interested in the real estate by reason of liens, encumbrances upon, defects in, or the unmarketability of the title to the real estate, or other matters affecting the title to real estate or the right to the use and enjoyment of the real estate, and insuring, guaranteeing, or indemnifying the condition of the title to real estate or the status of any lien on the real estate."

Most states do not, by definition, address the effective date of coverage, so that the statute expressly authorizes insurance only as to the conditions existing on or before the Date of Policy. Consequently, most state laws clearly allow "post-policy" coverage of matters such as gap coverage, mechanic's lien coverage to the lender, street assessment coverage to the lender, future advances and numerous other endorsements, and several Covered Risks in the ALTA Homeowner's Policy, ALTA Expanded Coverage Residential Loan Policy—Assessments Priority (04-02-15), and ALTA Expanded Coverage Residential Loan Policy—Current Assessments (04-02-15). Even in those few states, such as Alabama, Connecticut, Hawaii, Kansas, Nebraska, and Oklahoma, that state that the insurance policy may insure as to "conditions existing on or before the date of the policy" or similar language, the statutes do not appear to be exclusive in listing coverage available, so long as the insurance provided is substantially equivalent.

Some states, such as Alabama, do not explicitly address the rights of access to the land, but this coverage of access is well within the general scope of any definition of title insurance, given that the lack of access might result in an unmarketable title and that access insurance may entail insurance of an easement or other right:

Title insurance policy or policy. A contract insuring or indemnifying against loss or damage arising from any or all of the following existing on or before the date of the policy:

a. Defects in or liens or encumbrances on the insured title.
b. Unmarketability of the insured title.
c. Invalidity or unenforceability of liens or encumbrances on the property described in the policy.
d. Lack of legal right of access to the land; or

e. Unenforceability of rights in title to the land....

Many states, such as in South Carolina, statutorily authorize CPLs, and only one state, New York, prohibits CPLs:

(A) Notwithstanding Section 38-5-30, a title insurer may issue closing or settlement protection to a person who is a party to a transaction in which a title insurance policy will be issued, but may not provide any other coverage that purports to indemnify against improper acts or omissions of a person with regard to settlement or closing services.

47 NEB. REV. STAT. § 44-1981.
48 MICH. COMP. LAWS § 590.7301.
49 See CAL. INS. CODE § 12340.1; FLA. STAT. § 624.608; TEX. INS. CODE § 2501.003.
50 ALA. CODE § 27-25-3.
(B) Closing or settlement protection may indemnify a person only against loss of closing or settlement funds because of one of the following acts of a settlement agent under the terms and conditions of the closing or settlement protection:

1. Theft or misappropriation of settlement funds in connection with a transaction in which a title insurance policy will be issued by or on behalf of the title insurer issuing the closing or settlement protection, but only to the extent that the theft relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land;

2. Failure to comply with the written closing instructions when agreed to by the settlement agent, title agent, or employee of the title insurer, but only to the extent that the failure to follow the instructions relates to the status of the title to that interest in land or the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

(C) A premium charged by a title insurer for each party receiving closing or settlement protection must be submitted to and approved by the department in accordance with this article and must not be subject to any agreement requiring a division of fees or premiums collected on behalf of the title insurer.\(^{52}\)

A few states, including California, Florida, Nebraska, and Utah, impose liability on the title insurers for certain escrow defalcations by their title insurance agents, such as is provided under California law:

(a) If an underwritten title company is placed into bankruptcy, receivership, or conservation by the commissioner, each title insurer operating under an underwriting agreement with the underwritten title company during the six months prior to the earliest of the conservation, bankruptcy, or receivership shall be liable for its proportionate share of the commissioner’s costs and any escrow and sub-escrow account shortages as determined by the calculations set forth in subdivisions (b) and (c).

(b) If, during the six months prior to the earliest of the establishment of a conservation, bankruptcy, or receivership under subdivision (a), the underwritten title company was authorized by underwriting agreements to issue title policies for more than one title insurer, the liability of each title insurer is determined by multiplying the amount of the total escrow and sub-escrow shortages, as well as the costs, and expenses, as set forth in subdivision (c), by that title insurer’s percentage of the underwritten title company’s net premiums for policies issued by each title insurer during the 12-month period preceding the earliest of the establishment of the conservation, bankruptcy, or receivership, with each title insurer’s liability pursuant to this subdivision to be referred to as its proportionate share.\(^{53}\)

Some states, such as California, Hawaii, Idaho, Vermont, and Wyoming, authorize insurance with respect to promissory notes, such as appears in California law:

Every domestic title insurer may issue title policies and may also insure:

(a) The identity, due execution, and validity of any note or bond secured by mortgage.

(b) The identity, due execution, validity, and recording of any such mortgage.

(c) The identity, due execution and validity of evidences of indebtedness issued by this State, or by any political subdivision or district therein, or by any private or public corporation.\(^{54}\)

A majority of states prohibit the title insurer from guaranteeing debts, such as Ohio and Pennsylvania:

**Business prohibited**

A title insurance company shall not engage in the business of guaranteeing the payment of the principal or the interest of notes, bonds, or other obligations secured by mortgages upon real property. A title insurance company shall not engage in the business of guaranteeing the completion of improvements in this state. Notwithstanding section 1735.01 of the Revised Code, a title guarantee and trust company may not guarantee the collection of interest and principal of mortgage loans.\(^{55}\)

**Prohibition upon guaranteeing mortgages**

A title insurance company shall not, in any manner whatsoever, guarantee the payment of the principal or the interest of bonds or other obligations secured by mortgages upon real property.\(^{56}\)

A few states do not allow issuance of Usury Endorsements (e.g., Alaska, Idaho\(^{57}\), Kansas, and Missouri, and such endorsement is not approved in Delaware, Florida, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, and Vermont), Zoning Endorsements (e.g., New York), or insuring around outstanding enforceable liens (e.g., Idaho\(^{58}\) and Texas\(^{59}\)). Texas requires the following promulgated mechanic’s lien exception on construction loan mortgages:

“Any and all liens arising by reason of unpaid bills or claims for work performed or materials furnished in connection with improvements placed, or to be placed, upon the subject land. However, the Company does insure the Insured against loss, if any, sustained by the Insured under this Policy if such liens have been filed with the County Clerk of ________________ County, Texas, prior to the date hereof.”

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\(^{52}\) S.C. CODE ANN. § 38-75-1010.

\(^{53}\) CAL. INS. CODE § 12376.

\(^{54}\) CAL. INS. CODE § 12390.

\(^{55}\) O.HIO REV. CODE ANN. § 3953.09.

\(^{56}\) PA. STAT. ANN. § 40, § 910-9.

\(^{57}\) IDAHO ADMIN. CODE R. 18.01.25.005.

\(^{58}\) Id.

\(^{59}\) TEX. P. R. P-11; TEX. INS. CODE § 2502.003.
AND THE FOLLOWING "PENDING DISBURSEMENT" PARAGRAPH:

"Pending disbursement of the full proceeds of the loan secured by the lien instrument set forth under Schedule A hereof, this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to, the title up to the face amount of the policy. Nothing contained in this paragraph shall be construed as limiting any exception under Schedule B, or any printed provision of this policy."61

2. Monoline Restrictions

An understanding of title insurance requires the recognition that title insurers are monoline insurers and may not engage in other lines of insurance. A majority of the states have a monoline restriction, as does the NAIC Title Insurers Model Act. Those states and jurisdictions include Alabama, Alaska, Arizona, Arkansas, California (expressly extraterritorial), Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York (expressly extraterritorial), Ohio, Oklahoma, Oregon (in Oregon only), Pennsylvania, South Dakota, Tennessee, Texas, Utah (if order, applicable outside of state), Virginia, Washington, Wisconsin (possible extraterritorial application), and Wyoming.

The monoline approach is used in much of the United States, in contrast to the multiline insurance practiced in the United Kingdom and the remainder of Europe.

A monoline company insures under only one line of insurance and does not insure other types of risk. Consequently, property, casualty, and mortgage guaranty companies that provide mortgage impairment products relating to the priority of a residential lender’s mortgage are said to violate the monoline restraints in any other jurisdiction and then conduct business in the host state. The reasoning of the monoline restriction is that

1. some lines of insurance require specialized expertise, and these will be maintained best by separate lines of insurance;
2. some lines contain higher and lower risks, and it is best to maintain the separateness of the risks; and
3. given varied risks, the reserves can best be maintained by retaining separate lines for the different types of risk.

Typifying the monoline statute is Louisiana:

A. (1) No insurer that transacts any class, type, or kind of insurance other than title insurance shall be eligible for the issuance or renewal of a license to transact the business of title insurance in this state.

(2) No title insurance shall be transacted, underwritten, or issued by any insurer transacting or licensed to transact any other class, type, or kind of business.62

California law imposes a multistate monoline restriction and prohibits the title insurer from violating its limitations by engaging in any other lines of insurance anywhere in the United States:

An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof.63

The monoline stricture that reaches nationally is known as the "Appleton Rule."64 New York’s monoline law requires that insurers doing business in New York comply with the monoline requirements for all business nationally (named the "Appleton Rule" because the rule was adopted when Henry Appleton was Deputy Superintendent of Insurance):

Additional requirements for foreign or alien insurer’s license

... (c) No foreign insurer shall be licensed to do in this state any kind of insurance business, or combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No foreign insurer shall be authorized to do business in this state if it does in this state or elsewhere any kind of business, other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is licensed to do in this state.

(d) No alien insurer shall be licensed to do in this state any kind of insurance business, or any combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No alien insurer shall be authorized to do an insurance business in this state if it does anywhere within the United States any kind of business other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state.
(e) Except as otherwise specifically provided in this chapter no foreign insurer and no United States branch of an alien insurer shall be or continue to be authorized to do an insurance business in this state if it fails to comply substantially with any requirement or limitation of this chapter, applicable to similar domestic insurers hereafter to be organized, which in the judgment of the superintendent is reasonably necessary to protect the interests of the people of this state.

