North Dakota Law Review

Volume 79 | Number 2 Article 3

2003

Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a Quality of Title to Real Property Liable for a Defect in the Title Caused by Conduct of the Assured

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ASSURANCES OF TITLES TO REAL PROPERTY AVAILABLE IN THE UNITED STATES: IS A PERSON WHO ASSURES A QUALITY OF TITLE TO REAL PROPERTY LIABLE FOR A DEFECT IN THE TITLE CAUSED BY CONDUCT OF THE ASSURED?

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I. INTRODUCTION

Whaddya mean you own this property and I don't?

What do you mean that you have the right to build a road over a portion of my property?

Why do you think that you can put my property up for sale because someone else did not pay you money?

What makes you think you have a lien against this property that is superior to my lien?

Most certainly, the foregoing questions would likely be uttered in a more serious vein than the currently famous or infamous query—"Wassup"—or the equally famous or infamous rhetorical question—"How ya doin'." A person who confronts a situation that would give rise to any of the questions noted above, or which would evoke similar inquiries, is likely to be very interested in ascertaining whether the adverse claim is or is not valid. Regardless of the validity or invalidity of any such adverse claim, it is also likely that the person who fears that he, she, or it will be adversely affected by the claim will want to know if someone else has a responsibility to "take care of the problem." Whether someone else has a duty to "take care of the problem" depends upon what, if any, type of

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title assurance is in place for the benefit and protection of the aggrieved or apprehensive party.

Regardless of whether a person's fundamental beliefs concerning property[1] can be characterized as an intuitive image or vision,[2] a republican image or vision,[3] a liberal image or vision,[4] a utilitarian image or vision,[5] the essence of that person's beliefs pertains to the concept of ownership.[6] Thus, people who stand to acquire ownership of an interest in real property,[7] particularly people who contemplate acquisition of ownership of an interest in real property[8] by means of a purchase of that interest, usually seek to receive a particular quality of title. Consequently, people who contemplate the acquisition of, or actually acquire, ownership of an interest in

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1. A definition of property is set forth in CAL. CIV. CODE § 654 (West 1982) that reads as follows: "The ownership of a thing is the right of one or more persons to posses and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

2. CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY LAND OWNERSHIP AND USE 1-10 (4th ed. 1997). The intuitive image of property is based on the notion that individuals expect that they will gain certain advantages and benefits from owning property. Proponents of this image adhere to a belief of "absolute ownership" (one can do with his, her, or its property as he, she, or it pleases). *Id.*

3. *Id.* at 28-63. Proponents of a republican theory or image of property rights adhere to the basic notion that property ownership allows citizens to have personal independence, which enables citizens to pursue the common good instead of concentrating on their own self-interest. *Id.* at 34. Under an elitist republican theory, participation in civic matters is restricted to certain categories of property owners. *Id.* at 34-35. The egalitarian republican theory is founded upon the notion that land is common stock to all citizens, and economic and political safeguards must be instituted and maintained to ensure widespread distribution and redistribution of property rights. *Id.* at 35.

4. *Id.* at 64-111. Those who adhere to the liberal vision envision a society of equal individuals who are motivated principally, if not exclusively, by their passions or self-interests. *Id.* at 64. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (examining "externalities" that result from use of property to serve self-interests and the thesis that a primary function of property rights is to internalize costs that would otherwise exist as "externalities").

5. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 53-54 n.2 (5th ed. 2002). The concept upon which the utilitarian theory is based is that people obey principles of law because it is in their common interest to do so not because they are obligated to do so. *Id.* The concept of property and the laws pertaining thereto are merely artifacts, human inventions, social institutions, and a means of societal organization. *Id.* Some scholars regard the utilitarian theory of property as being the dominant view of property today. *Id.* at 53; *see also*, Demsetz, *supra* note 4, at 347.

6. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998) (explaining property theories and concepts of rights of ownership).

7. *See, e.g.*, CAL. CIV. CODE § 658 (West 1982) (defining real property as consisting of land, that which is affixed to land, that which is incidental or appurtenant to land, or that which is immovable from land by operation of law). An accepted definition of "land" is that it is the material of the earth whatever may be the ingredients of which the earth is comprised, and it includes airspace below and above the surface of the earth. *See, e.g.*, CAL. CIV. CODE § 659 (West 1982). Personal property can be defined as every kind of property that is not real property. *See, e.g.*, CAL. CIV. CODE § 663 (West 1982).

8. 14 RICHARD R. POWELL & PATRICK J. ROHAN, POWELLL ON REAL PROPERTY § 81.02[1][b], at 81-27 to -29 (Michael A. Wolf ed., 2000).

real property often arrange for and receive various forms of assurances as to the quality of the title tendered and ultimately acquired.

In the next segment of this article, I present information about types of assurances of title that are available to persons who acquire or who are considering the acquisition of an interest in real property located in the United States. These forms of title assurance are express or implied covenants or warranties of title included as part of a contract for the sale of an interest in real property, deed covenants or warranties of title, the scope of protection afforded under land record title systems, abstracts of title, attorney opinions of title, and title insurance.

In the third segment of this article, I explore the extent to which a person who provides assurances of title is liable for or exposed to a possible risk of loss regarding a title defect that is caused by conduct of the assured. Title insurance is the final form of title assurance that I address in the third segment of this article. Standard forms of policies of title insurance include printed exclusions from policy coverage of defects, liens, encumbrances, adverse claims, or other matters created, suffered, assumed, or agreed to by the insured claimant.[9] A body of case law exists regarding the manner in which these exclusions from coverage are construed.[10] However, there is a dearth of case law regarding the question of whether a person who assures a quality of title to real property under a form of title assurance other than a policy of title insurance may or may not be potentially liable for a title defect caused by conduct of the assured. Portions of the commentary included in the third segment of this article address the foregoing question and offer reasons for the apparent lack of case law on the point with respect to forms of assurances of title other than a policy of title insurance.

II. FORMS OF TITLE ASSURANCE AVAILABLE TO PERSONS WHO ACQUIRE AN INTEREST IN REAL PROPERTY LOCATED IN THE UNITED STATES

A person who is transferred title to an interest in real property that is located in the United States[11] may acquire or receive a variety of types of

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9. OLIN BROWDER ET AL., BASIC PROPERTY LAW 865-66 (5th ed. 1989) (quoting ¶ 3(a) of the pre-printed "Exclusions from Coverage" included in an American Land Title Association (ALTA) form of policy of title insurance).

10. Joel E. Smith, Annotation, *Title Insurance: Exclusion Of Liability For Defects, Liens, Or Encumbrances Created, Suffered, Assumed, Or Agreed To By The Insured*, 87 A.L.R.3d 515 (1978).

11. In this article, I present material that pertains only to various forms of title assurances that are available to acquirers of interests in real property under the laws in effect in the United States. This article does not include any comparative study on whatever similarities or differences might exist between methods of title assurance that are part of the jurisprudence of the United

assurances of the quality of that title. This is true regardless of whether a person's acquisition of an interest in real property is the result of an *inter vivos,* donative transfer,[12] an *inter vivos,* sale transaction,[13] or a testamentary transfer.[14]

There are six types of assurances of title that are available to a person who acquires an interest in real property located in the United States. These six types of title assurances are:

(1) covenants or warranties of title that are either expressly or impliedly contained in a contract for the sale of an interest in real property,[15]

(2) deed covenants or warranties of title,[16]

(3) protection afforded under land record title systems,[17]

(4) abstracts of title and abstractor's liability,[18]

(5) attorney opinions of title and the liability that attaches thereto,[19] and

(6) title insurance.[20]

A. CONTRACT COVENANTS OR WARRANTIES OF TITLE

A contract for the sale of an interest in real property includes at least one covenant or warranty of title in the absence of a stipulation between the parties in the contract to the contrary.[21] This covenant or warranty of title is a promise on the part of the seller to deliver to the buyer either a judicially, statutorily, or contractually defined marketable title.[22] The law does not require a seller to deliver perfect title to a buyer.[23] Some commentators suggest that even if a contract for the sale of an interest in real property contains a promise by the seller to deliver *perfect* title—a title that is not

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States and the methods of title assurance that are part of legal systems of other countries or regions of the world.

12. 2 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 13.04, at 335 (2002).

13. 12 ALLEN M. WEINBERGER, THOMPSON ON REAL PROPERTY §§ 99.01-.03, at 227-34 (1994).

14. 10 VICTORIA MIKESELL MATHER, THOMPSON ON REAL PROPERTY §§ 88.01-.17, at 218-439 (1998).

15. 14 POWELL, *supra* note 8, § 81.03[6]-[6][h], at 81-121 to -128.

16. *Id.* § 81A.06-.06[5], at 81A-112 to -132.

17. *Id.* §§ 82.01-.04[3], at 82-3 to -146 (recording acts) and §§ 83.01-.03[ii], at 83-3 to -26 (title registration).

18. 11 DAVID A THOMAS, THOMPSON ON REAL PROPERTY § 91.09(a)(5), at 56-58 (2002); *see also* 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.10(b)(1), at 278-80 (regarding abstracts of title); 11 JOHN L. MCCORMACK, THOMPSON ON REAL PROPERTY § 92.11(a), at 216-18 (regarding abstractor's liability).

19. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.11(b), at 218-20.

20. *Id.* §§ 93.01-93.10, at 225-332.

21. 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.10(a)(1), at 275 n.217.

22. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 126 (3rd ed. 1990).

23. *Id.*

burdened by any lien or encumbrance—to the buyer, it is probable that such a promise could be successfully challenged as being illusory and therefore unenforceable.[24] Such a promise would be illusory if the property in question is nonexempt property that is subject to a lien for payment of real property taxes. The promise would be illusory because it is impossible for the seller to tender or deliver a title that is free and clear of *all* liens and encumbrances. Consequently, the best quality of title that could be tendered in that type of situation would not be a *perfect* title.

Whether a seller has or has not tendered or delivered a contractually, judicially, or statutorily defined marketable title to a buyer is determined on a transaction-by-transaction basis.[25] Whether a title is free from reasonable doubt and is therefore marketable is tested from the standpoint of the prospective purchaser and not that of either the prospective seller or of the court.[26] It follows that the quality of the title to an interest in real property that is accepted as being marketable by a purchaser might be regarded as unmarketable by a different purchaser.[27]

The parties to a contract for the sale of an interest in real property may include an express covenant by the seller to transfer marketable title to the buyer in the contract.[28] Some contracts for the sale of an interest in real property do not contain an express promise by the seller to transfer marketable title to the buyer.[29] In that type of situation, such a covenant is nevertheless regarded as being a condition by implication, in the absence of a specific contract provision to the contrary.[30] Where time is of the essence, the buyer has the right to rescind the contract in the event that the seller is not able to tender marketable title to the buyer as of the time when the seller was supposed to perform that duty in accordance with the terms and provisions of the sale contract.[31]

A seller's obligation to deliver a particular quality of title to a buyer may be couched in specific contract provisions that are sometimes collectively referred to as alternatives to the marketable title standards established by law.[32] Thus, a seller and a buyer do not have to specifically or impliedly rely upon criteria established by case or statutory law in the subject juris-

24. *Id.*
25. 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.10(a)(1), at 275-77.
26. Lucas v. Indep. School Dist. No. 284, 433 N.W.2d 94, 97 (Minn. 1988).
27. *Id.*
28. 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.10(a)(1)-(2), at 275-78.
29. *Id.*
30. *Id.*
31. *Id.* § 99.15(d).
32. LEFCOE, *supra* note 22, at 129.

diction to determine whether a seller's title is or is not marketable. A buyer and a seller can stipulate to the use of other criteria to establish whether the seller does or does not have title that is marketable.[33] Criteria commonly used by sellers and buyers as an alternative to judicial or statutory definitions of marketable title include: a title that is insurable,[34] a record title,[35] quality of title specifically approved by the buyer as an express condition precedent to a closing of the sale transaction,[36] or any combination of those criteria.[37]

If a buyer is not careful, it is possible for the buyer to receive judicially defined marketable title to a parcel of real property where the use of that property is restricted by governmental regulation. In general, the mere existence of local building codes, zoning laws, subdivision laws, or other governmentally imposed land use controls do not render title to real property unmarketable because those laws, in and of themselves, are not treated as encumbrances.[38] However, a violation of codes or laws that exists prior to the formation of a contract for the sale of an interest in real property can result in the seller's title being regarded as unmarketable.[39] Evidence of a violation of building or zoning laws that existed prior to the formation of a

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33. *Id.*

34. *Id.*; *see also* 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.10(a)(2), at 277-78; *see also*, Conklin v. Davi, 388 A.2d 598, 601-02 (N.J. 1978).

35. LEFCOE, *supra* note 22, at 129.

36. 14 POWELL, *supra* note 8, § 81.03[6][a], at 81-121 to -123.

37. *See, e.g.*, Lohmeyer v. Bower, 227 P.2d 102, 105 (Kan. 1951). The contract that was before the court in *Lohmeyer* provided that the seller would convey to the buyer title:

> [b]y Warranty Deed with an abstract of title, certified to date showing good merchantable title or an Owners Policy of Title Insurance in the amount of the sale price, guaranteeing said title to party of the second part [Dr. Lohmeyer], free and clear of all encumbrances except special taxes subject, however, to all restrictions and easements of record applying to this property, it being understood that the first party shall have sufficient time to bring said abstract to date or obtain Report for Title Insurance and to correct any imperfections in the title if there be such imperfections.

Id.; *see also Conklin*, 388 A.2d at 601 (regarding an express contractual provision that seller deliver to buyer a title that is both marketable and insurable).

38. *See, e.g.*, Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168, 169 (Mass. 1975).

39. *See, e.g.*, *Lohmeyer*, 227 P.2d at 108; Bethurem v. Hammett, 736 P.2d 1128, 1134 (Wyo. 1987). The comments of the Wyoming Supreme Court in *Bethurem* indicate that the instant case and similar cases are based upon the rationale that a buyer usually does not bargain for a lawsuit. *Id.* at 1132. Consequently, if such a title is deemed marketable and if a buyer were forced to purchase the subject property notwithstanding such an existing violation, the buyer would be put in a position of being responsible for a correction of the violation. *Id.* at 1132. Being put in that position is deemed contrary to the reasonable expectation of a buyer with respect to the title for which the buyer has bargained. *Id.* at 1132. It follows, therefore, that by regarding the seller's title as being unmarketable because of the existence of such a violation, the buyer's expectation is protected. *Id.* at 1131-32. If the seller's title is unmarketable under such a circumstance, the buyer can cause the contract of sale to be rescinded. *Id.*

contract for the sale of an interest in real property might not be included in the public land title records.[40] Evidence of a violation of building or zoning laws that existed prior to the formation of a contract for the sale of an interest in real property might be undiscoverable by a mere reasonable and proper inspection of the property.[41] A buyer can militate against the consequences of the existence of such a violation by negotiating for and receiving contract covenants or warranties from the seller to the effect that the seller has not received any notices of any such violation; has not made any improvements to the subject property without having obtained proper permits; and is not aware of any violation of applicable building code, zoning law, subdivision law, or other governmentally imposed land use regulation.[42]

Building codes, zoning laws, or other governmentally imposed land use regulations might be adopted by the government after a contract for the sale of an interest in real property has been created and while the contract is executory.[43] If the buyer seeks rescission of the contract after the seller's obligation to tender marketable title becomes due, a court may grant the buyer's request for a rescission of the contract based either on the doctrine of mistake[44] or misrepresentation if the contract is silent as to whether a violation of a governmental land use regulation enacted after the contract was created does or does not render the seller's title as being unmarketable.[45]

It is well established that if a seller breaches a contract for the sale of an interest in real property, the buyer can elect between the equitable remedies of rescission or specific performance on the one hand and the legal remedy of damages on the other.[46] However, if a buyer relies *solely* upon a seller's contractual covenants of title assurance, the buyer is exposed to the risk that such reliance is not prudent.[47] A successful assertion of a cause of action for specific performance by a buyer against a seller might not be possible.[48] It is possible that the seller's present whereabouts and assets are unknown.[49] It is possible that the seller does not have the financial where-

40. *Lohmeyer*, 227 P.2d at 108.

41. *Id.*

42. LEFCOE, *supra* note 22, at 132.

43. *Id.* at 133.

44. *Id.*

45. *Id.*

46. *See, e.g.*, Beard v. S/E Joint Venture, 581 A.2d 1275, 1283-84 (Md. 1990); *see also* Donovan v. Bachstadt, 453 A.2d 160, 163-65 (N.J. 1982).

47. 11 GEORGE LEFCOE ET AL., THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(ii), at 392-93.