(f) No foreign insurer and no United States branch of an alien insurer which does outside of this state any kind or combination of kinds of insurance business not permitted to be done in this state by similar domestic insurers hereafter organized, shall be or continue to be authorized to do an insurance business in this state, unless in the judgment of the superintendent the doing of such kind or combination of kinds of insurance business will not be prejudicial to the best interests of the people of this state.65

This application of an extraterritorial monoline restriction actually seems to be inherent in most monoline limits, unless specifically addressed by the law, since otherwise a multiline insurer, engaged in practices in other states that would be considered extrahazardous if conducted in the host state, may undertake those practices, such as mortgage guaranty, in other locations and incur the same risk profile as a multiline insurer in the host state.

3. Application of Monoline Restrictions

a. Warranties

Title insurance has always competed against warranties of title, title searches, and title examinations, with or without abstracts of title. The advantage of title insurance over these alternatives has long been argued: a title insurer’s deep pocket generally exists to pay a title insurance claim, but a deep pocket does not necessarily exist in a claim against the warrantor, searcher, or examiner, although the warrantor may be financially strong, or the searcher or examiner may have malpractice or errors and omissions insurance, subject to deductibles, maximum liability, and term of coverage.

Warranties, with agreed-upon limits of liability, may be structured on the basis of an abstract of title, which may be limited in the time or nature of the search, or may be based upon information in the real property records, on a credit report, or combination of these alternatives. In some jurisdictions, to qualify as an abstract, however, the list may be required to include all recorded documents in the chain of title. The warranty may be backed by an Errors and Omissions Policy or other property and casualty policy that may inure only to the warrantor. “[T]he fact that an insurance product is labeled as a ‘warranty’ does not prevent it from being considered title insurance if it meets the statutory definition as set forth above.”66 As understood by the Department, mortgage impairment protection products, whether or not they use the term ‘insurance’ or ‘warranty’ in their name, purport to insure the validity or the priority of the insured mortgage. Be advised that the fact that a mortgage impairment product only covers second or third mortgage lenders does not change the Department’s position that such products are title insurance. Any product that, in essence, insures against loss by reason of defective title or incorrect title searches is title insurance, regardless of the name under which it is marketed to consumers.66

In the last 20 years, three additional products have been offered that have competed with title insurance: Title Option Plus (TOP), Radian Lien Protection (RLP), and Mortgage Impairment Insurance (MII). The essence of the RLP and MII products has been to require that a legal description (such as through the last deed, as one alternative) be secured, an affidavit of the borrower be used, an exception be made to liens on the credit report, and the parameters of the loan programs be acceptable (such as the loan-to-value ratio (LTV), the FICO credit score, the limitations on late payments within the last 12 months, the type of residential property, and the existing ownership only). The crux of RLP and MII is to insure against liens that are not shown on the credit report. The TOP program is based on a warranty.

b. Title Option Plus (TOP)

The TOP program is embodied in three interrelated contractual agreements [furnished to Freddie Mac in lieu of a traditional title policy or attorney’s title opinion].…

The first contract, the Master Agreement, is a “warranty” by NMI [the lender, Norwest Mortgage, Inc.] to Freddie Mac [and Fannie Mae] that those mortgages NMI sells to Freddie Mac [or Fannie Mae] are secured by a first lien. NMI’s contractual undertakings under the Master Agreement protect Freddie Mac against any title claims or problems, including non-record risks, that may affect Freddie Mac’s interest in the loans it has purchased. If a defect appears and cannot be cured, NMI agrees to repurchase the loan, if the claim cannot be otherwise resolved. (It is noted that NMI only warrants

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64 N.Y. Ins. Law § 1106.
65 Donald Bryan, Acting Comm’r of Banking & Ins., Bulletin No. 05-05, N.J. Ins. Notices and Bulletins (Mar. 9, 2005).
the title and priority of a lien, when the title search and title report is performed by ATI [the title
insurance agent, American Land Title Company, doing business as ATI Title Company, a wholly-owned
subsidiary of NMI]).

The second contract is a title condition report prepared by ATI and furnished to NMI to verify that, as
a matter of public record, NMI’s mortgage is secured by a first lien. ATI remains liable to NMI for any
on-record defects that are missed in the title search, while NMI assumes the risk of off-record
defects.

The third contractual arrangement is the Guarantee Agreement from Norwest [the guarantor,
Norwest Corporation, the bank holding company which owned NMI] to Freddie Mac under which
Norwest guarantees NMI’s title-related obligations to Freddie Mac.67

TOP was generally, but not universally, determined to be title insurance transacted, sold, or marketed in
violation of applicable insurance laws in most, but not all, jurisdictions that administratively or judicially
considered it.68 Numerous state insurance departments considered TOP:

<table>
<thead>
<tr>
<th>STATE</th>
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<tr>
<td>Colorado</td>
<td>The Colorado Division of Insurance concluded that TOP is title insurance.</td>
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<tr>
<td>Connecticut</td>
<td>The Connecticut Department of Insurance concluded that TOP is title insurance.</td>
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<tr>
<td>Idaho</td>
<td>The Idaho Attorney General concluded TOP is title insurance; a later ruling by a hearings officer determined that TOP is not title insurance.</td>
</tr>
<tr>
<td>Illinois</td>
<td>The Illinois Department of Financial Institutions concluded that TOP is title insurance.</td>
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<tr>
<td>Iowa</td>
<td>The Iowa Insurance Division concluded that TOP is title insurance.</td>
</tr>
<tr>
<td>Kansas</td>
<td>The Kansas Insurance Department and hearing determined that TOP is title insurance.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>The Minnesota Commissioner of Commerce concluded that TOP is not title insurance.</td>
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<tr>
<td>New York</td>
<td>The New York State Superintendent of Financial Services concluded that TOP is title insurance.</td>
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<tr>
<td>North Carolina</td>
<td>The North Carolina Attorney General concluded that TOP is title insurance.</td>
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<tr>
<td>Oklahoma</td>
<td>The Oklahoma Insurance Commissioner concluded that TOP is title insurance.</td>
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<tr>
<td>Oregon</td>
<td>The Oregon Department of Consumer and Business Services, Insurance Division concluded that TOP is title insurance.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>The Pennsylvania Department of Insurance concluded that TOP is title insurance, and a later hearing was conducted.</td>
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<tr>
<td>Tennessee</td>
<td>The Tennessee Department of Commerce and Insurance concluded that TOP is title insurance.</td>
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<tr>
<td>Texas</td>
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</tr>
<tr>
<td>Utah</td>
<td>The Utah Insurance Department concluded that TOP is title insurance.</td>
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### c. Radian Lien Protection (RLP)

RLP was offered as mortgage pool insurance (in a Mortgage Pool Insurance Policy) for an entire mortgage pool
on second mortgages, home equity mortgages, and refinances by existing owners at a fixed price of $275. The
coverage for monetary liens was limited to 50 basis points (0.5 percent of the initial principal) on the mortgage
pool. At one time, the program required that loans must be made to borrowers with a FICO credit score of 570
or greater, the loan amounts were not to exceed $650,000, and the maximum LTV/CLTV (combined loan-to-
value ratio) could not exceed 100 percent on loans up to $650,000. RLP, similar to some guarantees and
limited-coverage home equity policies, did not cover all of the defects in the title (nor have a number of other
home equity products) and did not provide for defense. Standard & Poor’s concluded that RLP was an
acceptable substitute on the loans it rated.

RLP was a limited-coverage policy, and thus did not include many of the provisions that normally appeared in
an ALTA policy. The differences from the ALTA policies and endorsements were not unique to RLP; RLP was
similar to some of the other home equity products used by title insurers. Some of the limitations to the
coverage under RLP included the following:

- RLP did not insure
  - that the borrower owns the land.
  - against an invalid mortgage because of the failure of the borrower’s spouse (or partner in
civil union) to join in the mortgage.
  - against liens recorded after the mortgage.
  - the location of a house with the address on the land.
  - the priority over later filed environmental protection liens.
  - against survey matters, such as boundary conflicts and encroachments.
  - against lis pendens or pending suits claiming the title.
  - the access to the land.
  - against the damage due to the use of the surface for mineral development.
  - that the mortgage was valid.

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mortgages, unless the mortgages were duly recorded within 48 hours after the funds were advanced.
- against defective recording of the mortgage.
- against forgery or impersonation causing the mortgage or title to be invalid.

- RLP required the lender to
  - advance money to pay taxes.
  - restore any damaged property.
- RLP did not promise to hire a lawyer as to the insured matters.
- RLP had various parameters, such as credit scoring, no purchase money loans, and aggregate loss limits. Aggregate loss limits were not applicable to title insurance home equity products.
- RLP protected only the named insured.

States considering RLP to be title insurance included Alabama, Connecticut, Florida, New Mexico, North Carolina, Pennsylvania, and Texas. Illinois, however, concluded that Radian Guaranty, Inc. (Radian) could sell its RLP if it did not market the product as title insurance, if the claims would be made only if there was a deficiency balance, and if Radian did not sell other mortgage pool products.

The California Insurance Commissioner subsequently issued a cease and desist order that prevented Radian, Amerin Guaranty Corporation, and RadianExpress.com, Inc., from marketing, soliciting, negotiating, and selling the mortgage pool insurance policies (more commonly referred to as the RLP program), which the Insurance Commissioner found to be title insurance under California law and to be an improper combination of mortgage guaranty and title insurance, both of which are subject to monoline limitations. The California monoline limitations have extraterritorial effect and would prevent Radian from conducting business in California if it issued such insurance in any other state.

An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof.  