48. *Id.*

49. *Id.*

withal to satisfy an award of damages rendered in favor of the buyer due to the seller's inability to fulfill the seller's contractual covenants or warranties of title.[50] A buyer's *sole* reliance upon a seller's contractual covenants or warranties of title in any one of these circumstances will most certainly be misplaced.[51]

Buyers who rely upon sellers' contractual covenants or warranties of title must also be mindful that they may not be able to enforce any covenants or warranties after the close of the transaction in question has taken place because of the merger doctrine.[52] Professor Jessie Dukeminier and Professor James Krier describe the merger doctrine as follows:

> An old doctrine says that a contract merges into the deed, and once the deed is accepted, the deed is deemed the final act of the parties expressing the terms of their agreement. The buyer can no longer sue the seller on promises in the contract of sale not contained in the deed, but must sue the seller on the warranties, if any, contained in the deed. There are recognized exceptions to the doctrine, such as fraud and contractual promises deemed collateral to the deed. . . . The merger doctrine is now in disfavor and is becoming riddled with exceptions where the buyer does not intend to discharge the seller's contractual obligations by acceptance of the deed.[53]

Although the merger doctrine has fallen to a state of disfavor according to Professor Dukeminier and Professor Krier, their comments also show that the doctrine has not been totally eradicated from the legal landscape that currently exists in the United States.[54] A postclosing claim of breach of contract for the sale of an interest in real property is barred in various jurisdictions under the merger doctrine when exceptions to the doctrine are found to be inapplicable to the claim at hand.[55]

While a seller's contractual covenants or warranties of title offer a form of protection, the buyer should not rely solely upon that form of title assurance.[56] A prudent buyer will arrange for and receive protection under other types of title assurance in addition to those provided by a seller in the form of contractual covenants or warranties of title.[57] One of these additional

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50. *Id.*
51. *Id.*
52. DUKEMINIER & KRIER, *supra* note 5, at 601.
53. *Id.*
54. *See, e.g.*, James v. McCombs, 936 P.2d 520, 524 (Alaska 1997).
55. *See, e.g.*, Davis v. Tazewell Place Assoc., 492 S.E.2d 162, 165-66 (Va. 1997).
56. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(ii), at 392-93.
57. *Id.*

forms of title protection that is available to people to whom interests in real property located in the United States are deeded is deed covenants or deed warranties of title.[58]

B. DEED COVENANTS OR WARRANTIES OF TITLE

A deed is a written document pursuant to the terms of which an interest in real property is transferred *inter vivosly*.[59] To be valid a deed, a written document must identify the transferor,[60] identify the transferee,[61] contain a description of the real property in which the interest is transferred,[62] contain words of unconditional transfer,[63] be signed or subscribed by the transferor,[64] be delivered to the transferee,[65] and be accepted by the transferee.[66] In at least two states, acknowledgment of the transferor's signature is also a requirement that must be satisfied in order for a written instrument to be a valid deed.[67] However, in each of the other states and the District of Columbia, if the elements of a writing, identification of the transferor, identification of the transferee, property description, words of unconditional transfer, a signing or a subscription by the transferor, delivery to the transferee, and acceptance by the transferee are all satisfied, the writing is a deed.[68] The usual consequence of a lack of acknowledgment of the deed under the

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58. DUKEMINIER & KRIER, *supra* note 5, at 611-32.

59. *Id.*; *see also* BERGER & WILLIAMS, *supra* note 2, at 1272-76; *cf.* Hayes v. Hayes, 148 N.W. 125 (Minn. 1925). In the *Hayes* case, the court explains that in general, inter vivos transfers of interests in real property cannot be created orally, but that an exception to that general rule is the "executed parol gift" doctrine. *Id.* at 127.

60. BERGER & WILLIAMS, *supra* note 2, at 1272; *see also* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(j), at 404.

61. *See, e.g.*, United States v. Stubbs, 776 F.2d 1472, 1474 (10th Cir. 1985); Board of Educ. v. Hughes, 136 N.W. 1095, 1096 (Minn. 1912); *see also* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(n), at 407.

62. DUKEMINIER & KRIER, *supra* note 5, at 613; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(s), at 410-11.

63. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(m), at 406.

64. *Id.* § 94.07(o), at 407-08.

65. *See, e.g.*, CAL. CIV. CODE § 1056 (West 1982); s*ee also* DUKEMINIER & KRIER, *supra* note 5, at 633-43.

66. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(q), at 408 (noting that "[o]ccasionally, grantees resist title by invoking the doctrine of [lack of] acceptance to avoid tax, tort or toxic clean-up liabilities"); 14 POWELL, *supra* note 8, § 81A.04[1][a][iii], at 81A-40 n.15 (citing 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 968 (Callaghan 3rd ed. 1975) wherein the author suggests that a "conveyance" to a person not yet born should be treated as having created an executory interest, subject to the constraints of the Rule Against Perpetutities, that will vest upon the birth of the named but yet to be born transferee).

67. *See* ARIZ. REV. STAT. ANN. § 33-401(B); OHIO REV. CODE ANN. § 5301.01 (Anderson 1989).

68. *See supra* notes 56-66 and accompanying text.

laws of the latter jurisdictions is that the deed is not in a recordable form.[69] A written document does not have to include a recital of consideration[70] nor be dated[71] to be a valid deed. In most jurisdictions, a document does not have to be under seal to be a valid deed.[72]

It has been observed that "[o]wners don't pass the same deed down one to another in succession. Each owner prepares and executes a new deed for delivery to the grantee."[73] The foregoing observation follows from the requirements that in order for a written instrument to be a deed, the written instrument must contain a sufficient identification of the person who is the transferor and the person who is the transferee.[74] A single deed is not passed from one person to another regarding a particular parcel of real property under the American system of jurisprudence because of the many types of interests[75] or the number of forms of ownership that can exist in or against a particular parcel of real property at the same time.[76] It follows from the foregoing that it is not possible for those various types of interests and ownership forms to be created or terminated in the United States by a continual use of but a single deed.

Whether and to what extent a person who has acquired an interest in real property has also received deed warranties of title depends upon the type of deed that the transferor delivered to the transferee. The types of deeds that are in common use in the United States are general warranty deeds, special warranty deeds, bargain and sale deeds, grant deeds, and quitclaim deeds.[77] In each state, particular forms of deeds are in common use with respect to real estate sale transactions in accordance with either the provisions of a statute or custom and practice.[78] Furthermore, a particular deed form might be in common use in a jurisdiction with respect to a transfer of an interest in real property as a gift, but a different deed form might

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69. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(g), at 401-02.

70. 9 RONALD R. VOLKMER, THOMPSON ON REAL PROPERTY, § 82.09(a), at 588 n.293 (David A Thomas ed., 1999); *see also*, Chase Federal Sav. & Loan Ass'n v. Schreiber, 479 So.2d 90, 98-100 (Fla. 1985).

71. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(p), at 408.

72. DUKEMINIER & KRIER, *supra* note 5, at 614 n.3.

73. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(a), at 386.

74. *See supra* notes 60-61 and accompanying text.

75. 1 RICHARD R. POWELL & PATRICK J. ROHAN, POWELLL ON REAL PROPERTY chs. 12-13 (Michael A. Wolf ed., 2000); *see also* 2 RICHARD R. POWELL & PATRICK J. ROHAN, POWELLL ON REAL PROPERTY chs. 14-15 (Michael A. Wolf ed., 2000) (describing various types of estates that can be created in real property under the American system of property law).

76. *See* 7 RICHARD R. POWELL & PATRICK J. ROHAN, POWELLL ON REAL PROPERTY chs. 49-54 (Michael A. Wolf ed., 2000) (wherein various concurrent forms of ownership that can created under the American system of property law are described).

77. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(a)-(b)(2)(i), at 386-92.

78. *Id.* § 94.07(b), at 387.

be commonly used in that same jurisdiction concerning a sale of an interest in real property.[79] Of course, the parties to a real estate sale transaction can agree to a form of deed that differs from the form of deed that is the most commonly used in the jurisdiction.[80] In addition, a donor of an interest in real property can elect to use a deed form that differs from the form of deed that is the most commonly used in the subject jurisdiction with respect to transfers in the nature of a gift.[81]

The delivery of a general warranty deed to a transferee results in the transferee receiving assurances from the transferor against title defects that are the consequence of either conduct on the part of the transferor or conduct on the part of a predecessor-in-interest of the transferor.[82] In some states, "a bargain and sale deed with full covenants" has the same effect as a general warranty deed.[83]

The delivery of a special warranty deed to a transferee results in the transferee receiving assurances from the transferor against title defects that arise from conduct on the part of the transferor only.[84] A bargain and sale deed containing covenants against the conduct of the transferor only is regarded as being similar in purpose and legal effect as a special warranty deed.[85]

Authority exists that suggests that the covenants in a grant deed are much "the same as those contained in special warranty deeds."[86] While that may be true in some jurisdictions, in other states, the scope of the title assurances that arise from the use of a statutory form of grant deed is narrower than the scope of assurances that arise out of the use of either a general warranty deed or a special warranty deed. The same types of warranties attach to both general warranty deeds and special warranty deeds except that the scope of those warranties under a special warranty deed is limited to defects that arise from conduct on the part of the transferor only.[87]

No assurances of title attach to or arise out of the use of a quitclaim deed.[88] A bargain and sale deed without covenants is used in the real prop-

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79. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, §§ 82.01-.15, at 537-691.

80. *Id.*

81. *Id.*

82. DUKEMINIER & KRIER, *supra* note 5, at 612; *see also* 14 POWELL, *supra* note 8, § 81A.03[1][b][ii], at 81A-28.

83. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(1)(iii), at 389.

84. *Id.* § 94.07(b)(2)(i), at 390; *see also* DUKEMINIER & KRIER, *supra* note 5, at 612.

85. 14 POWELL, *supra* note 8, § 81A.03[1][b][iii], at 81A-29.

86. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(i), at 390.

87. *Id.* at 390-92.

88. DUKEMINIER & KRIER, *supra* note 5, at 612.

erty marketplace in some jurisdictions.[89] Such a bargain and sale deed is the functional equivalent of a quitclaim deed.[90]

Many other labels are used to refer to deeds in the real estate marketplace.[91] A sampling of those labels follow: sheriff's deed, executor's deed, trustee's deed, and guardian's deed.[92] Regardless of what label is used to refer to a particular deed, functionally, the deed is either a type of general warranty deed, type of special warranty deed, or a type of quitclaim deed.[93]

A number of states have adopted some type of statutory short form deed for general use within those states.[94] At least one authority includes a state-by-state table to illustrate which type of statutory short form deed is currently in effect in each state.[95]

A transferor under a general warranty deed either expressly or impliedly undertakes six covenants of title for the benefit of the transferee.[96] Those covenants of title are: (1) the covenant of seisin,[97] (2) the covenant of the right to convey,[98] (3) the covenant against encumbrances,[99] (4) the covenant of warranty,[100] (5) the covenant of quiet enjoyment,[101] and (6) the

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89. 14 POWELL, *supra* note 8, § 81A.03[1][b][iii], at 81A-29.

90. *Id.* § 81A.03[1][b][iii]-[1][c], at 81A-28 to -29.

91. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.04(c), at 550.

92. *Id.*

93. *Id.* § 82.04(b), at 549-50; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b), at 387.

94. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.04[c], at 550-55.

95. *Id.* at 551-55.

96. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(1)(ii), at 387-89; *see also* DUKEMINIER & KRIER, *supra* note 5, at 612-13, 616.

97. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(c)(1), at 608-11. By means of the covenant of seisin, transferors warrant that they own the estate that they purport to convey to a transferee. *Id.*

98. *Id.* § 82.10(c)(2). Under a covenant of right to convey, a transferor warrants that he, she, or it has the right to convey the subject estate or other interest in real property that is a subject matter of the conveyance. *Id.* In most instances, the covenant of right to convey is functionally equivalent to the covenant of seisin when the conveyance in question involves the transfer or purported transfer of a freehold estate—a fee simple, a life estate, or where recognized, a fee tail. *Id.* However, it is possible that a person is seized of an estate (i.e., has legal title to the estate) but does not have the right to convey that estate under specified circumstances. *Id.* Consider, for example, a situation where a parcel of real property is held in trust under a trust instrument that forbids the trustee from selling the trust property and thereby conveying the property in question to someone other than a remainder beneficiary effective as of the time of the expiration of the trust or to the settlor in the event of a revocation of the trust. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT TRUSTS AND TRUSTEES § 741 at 401-04 (2nd ed. West 1982).

99. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(c)(3), at 611-15. A covenant against encumbrances involves a transferor warranting that there are no encumbrances against the transferred estate other than those identified and agreed to by the transferee. *Id.* Encumbrances include, among other items, liens, easements, and land use covenants. *Id.*

100. *Id.* § 82.10(c)(4) at 615-21; *see also* 14 POWELL, *supra* note 8, § 81A.03[1][b][i], at 81A-28; McDonald v. Delhi Sav. Bank, 440 N.W.2d 839, 843 (Iowa 1989). The covenant of general warranty is considered to be of prime importance and the label "warranty deed" is derived from this warranty. 14 POWELL, *supra* note 8, § 81A.03[1][b][i], at 81A-28. By use of the cove-

covenant of further assurances.[102] These same six covenants of title can be expressly included in a special warranty deed or be statutorily deemed a part of a special warranty deed.[103] However, as previously noted, the transferor under a special warranty deed undertakes responsibility only for a breach of any of those covenants that is the result of conduct of the transferor.[104] If a defect in title exists that was caused by the conduct of a predecessor of a transferor under a special warranty deed, the transferor is not liable to the special warranty deed transferee, nor to successors-in-interest of that transferee, for damages suffered by the latter caused by the title defect.[105]

The implied assurances that arise by statute in some jurisdictions in connection with the delivery of a grant deed are basically two in number. The first assurance is that the grantor has not granted or conveyed any right, title, or interest therein of the same estate to any person other than the grantee.[106] The second assurance is an assurance against encumbrances.[107]

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nant of general warranty, transferors warrant that they will defend against lawful claims and will compensate a transferee for any loss that the transferee may sustain by virtue of the assertion by a third party of a title to the property in question that is superior to that claimed by the transferor at the time of the transfer. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(c)(4), at 615-21. If the transferee successfully defends the claim of the third party, the claim of the third party was not lawful. LEFCOE, *supra* note 22, at 177. As a consequence, the transferor is not liable for the attorney's fees and costs incurred by the transferee in connection with the transferee's successful defense against the third party claim. *Id.* Some jurisdictions require that a transferee give notice of the third party claim to the transferor and demand that the transferor undertake the costs of defense against the claim of the third party as a condition precedent to allowing a transferee to recover costs and attorney's fees from the transferor if the transferor does not undertake the demanded defense on behalf of the transferee and thereby breaches the covenant of general warranty. *See, e.g.*, Bloom v. Hendricks, 804 P.2d 1069, 1071 (N.M. 1991).

101. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(c)(5), at 621. By inclusion of a covenant of quiet enjoyment in a warranty deed, a transferor warrants that a transferee will not be disturbed in possession and enjoyment of the property by an assertion of superior title by a third person. *Id.* Some authorities consider the covenant of quiet enjoyment as being the functional equivalent of the covenant of general warranty. *Id.*

102. *Id.* § 82.10(c)(6), at 622; *see also,* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, & DEVELOPMENT 169 (3d. ed. 1987). The covenant of further assurances is a transferor's promise to a transferee to do anything that might be necessary to perfect title in that transferee. *Id.* Performance of this promise might entail the execution and delivery of additional documents. *Id.*

103. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(1)(iii)-(b)(2)(ii), at 389-93.

104. *Id.* § 94.07(b)(2)(i), at 390.

105. 14 POWELL, *supra* note 8, § 81A.03[1][b][iii], at 81A-28.

106. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-435 (West 2000); CAL. CIV. CODE §1113 (West 1982); IDAHO CODE § 55-612 (Michie 2000); MONT. CODE ANN. § 70-20-304 (2002); NEV. REV. STAT. ANN. § 111.170 (Michie 1998); N.D. CENT. CODE § 47-10-19 (1999); OR. REV. STAT. § 93.850 (2001); S.D. CODIFIED LAWS § 43-25-10 (Michie 1997); TEX. PROP. CODE ANN. § 5.023 (Vernon 1984).

107. *Id.*

The covenants of seisin, right to convey, and against encumbrances that inure to the benefit of a transferee under a general warranty deed or a special warranty deed are sometimes referred to as "present covenants."[108] The term "present covenants" is derived from the fact that those covenants are either breached or not breached as of the time of the delivery of the warranty deed and at no other time.[109] Therefore, the word "present" in the term "present covenants" connotes the time at which the warranty deed in question was delivered.[110]

If a transferor's breach of a present covenant occurs at the time of the delivery of a warranty deed, the transferee has a chose in action as a result of that breach.[111] A chose in action is a right to pursue an action at law to procure payment of a sum of money.[112] The common law rule is that a chose in action cannot be assigned.[113] Application of that rule of law to present covenants by the courts has resulted in the conclusion that such covenants are personal to the warranty deed transferee and cannot be enforced against the transferor of the warranty deed by a remote transferee.[114] The foregoing is the basis for the formulation of the common law rule that personal deed covenants or warranties of title do not run with the land.[115]

In some states, owners of certain types of choses in action have the power to assign those rights.[116] The common law prohibition against such assignment is not followed in these states because of statutory law that abolishes the common law prohibition against assignment[117] because of case law that is founded either upon a finding that the common law is repugnant to a public policy of the state[118] or because the concept of vertical privity.[119] In such jurisdictions, remote transferees have standing to enforce present covenants of title against a remote transferor.[120] Of course, a re-