The court notes, "[t]he RLP policy language providing coverage for undisclosed liens mirrors the foregoing statutory and case law definition of title insurance. The insuring clause in the RLP provides that it insure against 'Loss sustained by reason of the Default...'. Two distinct types of losses are theoretically contemplated under the RLP. As already noted, 'Loss,' as defined by the RLP, includes a traditional mortgage guaranty component—reimbursement to the lender for financial loss due to default of the borrower on a mortgage lien secured by real estate. However, 'Undisclosed Lien Loss' is also included within the definition of 'Loss.' The RLP defines loss arising from an 'Undisclosed Lien' as meaning 'any lien or similar encumbrance which (i) takes priority over the position of a Mortgage Agreement and (ii) was not disclosed on the Ownership and Legal Description Verification Report (with Tax Status Report), the Mortgage Lien Report, the Borrower's Application or the Borrower's Affidavit obtained by the Insured prior to the consummation of such Mortgage Agreement and (iii) was not otherwise known to the Insured prior to the Consummation of such Mortgage Agreement.' The Court of Appeal of California upheld the cease and desist order."

d. Mortgage Impairment Insurance (MII)

This type of insurance occasionally insures the lender against failure by the lender to have sufficient title insurance, not due to the lender's willful fault. Some of the MII policies insure matters that may be asserted to be covered by title insurance. For example, some policies may insure against loss resulting from

1. failure to pay real estate taxes;
2. error, neglect, omission, or breach of duty in actual performance or failure to perform activities, including obtaining a tax bill showing ownership, review of credit bureau report showing liens and property address, or owner's affidavit relating to title or impairment by discovery of a previously unknown property interest in the collateral;
3. perfection of a second lien mortgage that could not be obtained despite timely filing of the mortgage;
4. loss by reason of defective title, if the insured required title insurance; and
5. impairment of lien, due to an unknown interest, if the lender required a tax bill showing ownership, a credit report showing liens and property address, and/or an owner's affidavit of title, and presented the (second) mortgage for recording.

Typically, this type of insurance is offered on junior home equity loans, but it is equally adapted to first lien refinances. It is sometimes offered on a surplus-line basis. Some of the policies are written as master policies with a stated maximum limit of liability. Some policies are called equity or lending activities policies. The terms

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69 CAL. INS. CODE § 12360.
used in such a policy often include "lien priority," "lending activities," "mortgage impairment," and "undisclosed liens." This coverage should be contrasted with collateral protection insurance, which provides insurance because of the consumer’s failure to provide evidence of insurance and excludes title insurance.²¹

Often, the language used in mortgage impairment policies is rather obviously title insurance. Examples include the following:

- "...guarantees the lender's second lien position...."
- "Coverage is extended...to loss incurred by the Assured...due to impairment to the Assured's Second Position Mortgage Interest.... The Mortgage Interest must have been impaired due to previously unknown Mortgage Interest or lien held by one who is not liable on the Assured's Second Position Mortgage."
- "Your inability to enforce your rights under a second mortgage loan, due to the existence of a superior lien of which you were unaware; solely as a result of you not performing a standard title search prior to recording your lien or encumbrance on property against which you hold a second mortgage interest."
- "...guarantees the lender's second mortgage position."  
- "...indemnifying the Named Insured against loss...caused or occasioned by an act or omission of the Borrower, whether fraudulently or not, or a servicer, including a failure to disclose a lien or mortgage position secured by Borrower's property...."
- "...insures your mortgagor's representations regarding the non-existence of mortgages, liens, or Judgments, which would impair your intended second mortgage position."
- "Loss means the amount of your second mortgage interest, after foreclosure and sale of the property, you are unable to recover from the proceeds of said sale because of the existence of an encumbrance not known or disclosed to you as required by your loan application and Property Owner Affidavit."
- "WE will pay YOU for Loss, in excess of the deductible amount...that is the result of a Foreclosure provided...the Superior Lien was recorded before the closing of the Second Mortgage Loan; and...YOU had no knowledge of the Superior Lien at the time of the closing of the Second Mortgage Loan because YOU made an intentional decision not to perform a standard title search prior to closing the Second Mortgage Loan...."

A number of states have rejected MII products, because they were construed as title insurance. Those states include Alabama, California, Connecticut, Florida, Illinois, Kansas, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, and Texas.

The ALTA filed a complaint in the U.S. District Court for the Northern District of California under Cause Number C 05 4354 on October 26, 2005, in connection with the issuance of "mortgage impairment" insurance and sought a determination that the mortgage impairment/lien priority insurance of the defendants constituted title insurance or illegal bundling of title insurance risks that is prohibited because the defendants are not licensed as title insurers and also sought injunctive relief. The ALTA alleged:

An insurance company that is not a licensed title insurer cannot issue title insurance and cannot provide insurance coverage for a title insurance risk. Indeed, in California, as in the majority of states, title insurance is legislatively mandated to be mono-line, meaning that a licensed title insurer cannot be licensed to issue any other class or line of insurance. Similarly, these mono-line statutes [in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming] clarify and confirm that an insurance company not licensed as a title insurer cannot issue title insurance or, in any way, provide insurance coverage for a title insurance risk.... The risk of loss arising out of undisclosed liens or encumbrances senior to the insured mortgage is commonly referred to in the title insurance industry as lien priority insurance and has always been categorized as title insurance.... The Departments of Insurance of at least thirty (30) states have confirmed that mortgage impairment/lien priority insurance constitutes title insurance and can only be issued by a licensed title insurer. These state determinations consist of Attorney General Opinions, Insurance Bulletins, Cease and Desist Orders and other formal communications. The Court of Appeal for the State of California recently rendered its published opinion confirming that mortgage impairment/lien priority insurance is title insurance and can only be issued by licensed title insurers.... The Department of Insurance of the States of Indiana, New Jersey, North Carolina, and Tennessee have issued formal Insurance Bulletins confirming, under their respective state laws, that mortgage/lien priority insurance is title insurance and can only be issued by licensed title insurers.

²¹ 815 ILL. COMP. STAT. 180/5; N.J. STAT. ANN. § 17:16V-2; W. VA. CODE § 46A-3-108a.
The complaint joined as defendants the following parties and alleged:

- Great American Insurance Company, Great American Assurance Company, and Agricultural Insurance Company (collectively, Great American), licensed as property and casualty insurers, issue insurance policies Form 5701 and Form 5701c (Great American Policies) as errors and omissions policies, but include insurance against loss arising from senior undisclosed liens or encumbrances. The Great American Policies are marketed, offered, and/or sold under various names, including Premier Equity Protector.

  Form 5701 "includes or bundles mortgage impairment/lien priority insurance with a standard errors and omissions policy via the use of endorsements to the standard policy" with endorsements such as Coverage G—Identification of Superior Positions, Coverage J—Validation of Owners Affidavit, and Coverage N—Affiliated Title Search Activities.

  Endorsement Coverage G revises the definition of "mortgage lending activities" to include "the process of identifying all legally superior rights, encumbrances and security positions to the mortgage agreement." Endorsement Coverage J deletes the exclusion relative to the failure to determine the accuracy of the Owner's affidavit. Through this endorsement, vesting coverage is given.

  Endorsement Coverage N revises the definition of "mortgage lending activities" to include title searches.

  Form 5701c "bundles mortgage impairment/lien priority insurance with the definitions of the risks insured under the policy." The policy defines "mortgage lending activities" as "the process of identifying all legally superior rights, encumbrances and security positions to the mortgage agreement via the credit bureau report; or all professional services of the Insured or an affiliate of the Insured in performing or failing to perform courthouse searches or other record searches in conjunction with the origination of a mortgage agreement; or the process of filing the mortgagor's security interest in the property securing the mortgage agreement with the proper Public Officer or Office or obtaining accurate and sufficient public information to record the mortgage agreement in the appropriate lien position." The States of North Carolina, Oregon, and Colorado have determined these are illegal title insurance policies or illegal bundling of title insurance. The States of Ohio and Florida also questioned the validity of the policies, and Great American subsequently withdrew the forms from the states.

- Group 9, Inc. has acted as an agent/producer for Great American in the offering and selling of its policies.

- Seattle Specialty Insurance Services, Inc. also has acted as an agent/producer of Great American in the offering and selling of its policies.

- Zurich North American and Zurich American Insurance Company (collectively, Zurich), authorized to issue property and casualty insurance and errors and omissions policies under its property and casualty insurance licenses, offers an insurance policy known as the Processors Liability Policy or the Mortgage Lending Activities Protection Policy (Zurich Policy) as an errors and omissions policy. The Zurich Policy insures against loss arising from senior undisclosed liens or encumbrances by including or bundling the insurance. "The policy provides coverage for "Loss resulting from a Mortgage Lending Wrongful Act in connection with [the Insured's] Mortgage Lending Activities." A Mortgage Lending Wrongful Act is defined to mean "any actual and material error, neglect, omission, or breach of duty in the actual performance of, or failure to perform, any Mortgage Lending Activities." Such activities include obtaining a tax bill, a credit report, and borrowers' affidavit; and provide insurance for an error with regard to the priority of the mortgage, undisclosed liens, and encumbrances.

- Fidelity & Deposit Company of Maryland, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.

- Colonial American Casualty and Surety Company, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.

- Empire Indemnity Insurance Company, licensed as a property and casualty insurer and authorized to issue errors and omissions policies under its license, has been unlawfully and wrongfully issuing title insurance through the Zurich Policy.

- Travelers Indemnity Company of America (Travelers), licensed as a property and casualty insurer and authorized to issue property and casualty policies, offers insurance policies known as the Home Equity Protector (HEP Policy) as a property and casualty policy and the Mortgage Impairment Policy Program (MIP Policy) as an errors and omissions policy, which include mortgage impairment/lien priority coverage, because they insure against loss arising from senior undisclosed liens and encumbrances. The Mortgage Interest must be impaired because of a previously unknown Mortgage Interest or lien. The Departments of Insurance for the States of North Carolina and Connecticut have determined that the HEP Policy is title insurance and that it cannot be issued by Travelers. The MIP Policy is alleged to include or bundle mortgage impairment/lien priority insurance in a standard Errors and Omissions Policy by endorsements, such as MPI 001—Failure To Pay Real Estate Tax Extension,
Examples of these inexpensive products for junior residential loans included:

- Guaranty National Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies, has been issuing an insurance policy called the Equiguard Policy as an Errors and Omissions Policy, which includes mortgage impairment/lien priority coverage because it insures against loss arising from senior undisclosed liens and encumbrances. The insurance includes "loss which you may sustain during the policy period caused by your inability to enforce your rights under a second mortgage loan, due to the existence of a superior lien of which you were unaware; solely as a result of you not performing a standard title search prior to recording your lien or encumbrance on property against which you hold a second mortgage interest."

- Deerfield Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies under its license, has been issuing the Equity Protection Plus Insurance Policy, which includes mortgage impairment/lien priority coverage because it insures against loss arising from senior undisclosed liens and encumbrances. The policy insures against the inability to enforce rights under a second mortgage loan because of a superior lien of which the insured was unaware, solely as a result of not performing a standard title search before recording the mortgage.