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108. DUKEMINIER & KRIER, *supra* note 5, at 616.
109. *Id.*
110. *Id.*
111. *See, e.g.*, Rockafellor v. Gray, 191 N.W. 107, 108 (Iowa 1922).
112. BLACK'S LAW DICTIONARY 234 (7th ed. 1999).
113. *See, e.g.*, *Rockafellor*, 191 N.W. at 108.
114. *Id.*
115. *Id.*
116. *Id.*
117. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(e), at 624.
118. *Rockafellor*, 191 N.W. at 108.
119. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(d), at 623.
120. *Id.* In a jurisdiction that allows a chose in action based on a breach of a present covenant to be assigned, the instrument of assignment is deemed to be the deed delivered by the immediate transferee to a subsequent transferee and so on. For example, suppose that X delivered a general warranty deed to Y. In time, Y delivered a special warranty deed to Z. Subsequently, O, the person who is the true owner of the property, ousts Z from the property. Also suppose that Y is not liable for the damages sustained by Z because O's paramount title is not the result of any

mote transferee must prosecute such a claim against a remote transferor in a timely manner.[121]

The covenants of warranty, quiet enjoyment, and further assurances that are expressly or impliedly made by a transferor under a general warranty deed or a special warranty deed are commonly referred to as future covenants.[122] The term "future covenants" evolved from the verity that a breach of any one of those covenants can occur, if a breach will occur at all, at some point in time after the delivery of the subject warranty deed.[123]

The common law regards future covenants as being promises that touch and concern land.[124] As a consequence, future covenants are deemed to "run with the land."[125] In other words, future covenants of title not only arise for the benefit of the immediate transferee under a general warranty deed or certain types of special warranty deeds, but they also inure to the benefit of remote transferees.[126] Thus, remote transferees have standing to assert a timely and appropriate claim against a remote transferor for breach of a future covenant of title under the common law.[127] These common law rules pertaining to future covenants are currently in force in all of the states and the District of Columbia.[128]

The courts have construed the two statutory warranties of title that attach to a grant deed as being personal to the transferee.[129] As a result, remote grantees do not have standing to assert a claim of breach of either or both of those warranties against a remote grant deed transferor.[130] The courts have adopted this line of reasoning notwithstanding language in the subject statutes that arguably merit a conclusion that the warranties in question are not personal[131] and in spite of the fact that some of those same courts have adopted the so-called modern law approach, which states that

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conduct on the part of Y. If Z pursues claims against X that X breached the covenants of seisin and right to convey, Z will be regarded as having been impliedly assigned each present chose of action by virtue of the delivery of Y's special warranty deed to Z. Put another way, Y's special warranty deed constituted both an instrument of conveyance and an instrument of assignment. *See, e.g., Rockafellor*, 191 N.W. at 108.

121. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(d), at 623.

122. *Id.* § 82.10(c), at 607.

123. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(c)(1), at 397.

124. *Id.* § 94.07(e), at 400.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See, e.g.*, Babb v. Weemer, 37 Cal. Rptr. 533, 535-36 (Cal. Ct. App. 1964).

130. *Id.*

131. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(i), at 390-92.

present covenants under a general warranty deed or another form of special warranty deed are able to be assigned.[132]

The scope of the assurances of title under deed warranties that inure for the benefit of an immediate or remote transferee is not without limits. As is the case with other forms of title assurance, one manner in which the assurance under a warranty deed or a grant deed is limited is by the verbiage that is used to describe or define the assurance.[133] Another way in which the scope of the assurance under a warranty deed or a grant deed is limited is by virtue of the measure of damages available to a protected person if a breach of a deed covenant or warranty of title occurs.[134] Like contract covenants or warranties of title, a potential limitation on the effectiveness of deed covenants or warranties of title is the possible inability of the transferor to prevent or satisfy whatever damages that might be suffered by the protected person.[135] Consequently, a transferee under a warranty deed or a grant deed should not rely solely upon the express or implied covenants or warranties of title that attach to those forms of deeds.[136]

C. LAND RECORD TITLE SYSTEMS

A few comments about the land record title systems that are in effect in the United States are in order before we turn to the topics of abstracts of title, attorney opinions, and title insurance.

Land record title systems are in use in many countries of the world.[137] Two types of land record title systems are in use in the United States.[138] Those record title systems are the Torrens Title Registration System and the Recording System.[139] Brief overviews of these systems follow.

1. *The Torrens Title Registration System*

The Torrens Title Registration System is one of five general types of title registration systems used in the world.[140] The Torrens Title Registra-

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132. *Id.*

133. 14 POWELL, *supra* note 8, § 81A.06[2][iii], at 81A-122 to -123; *see also* JOHN E. CRIBBET ET AL., PROPERTY CASES AND MATERIALS 1145-46 (8th ed. 2002); LEFCOE, *supra* note 22, at 174-76.

134. 14 POWELL, *supra* note 8, § 81A.06[1]-[4], at 81A-112 to -130; CRIBBET, *supra* note 133, at 1159-61; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(c)(2)-(3), 397-98.

135. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(i), at 392.

136. *Id.*

137. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.01, at 89.

138. *Id.* § 92.01, at 90.

139. *Id.*

140. *See id.* § 92.10(a), at 195 n.470 (citing "SIR ERNEST DOWSON & V.L.O. SHEPPARD, LAND REGISTRATION, 98 (2d ed. 1964) (stating, "The other four are the English, German, Swiss, and Ottoman title registration systems")).

tion System is named after its founder Sir Robert Richard Torrens.[141] The Torrens System was first implemented in Australia in the 1850s.[142] The basic goal under the Torrens System of Title Registration is to make title records maintained by the government conclusive proof of ownership and of the condition of title to a particular parcel of real property.[143] Title registration systems adopted in the United States exist primarily for the benefit of good faith purchasers for value[144] and private persons and governmental entities that acquire interests in registered property[145] by condemnation.[146]

Historically, the Torrens System involves the following: (1) a lawsuit adjudicating the then current state of the title to a particular parcel of real property; (2) official registration of the adjudicated title evidenced by the issuance of a certificate of title; (3) the maintenance of title records by a registrar; (4) issuance of a new certificate by the registrar regarding each transfer of title to the subject real property that occur subsequent to the initial registration of the adjudicated title; and (5) the establishment and maintenance of an assurance or indemnity fund, the principal of which is primarily comprised of fees collected by the registrar.[147]

According to one set of sources, statutes authorizing the use of the Torrens System existed in twenty states at one time.[148] These same sources report that in nine of those twenty states, the enabling statutes were either re-

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141. *Id.* at 194.

142. *Id.*; *see also* DUKEMINIER & KRIER, *supra* note 5, at 728.

143. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(b), at 196.

144. 14 POWELL, *supra* note 8, § 82.01[2][a]-[b], at 82-9 to -13. Under the nomenclature of the common law, a "purchaser" is any transferee who receives an interest in real property regardless of whether the "purchaser" parted with value in return for the transfer. 73B C.J.S. *Purchaser* 559-60 (1983). Applying that meaning of the word "purchaser" means that the phrase "purchaser for value" is not redundant. *Id.* Modernly, a "purchaser" is generally regarded as referring to anyone who acquires any interest in real property for a valuable consideration. *Id.* Thus, the phrase "bona fide purchaser" is commonly used modernly as opposed to the phrase "bona fide purchaser for value." 5A WORDS AND PHRASES *Bona Fide Purchaser* 76 (West 1968). The modern connotation of the word "purchaser" includes a person who is bound by the content of public land records and who, therefore, is obligated to undertake a proper search of those records. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.09(b), at 165-66.

145. 14 POWELL, *supra* note 8, § 83.02[2][b], at 83-9 to -10.

146. *See, e.g.*, CAL. CIV. CODE § 1001 (West 1982); WASH. REV. CODE ANN. § 8.24.010 (West 1992) (citing examples of state statutes that enable private persons to acquire particular types of interests in real property via a private condemnation proceeding). The federal government or a state government can condemn (i.e., take by eminent domain) privately owned property for public use or for a public purpose pursuant to the Federal Constitution or a state constitution. 29A C.J.S. *Eminent Domain* §§ 4, 23, & 26 (1992). These constitutional and statutory laws require a private or public condemning party to pay just compensation for the interest taken by condemnation. *Id.* §§ 71-73.

147. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(b)-(e), at 196-203; *see also*, DUKEMINIER & KRIER, *supra* note 5, at 728-29.

148. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(a), at 195.

pealed or allowed to lapse.[149] However, according to other sources, title registration statutes were originally enacted into law in twenty-one states.[150] Although title registration statutes are currently in force in ten states,[151] according to at least one authority, the Torrens System has been "used to a substantial extent in only five states: Hawaii, Illinois, Massachusetts, Minnesota and Ohio."[152] Use of the title registration system in Hawaii and Massachusetts is described in that same source as being "state-wide."[153] The Illinois Act enabling title registration was repealed in 1990.[154] The legislation by which the Illinois act enabling title registration was repealed provided for a transition period that expired January 1, 1997.[155]

Although the Torrens System is based upon the concept that a certificate of title is conclusive proof of ownership, the title registration system implemented in the United States includes legislatively or judicially created exceptions to that basic concept.[156] The net result of the recognition and application of these exceptions is that in the United States, a certificate of title is a rebuttable presumption of ownership rather than conclusive proof of ownership.[157] The presumption is rebutted under any one of the recognized exceptions.[158] These exceptions include federal tax liens, statutory liens, real property tax liens, short-term leases, easement claims based upon visible conditions of the property in question, and fraudulent registration.[159]

Various explanations have been offered as to why the Torrens Title Registration System has not gained popularity in the United States. Those explanations include: (1) costs associated with the initial adjudication proc-

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149. *Id.*

150. 14 POWELL, *supra* note 8, § 83.01[3], at 83-5 n.7 (stating, "Statutes permitting registration were enacted in California, Colorado, Georgia, Hawaii, Illinois, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Washington. *See* B. SHICK & I. PLOTKIN, TORRENS IN THE UNITED STATES 18 (1978)").

151. Colorado (COLO. REV. STAT. §§ 38-36-101 to –199 (2002)); Georgia (GA. CODE ANN.. §§ 44-2-4 to 44-2-253 (Harrison 1998)); Hawaii (HAW. REV. STAT. §§ 501-1 to 501-211 (1993)); Massachusetts (MASS. GEN. LAWS ANN. ch. 185, §§ 1-118 (West 1991)); Minnesota (MINN. STAT. ANN. ch 508 (West 2002)); North Carolina (N.C. GEN. STAT. ch 43 (2001)); Ohio (OHIO REV. CODE ANN. chs. 5309 & 5310); Pennsylvania (PA. STAT. ANN. tit. 21, § 321 & tit. 16, § 3708 (West 2001)); Virginia (VA. CODE ANN. § 55.112 (Michie 1995)); and Washington (WASH REV. CODE ANN. ch. 65.12 (West 1994)).

152. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(a), at 195.

153. *Id.*

154. 14 POWELL, *supra* note 8, § 83.01[3], at 83-6.

155. *Id.*; *see also* ILL. ANN. STAT. § 765 40/4 (repealed 1990).

156. 14 POWELL, *supra* note 8, § 83.02[3][b], at 83-12 to -14; *see also* DUKEMINIER & KRIER, *supra* note 5, at 728

157. 14 POWELL, *supra* note 8, § 83.02[3][a]-[b], at 83-10 to -14

158. *Id.*

159. *Id.*

ess;[160] (2) the exceptions recognized under the American system of jurisprudence that have resulted in certificates of title not being treated as conclusive proof of ownership;[161] (3) opposition to the title registration system by title insurance companies, abstract companies, and attorneys;[162] (4) inadequate or inadequately trained personnel in the offices of registrars resulting in substantial backlogs regarding the issuances of certificates of title;[163] (5) costs incurred by the government regarding the creation, maintenance, and use of a title registration system that are usually borne by private parties instead of the government;[164] and (6) the relatively narrow scope of assurance afforded under the system.[165]

In essence, the assurance afforded to persons protected under the Torrens System is indemnification for loss that is sustained in the registration process.[166] The Torrens System includes the establishment of a state regulated assurance fund from which protected, aggrieved persons are indemnified.[167] The sources of revenues for these assurance funds come primarily from payments of original registration fees, filing and indexing fees, and fees paid in connection with an application to withdraw property from the registration system.[168]

Comparisons between the assurances provided under the Torrens System and under policies of title insurance have resulted in a conclusion that the assurances provided by a typical policy of title insurance are broader in scope than those provided under a Torrens Title Registration System.[169] Of course, the government can enact a Torrens System that includes the same assurances as or assurances that are broader in scope than those which arise

160. DUKEMINIER & KRIER, *supra* note 5, at 728-29; 14 POWELL, *supra* note 8, § 83.02[3][c], at 83-14 to -15; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(g), at 205-09. In 1982, Minnesota became the first state to authorize initial registration by means of an administrative process instead of a judicial process in an effort to reduce costs. *See id.* § 92.10(d), at 198-201 (summarizing due process issues and the aftermath of the adoption of the Minnesota statute that authorizes administrative, initial registration); Anh T. Le, *The Effect of the Hersh Decision on the Torrens Act: Getting to the Root of the Problem – (Hersh Properties, LLC v. McDonald's Corp.*, 558 N.W.2d 728 (Minn. 1999)) 26 WM. MITCHELL L. REV. 601, 621-22 (2000).

161. DUKEMINIER & KRIER, *supra* note 5, at 728; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(g), at 205-09.

162. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(g), at 205-09.

163. *Id.*

164. *Id.* § 92.10(h), at 209-14; *see also* 14 POWELL, *supra* note 8, § 83.02[3][c], at 83-14 to -15.

165. 14 POWELL, *supra* note 8, § 83.03[10], at 83-25 to -26; 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(f), at 203-05.

166. 14 POWELL, *supra* note 8, § 83.03[10] at 83-25 to -26.

167. *Id.*

168. *Id.*

169. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.10(f), at 205.

in connection with the issuance of a policy of title insurance.[170] Notwithstanding factors that have been cited as reasons for the lack of widespread use of the registration system in the United States, favorable assessments of the Torrens Title Registration System exist.[171]

2. *Recording Systems*

As noted in prior passages of this article, the original Torrens Title Registration System is founded on the premise that a certificate of title constitutes conclusive proof of ownership and condition of title.[172] However, the Torrens Registration Systems adopted and implemented in the United States provide methods by which government-maintained records serve as a rebuttable presumption, not conclusive proof, of ownership and the condition of title.[173] Not surprisingly, the recording systems put into effect in the United States do not constitute conclusive proof or a conclusive statement of ownership or condition of title to a particular parcel of real property.[174] Rather, the recording systems that are in use in the United States provide methods by which evidence of title can be compiled, maintained, and accessed.[175] A proper gathering and analysis of evidence of title under a recording system involves adherence to required procedures for searching the public records regarding land title that are maintained under the laws of a particular jurisdiction[176] and proper examination of the contents of all of the documents that embody what is sometimes referred to as "the record chain of title."[177]

The public recording of documents that affect title to land began in the Bay Colonies around 1640.[178] The recording system was not part of English custom.[179] Consequently, the practice is unique to the American system of jurisprudence when compared to the English common law. A characteristic common to each of the types of recording statutes in effect in the

170. *Id.*

171. John L. McCormick, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61 (1992); C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55 (1987); *Possessory Title Registration: An Improvement of the Torrens System*, 11 WM. MITCHELL L. REV. 825 (1985); Barry Goldner, *The Torrens System of Title Registration: A New Proposal for Effective Implementation*, 29 UCLA L. REV. 661 (1982).

172. *See supra* notes 144-47 and accompanying text.

173. *See supra* notes 156-59 and accompanying text.

174. DUKEMINIER & KRIER, *supra* note 5, at 661, 663.

175. *Id.*

176. *Id.* at 663-64.

177. *Id.* at 695.

178. *Id.* at 661-62.

179. *Id.*

United States is that those statutes supplant the common law doctrine of first in time, first in right.[180]

A recording system can be used as a shield to assure that a current interest in real property will not be adversely affected by the status of a subsequent purchaser.[181] Put another way, the owner of an interest in real property should record evidence of that ownership in a timely and appropriate manner for the purpose of protecting the owner against that interest becoming adversely affected by the acquisition of that same or a different interest in the subject real property by a subsequent purchaser.[182] To properly use a recording act as a shield, a person must duly record a document that is evidence of that person's ownership of an interest in the subject real property.[183] To be a duly recorded document, the document must be regarded under the controlling law as a document that can be recorded,[184] the document must be proper in form,[185] and must be properly indexed in the records of the Office of the Recorder or other government official who has the responsibility of maintaining official land title records in a particular jurisdiction.[186]

A recording act can also be used as a sword to terminate or otherwise adversely affect prior unrecorded interests in real property.[187] Only those people for whose protection a recording act has been enacted may use a recording act as a sword.[188] Some types of recording acts protect subsequent purchasers for value regardless of whether they do or do not have knowledge of a prior, unrecorded interest.[189] Other types of recording acts protect only subsequent, good faith purchasers for value.[190] It appears that Colorado has the only recording statute that provides protection to subsequent,

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180. *Id.* at 663.

181. *Id.* at 705 n.17. "The term *purchaser* is uniformly held to apply to all parties who have paid consideration for the interest acquired, including a mortgagee or a lessee." *Id.*; *see also* 14 POWELL, *supra* note 8, § 82.01[2][b], at 82-11 to -13 (summarizing the definition of the term "bona fide purchaser").

182. DUKEMINIER & KRIER, *supra* note 5, at 662.

183. *Id.*

184. *See, e.g.*, HARRY D. MILLER, 5 MILLER & STARR, CALIFORNIA REAL ESTATE 3rd, § 11:6 (West Group 2000) (describing 116 of the various documents that may be recorded under the law of California).

185. 14 POWELL, *supra* note 8, § 82.03[1], at 82-97 to -100.

186. DUKEMINIER & KRIER, *supra* note 5, at 663-75

187. *Id.* at 663.

188. *Id.*

189. *Id.* at 685; *see also* LA. REV. STAT. ANN. § 2721 (1996), N.C. GEN. STAT. § 47-18 (2003); *see, e.g.*, Rowe v. Walker, 441 S.E.2d 156, 158 (N.C. 1994) (stating, "North Carolina does not require that a purchaser for valuable consideration be an 'innocent purchaser'").

190. DUKEMINIER & KRIER, *supra* note 5, at 685-87; *see also, e.g.*, CAL. CIV. CODE §§ 1107, 1214 (1982); FLA. STAT. ANN. § 695.01 (1994); WASH. REV. CODE ANN. § 65.08.070 (1994).

good faith purchasers who acquired their interest without giving value (i.e., acquisition of an interest in real property as a donee or as an heir).[191]

Currently, there are basically three types of recording acts that are in force in the United States: (1) race recording statutes,[192] (2) notice recording statutes,[193] and (3) race-notice recording statutes.[194]

The race type of recording act is the oldest type of recording statute in use in the United States.[195] However, for a period of time prior to 1981, Louisiana[196] and North Carolina[197] were the only two states with a race recording statute in general use.[198] A few states utilize race statutes as a means of determining priorities of liens,[199] but those same states use either a notice statute or a race-notice statute regarding conveyances in general.[200] For a period of time, twenty-three states had notice type recording acts in general,[201] and twenty-five states and the District of Columbia had race-notice types of recording acts in general use in those twenty-six jurisdic-

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191. COLO. REV. STAT. ANN. § 38-35-109 (2002). That statute protects "any person with any kind of rights in or to such real property." *Id.* The statute does not specifically require such a person to have given consideration for the right that they have acquired. *See also* 14 POWELL, *supra* note 8, § 82.01[2], at 82-12 n. 41, § 82.02[2], at 82-80.

192. DUKEMINIER & KRIER, *supra* note 5, at 685. A subsequent purchaser is able to use a race-recording act as a sword even if the subsequent purchaser has knowledge or notice of a prior, unrecorded interest. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(a), at 158. The paramount right as between the holder of the prior, unrecorded interest and the subsequent purchaser is established by which of those persons is the first to record. *Id.*

193. DUKEMINIER & KRIER, *supra* note 5, at 685-86. Subsequent purchasers are able to use a notice statute as a sword by acquiring their interest without knowledge of the prior, unrecorded interest. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(b), at 159-60. Recording is not a prerequisite to use a notice statute as a sword. *Id.* However, a subsequent, bona fide purchaser who has gained a paramount interest in the property in question by means of using a notice statute as a sword should record evidence of his, her, or its interest nevertheless. *Id.* § 92.04(a), at 99-100. If accomplished in a timely and proper manner, the recording of such evidence of title to an interest in the subject property will serve as a shield against persons who subsequently acquire an interest in the property in question. *Id.*

194. DUKEMINIER & KRIER, *supra* note 5, at 686-87. To use a race-notice recording act as a sword in jurisdictions other than Colorado, a subsequent purchasers must have their interest without knowledge of the prior, unrecorded interest, and as between the holder of the prior, unrecorded interest and the subsequent purchaser, the latter must be the first to record. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(c)-(d), at 160-63.

195. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 586 (1988).

196. LA. REV. STAT. ANN. § 2721 (2002).

197. N.C. GEN. STAT. § 47-18 (2003).

198. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(a), at 158.

199. *Id.*; *see also* ARK. CODE ANN. § 18-40-102 (1987).

200. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(a), at 158; *see also* ARK. CODE ANN. § 14-15-404 (Michie 1998).

201. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(b), at 159 n.286 (listing the following states: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and West Virginia).

tions.[202] Presently, the recording act that is in effect in North Carolina is deemed to be a type of race-notice statute and not a race statute, which was how various authorities prior to 1981 characterized the recording act.[203] Furthermore, the recording act that is in effect in Alabama is no longer regarded as being a type of notice statute, for it is currently also deemed to be a type of race-notice statute.[204] Based upon the foregoing, there are currently three categories of recording statutes that are in general use in the United States. First, the race type of recording act is now in general use in the state of Louisiana only.[205] Second, notice types of recording acts are presently in general effect in twenty-two states.[206] Third, race-notice types of recording acts are currently in general use in twenty-seven states and the District of Columbia.[207]

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202. *Id.* § 92.08(c), at 160 n.288 (listing the following states: Alaska, California, Colorado, District of Columbia, Georgia, Hawaii, Indiana, Illinois, Idaho, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Washington, Wisconsin, and Wyoming).

203. *Id.* § 92.08(a), at 158 n.283.

204. Baxter v. South Trust Bank of Dotham, 584 So.2d 801, 804 (Ala. 1989) (construing ALA. CODE § 35-4-90 (1989)).

205. LA. REV. STAT. ANN. § 2721 (2002).

206. *See* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(b), at 159 n.286 (citing ARIZ. REV. STAT. ANN. §§ 33-411 to -412 (West 2000); ARK. CODE ANN. § 14-15-404 (Michie 2002); CONN. GEN. STAT. ANN. § 47-10 (West 1995); DEL. CODE ANN. tit. 25, § 153 (1989); FLA. STAT. ANN. § 695.01 (West 1994); IOWA CODE ANN. § 558.41 (West Supp. 1995); KAN. STAT. ANN. §§ 58-2221 to -2223 (1995); KY. REV. STAT. ANN. § 383.080 (Michie 2002); ME. REV. STAT. ANN. tit. 33, § 201 (West 1999); MASS. ANN. LAWS ch. 183, § 4 (Law Co-op 2003); MO. ANN. STAT. §§ 442.380, 442.390, 442.400 (West 2000); N.H. REV. STAT. ANN. § 477:3-a (1992); N.M. STAT. ANN. §§ 14-9-1 to -3 (Michie 2002); OHIO REV. CODE ANN. § 5301.25 (Anderson Supp. 2002); OKLA. STAT. ANN. tit. 16, §§ 15-16 (West 1999); R.I. GEN. LAWS § 34-11-1 (1995); S.C. CODE ANN. § 30-7-10 (Law Co-op Supp. 2002); TENN. CODE ANN. § 66-5-106 (1993); TEX. PROP. CODE ANN. §§ 13.001 to .002 (Vernon Supp. 2003); VT. STAT. ANN. tit. 27, § 342 (1998); VA. CODE ANN. § 55-96 (Michie 1995); W. VA. CODE §§ 40-1-8 to -9 (1997)).

207. *See id.* (citing ALA. CODE § 35-4-90 (1991)). Courts of the State of Alabama have construed this statute as a race-notice recording act notwithstanding verbiage that at one time appeared to put this statute in the notice act category. *Id.; see also* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(b), at 159 n.288 (citing ALASKA STAT. § 40.17.080 (Michie 2002); CAL. CIV. CODE §§ 1107, 1214 (West 1982); COLO. REV. STAT. ANN. §§ 38-35-105, -108, -109 (West 2002); D.C. CODE ANN. §§ 42-401, -406 (1981); GA. CODE ANN. § 44-2-1 (Harrison 1993); HAW. REV. STAT. § 502-83 (1993); IND. CODE ANN. §§ 32-1-2-11, -16 (repealed 2002); 765 ILL. COMP. STAT. 5/30 (West 2001). It is noted that various scholars classify the Illinois statute as a notice statute notwithstanding that in 1882, the Illinois Supreme Court applied the statute in a manner that indicates that the court construed the statute as if it were a race-notice recording act. *See* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.08(d), at 161 n.294 (citing IDAHO CODE § 55-812 (Michie 2000); MD. CODE ANN. REAL PROP. § 3-203 (1996); MICH. COMP. LAWS ANN. § 565.29 (West 1998); MINN. STAT. ANN. § 507.34 (West 2002); MISS. CODE ANN. § 89-5-5(2003); MONT. CODE ANN. §§ 70-21-201, -302, -304 (2001); NEB. REV. STAT. §§ 76-237 to -238 (1996); NEV. REV. STAT. §§ 111.320, .325 (1998); N.J. STAT. ANN. § 46:22-1 (West 2003); N.C. GEN. STAT. § 47-18 (2002). The North Carolina statute has been judicially construed as a race-notice recording act even though the language in the statute appears to place it in the race act category. *See id.* § 92.08(c) at 160 n.288 (citing N.D. CENT. CODE § 47-19-41 (1999); OR. REV. STAT. § 93.640 (2001); PA. STAT. ANN. tit. 21, § 351 (West 2001); S.D.