- Safeco Insurance Company and Safeco Financial Institution Solutions, Inc. (collectively, Safeco), licensed as a property and casualty insurer and authorized to issue property and casualty policies, has issued the Safeco Policy as a standard property and casualty policy, which includes mortgage impairment/lien priority coverage and insures against an undisclosed senior lien or encumbrance.

- North American Capacity Insurance Company, licensed as a property and casualty insurer and authorized to issue property and casualty policies, has issued an insurance policy known as the Loan Backer Program and Lien Sentinel (collectively, the North American Policy) as a standard property and casualty policy, which includes mortgage impairment/lien priority coverage and insures against loss arising from senior undisclosed liens and encumbrances.

- BancInsure, Inc. (BancInsure), licensed as a property and casualty insurer and authorized to issue bonds under its license, has issued an insurance policy known as the Lenders Performance Bond as a standard performance bond, which includes mortgage impairment/lien priority coverage and insures against loss arising from senior undisclosed liens and encumbrances.

- Matterhorn Financial Services, Inc. is not a licensed insurer and has acted as an agent/producer of BancInsure in the offering and selling of its policies/bonds.

The ALTA complaint was subsequently dismissed for lack of subject-matter jurisdiction, because of a lack of complete diversity between the ALTA, which brought the action in a representative capacity, and all of its members and all of the defendants. The court also declined to exercise jurisdiction under the Declaratory Judgment Act. "The fact that insurance regulation is a matter that is left up to the states militates against the exercise of jurisdiction under the Declaratory Judgment Act, as does the fact that courts in fewer than half the states have ruled to date on the question whether the 'lien protection' policy is a policy of title insurance. Each individual state must decide who can be licensed to sell title insurance policies within its borders. While such insurance may be illegal, it should generally be enforceable by the insured."
• Stewart Master Residential Junior Loan Policy, EQUICK Policy, and Master Residential Loan Policy (issued by Stewart Title Guaranty Company);
• Mortgage Impairment Protection Insurance Policy (issued by Old Republic National Title Insurance Company);
• Master Equity Line Loan Policy (issued by LandAmerica); and
• Master Lien Protection Loan Policy (issued by Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, and Security Union Title Insurance Company).

Typical exceptions included taxes and assessments not yet due and payable; covenants, conditions, and restrictions, whether or not appearing in the public records; easements and servitudes, whether or not appearing in the public records; minerals and mineral rights, whether or not appearing in the public records; liens or rights to liens for services, labor, or material hereafter furnished; survey matters; and any mortgage, judgment, or other lien or encumbrance, whether or not appearing in the public records, that would be disclosed by a borrower’s affidavit, a tri-merged credit report, any prior title policy to the insured or an affiliate, or agreed to or known by the insured. Such policy would be conditioned on a borrower’s affidavit and tri-merged credit report—the report reflecting a prior mortgage, recordation within a stated time after funding, and use of the same description shown on the last deed pulled—and might be subject to a separate service agreement that entailed additional services, including securing a legal description from the last recorded deed. The lender’s program might require a minimum 625–650 FICO credit score and a maximum LTV/CLTV of 100 percent.

With the Great Recession and the great number of loan defaults, reduced home values, and fraud, issuance of these title insurance products culminated in Bank of America, N.A. v. United General Title Insurance Company and First American Title Insurance Company,74 in Mecklenburg County filed in 2010, seeking damages under master policies and certificates relating to home equity and credit line mortgages for three types of claims: lien position claims (such as matters shown as unsecured on a credit report or which the borrower states are not secured or outstanding), vesting claims (such as where an undisclosed co-owner or spouse did not join in the mortgage), and legal description claims. The complaint alleged that United General Title Insurance Company (United General) and First American Title Insurance Company (First American) appointed Fiserv Solutions, Inc., doing business as Integrated Loan Services (Fiserv) as the agent for the insurers for certain title insurance policies for home equity and credit line loans of lenders that participated in the ILS QuickClose Lien Protection Insurance Program (QuickClose LPI Program), including policies issued to Bank of America, N.A. (Bank of America or Bank) and FleetBoston Financial Corp., including Fleet National Bank (Fleet). Bank of America alleged:

14. Fiserv marketed the QuickClose LPI Program—for itself and on behalf of United General and First American—as a replacement for conducting title searches in connection with the loans processed under the program. A basic premise of the program was that a participating lender would no longer conduct title searches in connection with loans processed under the program in order to verify ownership or to identify existing liens on the collateral property. Instead of conducting a traditional title search, a lender under the QuickClose LPI Program would rely on the borrower’s statements made in applying for the loan, review a credit bureau report for the borrower, and ask the borrower about any secured mortgages shown on the credit report and not disclosed by the borrower in the loan application.

15. The QuickClose LPI Program included an insurance component intended to protect the lender against any risks and losses resulting from the lender not conducting title search prior to closing. Among other things, the insurance policies were intended to protect Fleet and Bank of America against the risks of certain types of title defects—including undisclosed intervening liens, vesting problems, and legal description errors—that would have been discovered had the Bank conducted a full title search.

21. When Bank of America closed a loan under the QuickClose LPI Program, the Bank would notify Fiserv of the new loan and, after loan closing, send the mortgage document to Fiserv. Fiserv was responsible for attaching a legal description (pursuant to a power of attorney) to the signed mortgage or deed of trust and arranging for the signed mortgage or deed of trust to be recorded with the appropriate register of deeds.

22. Bank of America paid a pre-determined fee to Fiserv on each loan as a premium for insurance on the loan and for Fiserv’s services in connection with the loan. On behalf of the insurer, Fiserv issued to Bank of America a certificate of insurance to evidence that the loan was insured under a QuickClose LPI Program master insurance policy issued by insurers such as United General and First American.

25. First American issued several policies to Fleet and/or Bank of America, including, without limitation, FACT Master Loan Policy No. 100066, FACT Master Loan Policy No. 100067, and FACT Master Loan Policy No. 100101 (collectively, the "First American Policies"). (The United General Policy and the First American Policies are referred to together as the "United General and First American Policies.")75

27. Among other responsibilities as agent of United General and First American, Fiserv was authorized to issue insurance certificates in connection with Fleet and Bank of America loans processed under the QuickClose LPI Program. The issuance of an insurance certificate meant that the loan at issue was

insured under the applicable United General Policy or First American Policy, and that the Bank had paid a corresponding premium to United General or First American. The United General and First American Policies insure Bank of America for the following risks, among others:

28. a. The mortgagor shown in the Insured Mortgage not being the named grantee on the last document recorded in the Public Records purporting to vest the mortgagor’s estate or interest in the title to the Land.
b. The description of the Land not being sufficient to impart constructive notice to purchasers and encumbrancers for value and without Knowledge.
c. Any Monetary Lien affecting the title recorded in the Public Records.
d. Invalid execution of the Insured Mortgage because of forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation.
e. Unauthorized execution of the Insured Mortgage (a) under a falsified, expired, or otherwise invalid power of attorney; or (b) by an entity established for estate planning purposes.

29. Each of the United General and First American Policies additionally include or were intended to include a credit endorsement that provided coverage for liens securing debt listed as unsecured on the borrower’s credit report reviewed by Bank of America in underwriting the loan.
30. Each of the United General and First American Policies additionally include or were intended to include a gap endorsement that provided coverage for any liens or other title issues that arose during the time after execution of the mortgage until the mortgage was recorded.
31. As of February 2010, United General and First American have denied at least 2,200 of Bank of America’s claims—representing more than $235,000,000 in losses sustained by the Bank—and have failed to timely respond to at least 2,300 of Bank of America’s claims—representing more than $300,000,000 in losses sustained by the Bank. United General and First American have thus breached the terms of their policies and acted in bad faith.

32. On the vast majority of the loans subject to a claim, Bank of America either cannot foreclose on the loan or foreclosure would not make economic sense because of the defect giving rise to the claim.
33. The United General and First American Policies contain no requirement that Bank of America foreclose in order to pursue a claim.
34. Nevertheless, United General and First American have refused to pay many of Bank of America’s claims unless Bank of America forecloses on the loan at issue, in violation of the policy terms and in bad faith....
35. United General and First American wrongfully have denied Lien Position Claims when the intervening lien giving rise to the claim was not shown on the borrower’s credit report as secured or where the claim otherwise qualified for coverage under the United General and First American Policies.
36. The United General and First American Policies provide coverage for undisclosed intervening liens. For purposes of Bank of America’s claims and the Complaint, an “undisclosed intervening lien” is a lien on the collateral property senior to Bank of America’s insured mortgage that (i) was not disclosed by the borrower and not listed as a secured mortgage on the credit bureau report reviewed by Bank of America during the loan application process or (ii) if listed on the credit bureau report as secured, a lien that the borrower indicated was not secured by the property to be encumbered by the insured mortgage or that the borrower indicated was paid in full and closed by the borrower. For example, Bank of America may have made a loan intending to be in the second position, but an undisclosed intervening lien causes the Bank to in fact be in a third position.
37. The loan underwriting process contemplated by the United General and First American Policies was that the Bank would ask borrowers only about secured mortgage loans shown on the borrower’s credit report, not unsecured loans.
38. The United General and First American Policies included a credit endorsement that provided (using the specific language of the United General Master Policy as an example), “the Company hereby insures the insured against all loss or damage which the insured may sustain by reason of a lien securing a debt shown on the credit report as secured.”
39. In addition, in a letter dated November 5, 2005, First American stated on this point, “Confirming our understanding, we will not interpose as a defense to our liability under any Master Policy we have issued in connection with the QuickClose program...based on the existence of a debt shown as secured on any credit report obtained by the Insured if the Insured obtains an affirmative statement from the Borrower that the debt is not secured by the real estate that is to be encumbered by the insured mortgage and/or has been paid in full and closed by the Borrower provided that the Insured has no actual knowledge that the Borrower’s statement is incorrect.”
40. Under the terms of the United General and First American Policies, the Bank was required to ask borrowers only about lines shown on the credit report reviewed by the Bank during underwriting as secured. This did not include lines listed on the credit report as revolving loans or installment loans, as opposed to a secured mortgage. If a loan was listed as a revolving loan or an installment loan on the borrower’s credit report reviewed during loan underwriting, the United General and First American Policies did not require the Bank to ask the borrower about that loan. If such a line was in fact a mortgage on the collateral property that causes Bank of America to not be in its intended lien position, the United General and First American Policies provided coverage for the claim whether or not the loan officer asked the borrower about the line.
68. By denying Bank of America's Lien Position Claims [allegedly in part based on the expanded knowledge exclusion applicable whether the matter is recorded or unrecorded] when the borrower did not disclose the intervening lien in applying for the loan and the lien was not listed as an open secured mortgage line on the credit report reviewed by the Bank during the loan underwriting process, United General and First American have breached the terms of their policies and acted in bad faith.

... United General and First American wrongfully have denied many of Bank of America’s Vesting Claims on the basis of an exclusion contained in the policies for “[d]efects, liens, encumbrances, adverse claims or other matters (a) created, suffered, assumed or agreed to by the Insured Claimant; (b) Known to the Insured Claimant, whether or not disclosed in the Public Records.”

First American filed a counterclaim alleging that Bank of America failed to comply with requirements for issuance of certificates. The case was later settled in 2011. Increased fraud, rising credit delinquencies, reduced home values, and the inexact nature of credit reports resulted in more claims and reevaluation by several insurers of the value of the limited search master loan policy products.

5. Environmental Superlien Coverage

The Connecticut Insurance Department determined that a form of coverage for environmental liens was casualty insurance. The Connecticut Insurance Department ruled on a request by Lawyers Title for determination “that a title insurance company violates the single line restrictions on title insurance companies mandated by Connecticut General Statutes Section 38-29 if it extends coverage in a title insurance policy against loss or damage incurred from (i) the loss of priority of an insured mortgage or (ii) loss of title to land insured by such policy as a result of the imposition of a statutory lien for the cost of cleanup of a hazardous waste spill created under Connecticut General Statutes Section 22a-452a….” Because of the ‘superlien’ provision of Section 22a-452a, C.G.S., gives the state of Connecticut’s lien for cleanup of a ‘spill’ priority over previously recorded interests, lenders with mortgages on non-residential properties, have required borrowers to obtain coverage to protect against such liens from the title insurers…. [C]ompetitive pressures have compelled title insurers to meet the demands for this special coverage or withdraw from the Connecticut market. According to the Petition, these special endorsements place title insurers in an area of risk assumption outside the business of title insurance in violation of Section 38-29, C.G.S.…. In substantially all other respects not predicated on a search and examination of relevant public records, the undersigned is persuaded by the Parties that a title insurer doing business in Connecticut is prohibited from providing affirmative coverage against the State’s environmental lien…. Extending coverage in a title insurance policy to protect an insured against loss or damage incurred by this risk would constitute an impermissible assumption of casualty risk, outside the lawful business of title insurance…. The risks associated with providing affirmative coverage under a title insurance policy for loss or damage caused by future enforcement of the State’s environmental super lien, are risks that cannot be eliminated by the title insurance underwriting process…. Although it is possible for one to conduct an environmental survey of the property to be insured, such a survey would be inadequate for determining whether a parcel of property is free of contamination. Environmental surveys are based upon sampling techniques, which simply do not eliminate the risk that undiscovered environmentally hazardous material may be present in the soil…. Thus, there will always be the risk that a particular parcel of property contains some undiscovered contaminant that would be the basis for the imposition of the State’s environmental super lien. This risk, given the fact that the expense of an environmental cleanup of a ‘spill’ can be staggering, is a risk of significant nature that would have to be assumed by the title insurer.”

6. Creditors’ Rights Coverage

Over the last several years, title insurers have experienced significant creditors’ rights claims giving rise to doubt as to the wording and use of the Creditors’ Rights Endorsement.

This was an issue of magnitude relating to the current insured transaction only, because additional protection is provided to a party as to prior transfers in the title, and because the coverage given with respect to a claim that the current transaction is a voidable preference because of delayed or ineffective recording can be addressed by standard underwriting.

Creditors’ rights coverage insured against stated loss because of
(1) insolvency of the seller or mortgagor,
(2) unreasonably small capital of the seller or mortgagor, and
(3) belief or intent of the seller or mortgagor to incur debts beyond its ability to pay.

All of these matters can trigger an avoidance of the transfer or a judgment for money, for example, if the consideration for the loan is given to an affiliate or corporate parent of the mortgagor or seller, and not to the mortgagor or seller. Such creditors’ rights coverage had frequently been provided in many states by all of the major title insurers, principally to lenders. However, these are all matters within the control of the lender, and that can be evaluated by the lender.

Creditors’ rights coverage could have potentially resulted in catastrophic loss to title insurers when provided on a Loan Policy or an Owner’s Policy. For example, in Official Committee of Unsecured Creditors of Tousa, Inc. v. Citicorp North America, Inc. (In re Tousa, Inc.), the bankruptcy court invalidated mortgages securing $200 million and $300 million with Wells Fargo as Administrative Agent and awarded additional damages against the lenders. The court concluded that “the Conveying Subsidiaries (a) did not receive reasonably equivalent value in exchange for the liens granted, (b) were insolvent both before and after the transaction, and (c) were left with unreasonably small capital with which to operate their businesses as a result of the transaction, the liens will be avoided and the value of the property conveyed will be recovered with interest for the benefit of the respective Debtors’ estates.”78 In addition to invalidating the mortgages, the court awarded all principal, interest, costs, expenses, and other fees associated with the loan transaction, the cost of pursuing the litigation, and the diminution in value of (title subject to) the liens since the date the mortgages were executed. Underscoring the argument that creditors’ rights coverage cannot be safely evaluated, the court rejected two procedures that had been used to underwrite creditors’ rights coverage: (1) a solvency opinion that was determined not to be credible and (2) “savings clauses” in Loan Documents (e.g., “[S]uch joint and several liability and each such Lien shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such Lien to be unenforceable under applicable law, and such joint and several liability and such Lien shall be deemed to have been automatically amended accordingly at all relevant times”).79

The ALTA 21-06 (Creditors’ Rights) was designed for issuance with a 2006 ALTA Owner’s Policy or 2006 ALTA Loan Policy when insuring with respect to the voidability of an estate or interest or the lien of the Insured Mortgage because of the occurrence on or before the Date of Policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency, or similar creditors’ rights laws, subject to the terms and provisions of the endorsement, the Exclusions from Coverage, and other terms of the policy. The revision or the decertification and withdrawal of the ALTA 21-06 (Creditors’ Rights) were discussed with the benefit of outside antitrust counsel. The ALTA Forms Committee was unable to arrive at an agreement on the applicable terms for the ALTA 21-06 (Creditors’ Rights) and concluded that developing a new or revised standard ALTA endorsement was not achievable or in the industry’s best interest, nor in the best interest of the customer groups. Because there was no agreement on the revision of the existing ALTA 21-06 (Creditors’ Rights) and because many customers and other parties perceived that title insurers were not well positioned to evaluate the matters addressed by this endorsement, the Committee concluded that the most appropriate resolution was to recommend that the ALTA 21-06 (Creditors’ Rights) be decertified and withdrawn as an ALTA endorsement. This action did not affect the ability of each title insurer to separately decide what coverage or endorsement, if any, it will be willing to provide. Each title insurer is free in each transaction to agree to issue any creditors’ rights endorsement or other coverage or not to issue such endorsement or other coverage at all, as it shall separately and individually decide. The ALTA Board of Governors voted to decertify the ALTA 21-06 (Creditors’ Rights) on February 3, 2010.

After the ALTA decertified (withdrew) the ALTA 21-06 (Creditors’ Rights) as an ALTA endorsement, the CLTA (California Land Title Association) withdrew its prior filing of the Creditors’ Rights Endorsement. Rating Bureaus later withdrew previously filed Creditors’ Rights Endorsements in states such as Delaware, Louisiana, New Jersey, North Carolina, Ohio, Oregon, and Pennsylvania.

The New York State Insurance Department previously determined that title insurance is not designed to provide creditors’ rights coverage. The New York State Insurance Department in reviewing title insurance policies filed with the Department stated that “[I]n view of testimony received and contemporary complexity of corporate deals such as leveraged buy-outs, mergers and acquisitions, and tender offers—often involving and impacting real estate transactions—the Insurance Department has determined that a creditors’ rights exclusion is appropriate and should be included in title insurance policies. Title Insurance was never intended to cover these phenomena. Unrequited creditors of a real estate seller or buyer should not be able to claim against title insurance.80

The Florida Office of Insurance Regulation concluded by letter dated July 17, 2009 that a Creditors’ Rights Endorsement did not provide title insurance coverage: “This endorsement is not title insurance because, in insuring loss or damage sustained by the insured by reason of the avoidance, in whole or in part, or a court order providing some other remedy, based on the voidability of any estate, interest, or insured mortgage because of an occurrence on the date of policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency, or similar creditors’ rights laws, the coverage is prospective. The determination of insurability cannot be based on the evaluation of a reasonable title search as is required by...[applicable law].” Similarly, the New Mexico Office of Superintendent of Insurance and the Texas Department of Insurance never adopted any creditors’ rights coverage.

79 Id.
Subsequently, several additional states considered whether a Creditors’ Rights Endorsement (or similar coverage relating to the current transaction) constitutes the business of title insurance and could be filed for use by a title insurer or whether it constitutes another line of insurance, such as casualty insurance, mortgage insurance, or mortgage guaranty insurance, so that it may not be offered in the future. If it did not constitute the business of title insurance, any future offer of such coverage might violate the monoline statute of many states that prohibit title insurers from providing other forms of insurance that are not title insurance. States, such as Hawaii and Wisconsin, concluded that a Creditors’ Rights Endorsement is not title insurance.

California did not allow the filing of any Creditors’ Rights Endorsements after this time. An example of a state with various statutes that may be construed as prohibiting creditors’ rights coverage arising out of the current transaction is California.

The California Insurance Code defines mortgage guaranty insurance as follows:

(a) **Mortgage guaranty insurance means:**

1. Insurance against financial loss by reason of nonpayment of principal, interest, and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness secured by a mortgage, deed of trust, or other instrument constituting a first lien or charge on real estate, provided the improvement on the real estate is a residential building or a condominium unit or buildings designed for occupancy by not more than four families.

2. Insurance against financial loss by reason of nonpayment of principal, interest, and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness secured by a mortgage, deed of trust, or other instrument constituting a junior lien or charge on real estate, provided the improvement on the real estate is a residential building or a condominium unit or building designed for occupancy by not more than four families.

3. Insurance against financial loss by reason of nonpayment of principal, interest, and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness secured by a mortgage, deed of trust, or other instrument constituting a lien or charge on real estate, provided the improvement on the real estate is a residential building or a condominium unit or building designed for occupancy by five or more families or designed to be occupied for industrial or commercial purposes.

4. Insurance against financial loss by reason of nonpayment of rent and other sums agreed to be paid under the terms of a written lease for the possession, use, or occupancy of real estate, provided the improvement on the real estate is a building or buildings designed to be occupied for industrial or commercial purposes.

The California Insurance Code provides:

(a) **Mortgage guaranty insurance may be transacted in this state only by a stock or mutual casualty insurer holding a certificate of authority for the transaction of the insurance pursuant to this chapter.**

The California Insurance Code states:

(a) An insurer which anywhere transacts any class of insurance other than mortgage guaranty insurance defined in paragraphs (1), (3) and (4) of subdivision (a) of Section 12640.02 is not eligible for the issuance of a certificate of authority to transact such classes of mortgage guaranty insurance in this state nor for the renewal thereof.

(b) An insurer which anywhere transacts the classes of insurance defined in paragraphs (2), (3) and (4) of subdivision (a) of Section 12640.02 is not eligible for the issuance of a certificate of authority to transact in this state the class of mortgage guaranty insurance defined in paragraph (1) of subdivision (a) of Section 12640.02.

The California Insurance Code defines title insurance as follows:

**Title insurance means insuring, guaranteeing, or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of:**

(a) Liens or encumbrances on, or defects in the title to said property;
(b) Invalidity or unenforceability of any liens or encumbrances thereon; or
(c) Incorrectness of searches relating to the title to real or personal property.

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81 CAL. INS. CODE § 12640.02
82 CAL. INS. CODE § 12640.07.
83 CAL. INS. CODE § 12640.10.
84 CAL. INS. CODE § 104.
The California Insurance Code also defines title insurance as follows:

"Title insurance" means insuring, guaranteeing, or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of:
(a) Liens or encumbrances on, or defects in the title to said property;
(b) Invalidity or unenforceability of any liens or encumbrances thereon; or
(c) Incorrectness of searches relating to the title to real or personal property.\(^{15}\)

The California Insurance Code provides:

An insurer which anywhere in the United States transacts any class of insurance other than title insurance is not eligible for the issuance of a certificate of authority to transact title insurance in this State nor for the renewal thereof.\(^{16}\)

California law establishes title insurers as monoline insurers, and the monoline limitations are not limited to activities conducted in California; as a result, a title insurer may not provide casualty, mortgage, or mortgage guaranty insurance in any jurisdiction.

The broad reach and public policy of California monoline statutes was recognized in the Radian Guaranty Inc. v. Garamendi, in which the court concluded that "because Radian [the mortgage guaranty insurer] does not possess the requisite certificate of authority to transact title insurance, it [the mortgage guaranty insurer] is not authorized to sell RLP in California or anywhere else in the United States."\(^{25}\) This case emphasized the importance of California monoline statutes:

...[R]ecognizing the potential volatility of the California real estate marketplace, title insurers, mortgage insurers, and mortgage guaranty insurers are permitted to write only a single line of insurance. As such, the Legislature has expressly prohibited title insurers, mortgage insurers, and mortgage guaranty insurers from transacting any other class of insurance other than the one for which they have been authorized by their respective certificates of authority; hence, they are known as monoline insurers....

The monoline provision was added to permit more focused regulatory supervision of the new line and also to protect other lines of insurance from the volatility presented by mortgage guaranty insurance in the event of an economic downturn, falling house prices, and widespread foreclosures.\(^{26}\)

Subsequently, Texas adopted Texas Insurance Code Section 2502.006:

Certain Extra Hazardous Coverages Prohibited

(a) A title insurance company may not insure against loss or damage sustained by reason of any claim that under federal bankruptcy, state insolvency, or similar creditor’s rights laws the transaction vesting title in the insured as shown in the policy or creating the lien of the insured mortgage is:
(1) a preference or preferential transfer under 11 U.S.C. Section 547;
(2) a fraudulent transfer under 11 U.S.C. Section 548;
(3) a transfer that is fraudulent as to present and future creditors under Section 24.005, Business & Commerce Code, or a similar law of another state; or
(4) a transfer that is fraudulent as to present creditors under Section 24.006, Business & Commerce Code, or a similar law of another state.

(b) The commissioner may by rule designate coverages that violate this section. It is not a defense against a claim that a title insurance company has violated this section that the commissioner has not adopted a rule under this subsection.

(c) Title insurance issued in or on a form prescribed by the commissioner shall be considered to comply with this section.

(d) Nothing in this section prohibits title insurance with respect to liens, encumbrances, or other defects to title to land that:
(1) appear in the public records before the date on which the contract of title insurance is made;
(2) occur or result from transactions before the transaction vesting title in the insured or creating the lien of the insured mortgage; or
(3) result from failure to timely perfect or record any instrument before the date on which the contract of title insurance is made.

(e) A title insurance company may not engage in the business of title insurance in this state if the title insurance company provides insurance of the type prohibited by Subsection (a) anywhere in the United States, except to the extent that the laws of another state require the title insurance company to provide that type of insurance.

This law prohibits a title insurer from doing business in Texas if it provides creditors’ rights coverage arising out of the current transaction in any other state, absent a requirement by that state for such coverage. This law applies to any title insurance policy delivered, issued for delivery, or renewed (by issuance of a new policy) on or after January 1, 2012.

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\(^{15}\) CAL. INS. CODE § 12340.1.
\(^{16}\) CAL. INS. CODE § 12360.
\(^{26}\) Id. at 467—473 (emphasis added).
Title Examination and Casualty Insurance

It should be clear that title insurance actually is insurance. The purpose of insurance is to spread risks. Black’s Law Dictionary defines insurance as “[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the ‘insurer’ or ‘underwriter’; the other, the ‘insured’ or ‘assured;’ the agreed consideration, the ‘premium;’ the written contract, a ‘policy,’ the events insured against, ‘risks’ or ‘perils;’ and the subject, right, or interest to be protected, the ‘insurable interest.’” Whether a practice is the business of insurance depends on (1) whether the practice transfers or spreads the insured’s risk; (2) whether the practice is an integral part of the relationship of the parties pursuant to the policy; and (3) whether the practice is limited to insurers. For example, while title insurance is insurance, the title search, title examination, and escrow do not spread the risk and are not the business of insurance.99

Even though title insurance is a category of insurance, it operates on the principle of risk avoidance or minimization, but not on the principle of risk elimination. Thus, most of the premium is devoted to determining for the benefit of the title insurer, in its decision to insure, the status of title and to underwriting the title insurance policy. Title insurer loss ratios range from approximately 4 percent of the premium to approximately 9 percent of the premium, with recent averages of less than 7 percent, while title insurance agent retention varies from 60 percent to 90 percent of the premium (ranging from remittance of approximately 10 percent in some western states to 40 percent in the states of South Carolina and Connecticut, for an average of approximately 20 percent), depending on the state, regulation of remittance, and the definition of the premium and type of regional losses. The remittance to the title insurer varies, depending on the size of the transaction or the type of risk in some jurisdictions. For example, the remittance varies (with the percentage remittance to the title insurer increasing as the transaction size increases) based on the size of the transaction in Florida and in New Mexico.

A commonly held view of title insurance is that “[e]xamination of record title or an abstract of the record title of real property is both an esoteric and a painstaking process. Evaluation of the status of title requires considerable expertise.... It was for these reasons that the concept of title insurance was developed and similar reasoning has made the furnishing of title insurance a successful business. It is also appropriate to note that title insurance is not casualty insurance.... A policy issues based upon the informed opinion of title examining experts employed by the company that title is in the condition expressed in the policy.... As a matter of public policy a duty is imposed upon the title company to make a thorough and competent search of the record title.”100

Risk avoidance is implemented by the title search, examination, and underwriting requirements, including curative work. The ALTA Research Committee on operations estimated that 25 percent of titles require curative work to remove defects, and most titles require the release of outstanding encumbrances to secure clear title.

The Title Insurance Guidance in the NAIC Financial Conditions Examiners Handbook explained the difference between the nature of title insurance and casualty insurance:

The primary emphasis in property and casualty insurance is to provide indemnity for events over which, at least in theory, neither the policyholder nor the insurance company has any control. In contrast, title insurance is a business of loss elimination or identifies or eliminates risk before issuing a policy. Title searches are done not to provide indemnification of defects in title, but to try to make sure that there are no unknown defects in title at the time of transfer. In theory, if title searches were done perfectly, title policies issued on “on the record” items would have no losses. In practice, there are errors in title searches, errors in escrow operations, and “off the record” items such as mechanics liens that can cause title claims. In property and casualty insurance, the bulk of the premium dollars go to pay claims. As a result, the profitability of a property and casualty line is mainly due to the loss and loss adjustment expense ratios. The title industry’s cost structure differs substantially from that of property and casualty insurers. In title insurance, the bulk of the premiums go to the costs of maintenance of title databases, called title plants, title searching costs, agent commissions, and other costs of administration. Title insurers have relatively high fixed costs. As a result, profitability for title insurers is much more related to the volume of title business than to loss costs.

Title insurers are required in a majority of states to perform due diligence of the status of title before insuring, and this consists of a search and examination. This is true in Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

The Colorado Revised Statutes contain a typical statute mandating an examination of title:

No policy or contract of title insurance shall be written unless and until the title insurance company has caused to be conducted a reasonable examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies....”

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In some states, primarily in the western United States, the title insurer or its title insurance agent must also maintain a title plant. For example, in Missouri, a policy generally may not be written unless based on a title plant:

No title insurance policy shall be written unless and until the title insurer, title agent, or agency has:

1. Caused a search of title to be made from the evidence prepared from a title plant of the county where the property is located as herein defined, or if no such title plant of the county exists, or the owner of such plant refuses to furnish the title insurer, title agent, or agency desiring to insure, such title evidence at a reasonable charge and within a reasonable period of time, then such policy of title insurance shall be based upon the best title evidence available. An attorney licensed to practice law in this state may upon personal inspection use the best evidence available in any county and is not subject to the provisions of the title plant requirement of sections 381.011 to 381.241....

The definition and period of time covered by a title plant varies, but Arizona law contains a typical definition of a title insurance plant:

"Title insurance plant" means a set of records in which an entry has been made of all documents or matters which under the law impart constructive notice of matters affecting title to real property or any interest therein or encumbrance thereon and which have been filed or recorded in the county for which such title plant is maintained for a period of not less than the immediately preceding twenty years. In order to constitute a title insurance plant such records shall include:

1. An index or indices in which notations of or references to any such documents that describe the property affected thereby are posted, entered or otherwise included, according to the property described therein, or copies or briefs of all such documents that describe the property affected thereby which are sorted and filed according to the property described therein.

2. An index or indices in which all other such documents are posted, entered or otherwise included, according to the name or names of the parties whose title to real property or any interest therein or encumbrance thereon is affected.

Consistent with the requirement that the title insurer undertake risk reduction by an examination of title is the prohibition on insuring around known matters in a number of states. Florida succinctly addresses this issue and states:

A title insurance policy or guarantee of title may not be issued without regard to the possible existence of adverse matters or defects of title.

In similar vein, Texas prohibits "insuring around" liens:

(a) Except as provided by Subsection (c), a title insurance company may not willfully issue a binder for title insurance or a title insurance policy showing no outstanding enforceable recorded liens on real property against which the company knows an outstanding enforceable recorded lien exists.

(b) A title insurance company knows that an outstanding enforceable recorded lien exists against real property if, based on an examination of the title under which the binder for title insurance or title insurance policy is issued, the company determines that the lien is valid and enforceable.

(c) The commissioner by rule may approve circumstances under which a title insurance company may issue a binder for title insurance or a title insurance policy otherwise prohibited by Subsection (a).

(d) Except as otherwise provided by this section, a title insurance company may determine the insurability of title to real property and any other matter that the company considers to be insurable under a binder for title insurance or a title insurance policy issued in connection with the property.

In some cases, agreeing to facilitate insuring over outstanding mortgages may be illegally making false statements to influence a federally insured financial institution to grant a loan or making or abetting the making of false statements in mortgage notes.

8. Title Insurance versus Information

Title insurance forms are not abstracts of title, title opinions, or title information. They are written in the form of indemnities against loss under stated circumstances, not as representations of fact. It is common to see the policy or other form indemnify against loss if certain claims or defects are asserted, but not to represent or "assure" the insured that particular facts exist relating to the ownership or use of the land. For instance, the 2006 ALTA Owner’s Policy insures against loss or damage sustained by the Insured by reason of any defect in or lien or encumbrance on the Title; the policy does not represent that there is no defect in the Title. This is an important distinction in understanding the damages recoverable, which usually are as stated in the policy, and should not be based on tort liability, although some courts recognize a cause of action for negligence in the title company examination undertaken to evaluate the risks relating to title.

Even so, it is commonly asserted that the commitment for title insurance and the policy of title insurance are informational and not simply insurance products. This assertion is made in order to recover in tort for the title insurance.

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92 Mo. Rev. Stat. § 381.071.
94 Fla. Stat. § 627.784.
95 Tex. Ins. Code § 2502.003.
96 United States v. Keskey, 863 F.2d 474 (7th Cir. Wis. 1988).
agent or title insurance company, with the possibility of greater damages than may be recovered under the title insurance policy. The ALTA commitment contradicts this position by stating that the commitment is not an abstract of title or report on the condition of title. Similarly, the ALTA Notice of Availability of Owner’s Title Insurance for One-to-Four Family Residential Property (which is required to be provided to and signed by a purchaser in some states if the purchaser does not acquire an Owner’s Policy) states that “[a] preliminary report or title insurance commitment issued in connection with the Property is an offer to provide title insurance, is not a representation as to the condition of title, does not constitute an abstract of title, and does not provide You the protection of an Owner’s Policy.”

Several different results may occur when considering the issue of negligence in the search or examination for issuance of a commitment or policy:

(1) Tort recovery is not allowed against the title insurer or title insurance agent. This conclusion appears to be the rule in Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Texas, Utah, Washington, Wisconsin, and Wyoming. This result may occur because of case law97 or state statutes that distinguish a title insurance form and an abstract or representation of title, such as in California.

“Abstract of title” is a written representation, provided pursuant to a contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein. An abstract of title is not a title policy as defined in Section 12340.2.98

“Preliminary report”, “commitment”, or “binder” are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute a representation as to, the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.99

In some cases, the law may state that the title examination is done solely for the title insurer, as in Alabama, although this may not prevent recovery for alleged negligence.

Title search or title examination.
A search of the records in the office of the judge of probate in the county where the real property is situated through such period of time as is acceptable to the title insurer. The search of the public records relating to matters of title performed in connection with the issuance of a preliminary report, commitment, or binder shall be solely for the benefit of the title insurance company requested to issue its policy or policies of title insurance.100

(2) The title insurer and/or title insurance agent may be liable for negligent misrepresentations about the title made in the preliminary commitment. This appears to be true in several states, including Alaska, Arkansas, Florida, Georgia, Hawaii, Indiana, Kansas, Missouri, Nebraska, New Hampshire, Oklahoma, Pennsylvania, and South Dakota.

In the case of U.S. Bank, N.A. v. Integrity Land Title Corporation, the court held:
The precise issue presented here concerns the exception of negligent misrepresentation: whether the issuance of a title commitment and subsequently issued title insurance policy give rise in Indiana to a tort cause of action for negligent misrepresentation against a title insurer or commitment issuer, separate and apart from the contractual obligations of the title policy. Courts in our sister jurisdictions are split on the question of whether a title insurer or a commitment issuer can be exposed to liability in tort for negligent misrepresentation regarding the search of title records. Some jurisdictions have refused to impose tort liability on a title insurance company or a commitment issuer. See Brown’s Tie & Lumber v. Chi. Title Co. of Idaho, 115 Idaho 56, 764 P.2d 423 (Idaho 1988) (no claim in tort against both the title insurer and the commitment issuer for negligent search of the title records); Greenberg v. Stewart Title Guar. Co., 171 Wis. 2d 485, 492 N.W.2d 147 (Wis. 1992) (same). These courts reason that because a title insurer does not purport to act as anything other than an insurance company, no tort liability exists unless the insurer has voluntarily assumed a duty of searching title for the insured’s benefit in addition to the contract to insure title. Greenberg, 492 N.W.2d at 151 (“The title insurance company is not, as is an abstract company, employed to examine title; rather, the title insurance company is employed to guarantee the status of title and to insure against existing defects. Thus, the relationship between the parties is limited to that of indemnitor and indemnitee.”). As to the title commitment issuer, they further conclude that the issuance of a preliminary report or title commitment is not an independent assumption of a duty to search and disclose reasonably discoverable defects and thus no liability in tort exists for the commitment issuer. Id.
Other jurisdictions have concluded that a title insurance company and the commitment issuer

98 CAL. INS. CODE § 12340.10.
99 CAL. INS. CODE § 12340.11.
100 ALA. CODE § 27-25-3(13).
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have duties in tort to search for and disclose all recorded title defects and base that duty on the relationship between the parties, rather than on any agreement; U.S. Bank, N.A. v. First Am. Title Ins. Co., 826 P.2d 1126 (Alaska 1992) (holding that a title insurance company and a commitment issuer are subject to liability for negligent misrepresentation when the commitment issuer negligently supplies inaccurate information regarding the state of title in a preliminary commitment); Title Ins. Co. of Minn. v. Costain Ariz., Inc., 164 Ariz. 203, 791 P.2d 1086, 1090 (Ariz. Ct. App. 1990) (remarking that a title company’s duty in issuing its preliminary commitment is distinct from its duty in issuing title insurance and the title company may be held liable in tort as long as the third party justifiably relies to its detriment); Shada v. Title & Trust Co. of Fla., 457 So.2d 553, 557 (Fla. Dist. Ct. App. 1984) (“The use of a title...commitment instead of an abstract...has become commonplace. A title insurance company [which under takes to prepare a title commitment] has a duty to exercise reasonable care when it issues a title binder or commitment and its failure to do so may subject it to liability in either contract or tort.”); Ford v. Guarantee Abstract & Title Co., Inc., 220 Kan. 244, 553 P.2d 254, 258-59 (Kan. 1976) (“Where a title insurer presents a buyer with both a preliminary title report and a policy of title insurance two distinct responsibilities are assumed; in rendering the first service, the insurer serves as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report. When a title insurer breaches its duty to abstract title accurately it may be liable in tort for all the damages proximately caused by such breach.”); Malinak v. Safeco Title Ins. Co. of Idaho, 203 Mont. 69, 661 P.2d 12, 15 (Mont. 1983) (qualifying the duty of care for a title insurer or a commitment issuer as one owed only when the title report or commitment is understood to serve as an abstract of title to be relied on by a title insurer in issuing a title insurance policy); Tess v. Lawyers Title Ins. Corp., 251 Neb. 501, 557 N.W.2d 696, 705 (Neb. 1997) (holding that state statutes providing that a title insurance commitment or policy is not an abstract or a report of title do not protect a title insurance company or the commitment issuer from liability pursuant to Restatement (Second) of Torts § 552 for failing to exercise reasonable care in supplying information). The theory is that once the title insurer or the commitment issuer assumes the responsibility of performing a title search and disclosing defects, either company may be liable in tort to all foreseeable third parties for failing to exercise reasonable care in supplying information in the course of its own business. See Bank of Cal., 826 P.2d 1126.... [W]e conclude that Integrity had a duty under Restatement Section 552 communicated to make that state of title accurately when issuing its preliminary commitment. We first the reasoning of Justice Matthews of the Alaska Supreme Court in Bank of America persuasive: We agree with the authorities, which hold that there may be tort liability for misrepresentations made in preliminary commitments for title insurance. In our view, such commitments provide an essential service to prospective buyers and lenders. They are told what transactions must take place before they can receive clear title or an effective security. 826 P.2d at 1129. In reaching this conclusion, the court stressed that “preliminary title reports are normally relied on by insureds, escrow agents, and lenders with full knowledge, and sometimes with the encouragement, of the insurance company.” Id. Title searches are frequently required in situations involving transactions in which the state of the title must be known accurately or the customer will foreseeably suffer harm that is both certain and direct. See Patton and Palomar on Land Titles § 41. [T]itle insurers give a preliminary commitment to property purchasers or [lenders] before the closing of the real estate transaction. The buyer or lender then may negotiate with the seller or borrower for the removal or any listed title defects, bargain to pay a lower amount to take subject to those risks, or rescind the transaction.... The buyer or lender who receives a clear preliminary commitment at this stage of the transaction perceives it to be a representation that the seller or borrower has a clear title and may close the transaction in reliance upon it.[1] Id. Integrity should have known that Texcorp (U.S. Bank’s predecessor in interest), in closing the loan to buyer, would act in justifiable reliance on the statement in the preliminary commitment that title was free and clear of any encumbrances. In fact, supporting affidavits established that Texcorp directly communicated with Integrity and instructed Integrity to prepare a title commitment, conduct the mortgage closing, and provide an insured first and superior mortgage lien against the subject real property. Armed with direct knowledge of Texcorp’s interests and requirement of accurate title information to guide its lending practices, Integrity prepared the title commitment that indicated that it had performed a title search on the subject property and had found no prior judgment liens. In justifiable reliance on the commitment, Texcorp approved the mortgage loan in the amount of $123,090.00, and Integrity provided Texcorp with the Policy which insured a first and superior mortgage against the real estate.... Second, the other factors advanced by Professor Gergen also suggest finding a duty in tort on these facts. Here, the relationship between Integrity and Texcorp was of an advisory nature. Integrity had superior knowledge and expertise, was in the business of supplying title information, and was compensated for the information it provided to Texcorp. Integrity deliberately provided specific information in response to a request by Texcorp, to guide Texcorp in its transaction with a third party, and Integrity affirmatively vouched for the accuracy of the information. On these facts, we are convinced that applicable tort law permits U.S. Bank’s tort claim to go forward.101

101 U.S. Bank, N.A. v. Integrity Land Title Corp., 929 N.E.2d 742 (Ind. 2010).
The Restatement (Second) of Torts § 552 addresses negligent misrepresentation:

Information Negligently Supplied for the Guidance of Others

1. One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

2. Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

   (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

   (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

3. The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

An example of a cause of action for negligent misrepresentation may occur if the title insurance binder, commitment, or policy states “none” after the exception provided for restrictions or for other matters.

Another example involves use of “assurance” language as described in Alliance Mortgage Company v. Rothwell, in which the court concluded could serve as a basis for negligent misrepresentation:

Alliance argued that Ticor actually anticipated and induced such reliance by the specificity of its description of the insured properties. To show Ticor knew an endorsement precisely describing a property was likely to be viewed as a reliable representation as to the nature and condition of the property, Alliance emphasized that Ticor’s manual pertaining to the drafting of endorsements advises that detail concerning the condition of the property should not be provided because, as stated in the manual, “of the possibility that such detail furnishes assurance that the improvements are lawfully constituted as described.” The substance of the endorsements with which we are here concerned facially provide such assurance and induce reliance. For example, the endorsements regarding the single unit Haight Street properties each commence with the statement that: “The Company assures the insured that at the date of this policy there is located on said land [a] 4-unit Residence,” which the endorsement goes on to further identify by street address and the precise numbers of units Ticor now concedes are nonexistent.

A disclaimer has proved effective and enforceable in some cases. For example, the following disclaimer was recognized as enforceable in Hoffman v. Fraser:

THE COMMITMENT FOR TITLE INSURANCE IS ISSUED IN CONTEMPLATION OF THE ISSUANCE OF A POLICY *** OF TITLE INSURANCE AND *** MIDLAND TITLE *** (AGENT) OR FIRST AMERICAN *** SHALL HAVE NO OBLIGATION OUTSIDE THE TERMS OF THIS COMMITMENT. SPECIFICALLY, ANY TITLE SEARCH OR EXAMINATION CONDUCTED BY MIDLAND TITLE *** AS A BASIS FOR ISSUING THIS COMMITMENT SHALL BE FOR THE BENEFIT OF MIDLAND TITLE *** AND FIRST AMERICAN ONLY, AND DOES NOT INURE TO THE BENEFIT OF ANY OTHER PARTY, INCLUDING ANY SELLER, PURCHASER OR LENDER. IN THE EVENT ANY PROPOSED INSURED UNDER THIS COMMITMENT FAILS TO ACQUIRE, OR ELECTS NOT TO ACQUIRE, A FINAL POLICY PRIOR TO THE EXPIRATION DATE OF THE COMMITMENT, SAID PROPOSED INSURED SHALL HAVE NO CAUSE OF ACTION OR RECURSE AGAINST MIDLAND TITLE *** OR FIRST AMERICAN AND IN NO EVENT SHALL ANY PROPOSED INSURED HAVE ANY CLAIM OR CAUSE OF ACTION AGAINST MIDLAND TITLE *** OR FIRST AMERICAN BASED ON THE TITLE SEARCH OR EXAMINATION. BY ACCEPTING THE WITHIN COMMITMENT, THE PROPOSED INSURED, ALONG WITH ANY OTHER PARTIES TO THE CONTEMPLATED TRANSACTION, CONSENTS TO AND AGREES WITH THE FOREGOING.

In another case, a lot book guarantee that stated it had a maximum liability of $100 to the named insured and was solely based on the title company records was held to be enforceable, and a third-party purchaser could not have justifiably relied on the guarantee to believe that title was free of encumbrances.

In some jurisdictions, disclaimers may be ineffective. A Colorado court held a disclaimer to be ineffective if implemented solely by an integration clause:

We conclude that a general integration clause does not effect a waiver of a claim of negligent misrepresentation not specifically prohibited by the terms of the agreement. The general language of the integration provisions of the purchase agreements here at issue does not specifically preclude negligent misrepresentation claims.

102 RESTATEMENT (SECOND) OF Torts § 552 (1972).
Presumably, a disclaimer (a limitation of circumstances for which the liability will exist) or a limitation of remedy (a limitation to the form or the type of relief) that would more likely be enforceable would include recitals of the waiver/limitation as the basis and consideration for the limited title information in lieu of a separate, more expensive title insurance product, an integration clause, a waiver or limitation of liability for the current or prior negligence, negligent misrepresentation, a tort or other basis of recovery, an acknowledgment of the opportunity to review with counsel, a choice of law provision, and conspicuous terms.

An example of a limitation on liability appears in the ALTA Application for the Recorded Document Guarantee:

6. BY THE EXECUTION AND SUBMISSION OF THIS APPLICATION TO THE COMPANY, APPLICANT ACKNOWLEDGES AND SUBMITS:
   a. That the Company’s sole obligation under the Certificate, and this Application, shall be to conduct a search in accordance with the terms and provisions of this Application and to furnish copies of the Designated Documents to Applicant as a part of the Certificate. The Company shall have no obligation to read, examine, or interpret the Designated Documents.
   b. That the Company shall not be obligated under this Certificate to pay any costs, attorneys’ fees, or expenses incurred in any action, proceeding, or other claim brought against Applicant.
   c. That the Certificate is limited in scope and is not an abstract of title, title opinion, preliminary or title report, or commitment to issue title insurance.
   d. That the Certificate is not to be relied upon by Applicant or any other person as a representation of the status of title to the Subject Property.
   e. That Applicant shall have no right of action against the Company, whether or not based on negligence, except under the terms and provisions of, and subject to all limitations of this Application and the Certificate.
   f. That the Certificate is not valid and the Company shall have no liability thereunder unless this Application, or a copy thereof, is attached thereto.
   g. That the Certificate does not assure that Applicant will be entitled to any innocent landowner or purchaser defenses, which may be available under CERCLA.

C. WHICH COMMON LAW RIGHTS AND ESTATES IN REAL PROPERTY WILL TITLE INSURERS INSURE?

The title insurer can insure any real property interest in each jurisdiction in which it conducts business. The title insurer will, under varying circumstances, consider each of the following potentially to be an insurable real property interest (each as defined in part below by Black’s Law Dictionary):

- **Fee simple absolute**
  In most circumstances, this possessory interest is insured in the Owner’s and Loan Policies. It is the estate to a person forever without condition or limitation.

- **Fee simple conditional**
  This possessory interest is rarely insured. It is the conveyance of a fee on condition (e.g., “on condition that,” “provided that,” or “but if”) with the right of the grantor to enter for broken condition.

- **Fee simple determinable**
  This possessory interest is rarely insured but commonly appears in oil and gas leases. It is the conveyance, subject to an automatic reversion or expiration of the estate (e.g., “for so long as,” “during,” or “until”).

- **Estate for years**
  This possessory interest is frequently insured. It is a fixed amount of time, such as weeks, months, a year, or years. A tenancy may be a “periodic tenancy” that continues for successive periods unless it is earlier ended.

- **LIFE ESTATE**
  This possessory interest is rarely insured. It is an estate held for the life of the person owning the estate, or it may be limited to the life or lives of one or more other persons as an estate pur autre vie.

- **Remainder**
  This non-possessory interest is rarely insured. It is an interest that arises on the end of the prior estate and is in favor of a person other than the grantor. A future interest may in some states be subject to the Rule in Shelley’s Case, Doctrine of Worthier Title, and Destructibility of Contingent Remaindermen. A remainder may be vested, contingent, or vested subject to open. A future interest may be vulnerable under state law, such as a Rule against Perpetuities as modified.

- **Reversion**
  This interest is rarely insured. It is the remaining interest retained by the grantor after the termination of any estate in a third party.

- **Executory interest**
  This interest is rarely insured. It is a future interest other than a reversion or a remainder. It may be springing (cutting off the interest of the grantor or the grantor’s heirs) or shifting (cutting off the interest of someone other than the grantor).

- **Easement appurtenant**
  This non-possessory interest is frequently insured. This interest is a non-possessory right or interest, not an estate, and is an incorporeal hereditament that attaches to or is inherent in the dominant estate benefitted by the easement. Frequently, the insurance against the lack of the right of access to the Land is based upon such easement; the Covered