Some authorities propose that prospective purchasers of an interest in a particular parcel of real property are under an obligation to search the public records concerning the subject realty prior to the completion of the contemplated or pending sale transaction.[208] In reality, however, "the duty" to which those authorities refer is not a duty at all in the absence of a contractual or fiduciary obligation that dictates otherwise.[209] Rather, it is conduct that a purchaser would be prudent to undertake for the purchaser's own protection.[210] Therefore, the undertaking of a search of the public records by a prospective purchaser, or a person acting on behalf of the prospective purchaser can be characterized as an act of prudence rather than a discharge of a duty.[211] By undertaking an appropriate search of public records and examining the contents of all documents that are part of the chain of title or causing such a search and examination to be undertaken, a prospective purchaser is able to assess evidence of the state of the title to the property in question.[212] This search enables prospective purchasers to determine whether the apparent state of the title to the interest under scrutiny is or is not acceptable.[213]

It is likely that few prospective purchasers personally engage in a search of public records or an examination of the contents of chain of title documents.[214] Most purchasers rely upon the services of and the representations made by a professional title examiner and abstractor or an attorney, purchase protection that is provided under the terms, provisions, conditions, and stipulations of a policy of title insurance; or they do all or a combination of less than all of the foregoing.[215]

In some jurisdictions, professional providers of title assurances, title information, and title services access, examine, and rely upon the public records as maintained by the Office of the County Recorder or other public official or officials to whom the responsibility of maintaining such records

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CODIFIED LAWS § 43-28-17 (Michie 1997); UTAH CODE ANN. § 57-3-103 (1988); WASH. REV. CODE ANN. § 65.08.070 (West 1994); WIS. STAT. ANN. § 706.08 (West 2001); WYO. STAT. § 34-1-121 (2001)).

208. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.09(b)(4), at 168-69; *see also* Angle v. Slayton, 697 P.2d 940, 942 (N.M. 1985); Romero v. Sanchez, 492 P.2d 140, 143-44 (N.M. 1971).

209. IV AMERICAN LAW OF PROPERTY § 18.4, at 659 (A. James Casner, ed. 2d 1974) (1952).

210. 14 POWELL, *supra* note 8, § 82.01[3]-[4], at 82-13 to-17.

211. *Id.*

212. *Id.*

213. *Id.*

214. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, §§ 92.05(a)(1)-(5), at 110-14.

215. *Id.* chs. 91-93.

has been designated under the laws of those jurisdictions.[216] In other jurisdictions, those professionals (in particular title companies and title insurance companies)[217] access, examine, and rely upon documents that comprise privately owned and maintained "title plants."[218] Basically, the documents that are maintained as part of a privately owned title plant are copies of public land title record documents obtained from the Office of the County Recorder or the office of some other public official charged with the responsibility of maintaining public land title records.[219] Personnel of the owner or maintainer of a title plant obtain those copies on a regular basis, usually daily.[220] The copied public land title documents are then maintained as part of the privately owned "title plant."[221]

Privately owned and maintained title plants are generally comprised of two groupings of records. One grouping of documents that are part of a title plant is commonly referred to as the property index, and the other grouping of documents is commonly referred to as the general index, sometimes referred to as "the G.I."[222] Documents that affect title to real property and include a description of the affected property are, not surprisingly, the types of documents that comprise the property index portion of a title plant.[223] Copies of deeds, mortgages, deeds of trust, leases, memoranda of leases, options, rights of first refusal, and releases are a few of the types of documents that are maintained as part of the property index of a privately owned title plant.[224] In contrast, a document that affects title to real property even though a description of the affected real property is not included in the text of the document is the type of document that is regarded as part of the general index of a privately owned title plant.[225] General index documents include judgment liens, abstracts of judgments, tax liens, and bankruptcy petitions.

Documents and the information contained therein that constitute the public records concerning real property are used to compile abstracts of title, serve as the basis for an attorney's issuance of an opinion of title, or serve as a benchmark for the determination of the scope of protection that is

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216. BARLOW BURKE, REAL ESTATE TRANSACTIONS 170 (2d ed. 1999).

217. MARJORIE FLOYD BURCHETT, *Title Search and Surveys*, CALIFORNIA TITLE INSURANCE PRACTICE, §§ 4.1-.25 (CEB attorneys eds. 1999).

218. BURKE, *supra* note 216, at 174.

219. BURCHETT, *supra* note 217, at §§ 4.1-.25.

220. *Id.*

221. *Id.*; *see also* DUKEMINIER & KRIER, *supra* note 5, at 663-67.

222. BURCHETT, *supra* note 217, at §§ 4.1-.25.

223. *Id.*

224. *Id.*

225. *Id.*

provided to an insured by a title insurer pursuant to the terms and provisions of a policy of title insurance. [226] Comments that follow herein address abstracts of title, attorney opinions, and title insurance.

D. ABSTRACTS OF TITLE

Generally speaking, an abstract of title is a title examiner's or title abstractor's summary of the documents that comprise a chain of title.[227] The summary includes references to liens or encumbrances against that title.[228] The documents comprising the subject chain of title are summarized in chronological order.[229] An abstract of title is statutorily defined in at least one state as:

> 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.[230]

As indicated by the foregoing descriptions and definitions of an abstract of title, abstractors of title[231] undertake the duty to properly compile an abstract of title.[232] To properly compile an abstract of title, an abstractor must perform a proper search of the public real estate records as they pertain to the real property that is described in the abstract,[233] and the abstractor must set forth appropriate summaries of every transfer or other transaction affecting the property in question during the span of time to which the requested abstract pertains.[234] An abstract of title will usually include a certificate by the abstractor that refers to the periods of time covered by the abstract of title and the records that are the subject matter of the abstract.[235]

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226. *See* Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231 (1962) (noting an in depth assessment of recording statutes and title plants).

227. BURKE, *supra* note 216, at 174 (citing James P. Root, *An Abstract of Title*, 14 AM. L. REG. 529 (1875)).

228. *Id.*

229. *Id.*

230. CAL. INS. CODE § 12340.10 (West 1988).

231. RAY E. SWEAT, *Abstractor or Abstracter*, 289 PRACTICING LAW INSTITUTE 345 (1987).

232. PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 297 n.2 (3d ed. 1997).

233. *Id.* at 290.

234. *Id.*

235. *See* BURKE, *supra* note 216, at 176-77 (citing an example of an abstract of title that is based upon CLINTON P. FLICK, 1 ABSTRACT AND TITLE PRACTICE 22-40 (2d ed. 1958)).

By custom and practice, it is the current owner (i.e., the prospective seller or other category of prospective transferor) who contracts with an abstractor to provide a requested abstract of title.[236] However, the prospective seller, the prospective purchaser, and other persons are likely to rely upon the contents of the abstract of title after the abstractor has issued it.[237] The third persons who are likely to rely upon the contents of an abstract of title include legal counsel for the prospective seller, legal counsel for the prospective buyer, prospective lenders, legal counsel for prospective lenders, real estate brokers, and escrow companies or other types of real estate closers.[238] For example, the prospective purchaser and any legal counsel for the purchaser will likely rely upon an abstract of title to determine whether the purchaser should accept or should reject the title evidenced by the abstract.[239] The degree, if any, to which a person other than the prospective seller is able to hold an abstractor liable for a failure on the part of the abstractor to properly compile an abstract of title depends upon whether the laws of the subject jurisdiction do or do not regard a prospective purchaser or other third party as a person to whom the duties of an abstractor are owed.[240]

If a purchaser or other third person seeks recovery against an abstractor under a breach of contract theory for injuries sustained by the purchaser or other third person as a result of the purchaser's or other third person's reliance upon the content of an abstract of title issued by the abstractor, the application of traditional rules of contract law will result in the contract claims of the purchaser or other third party being barred because of a lack of contract privity between the purchaser or other third person and the abstractor.[241] Use of lack of contract privity as a bar to recovery for the purchaser or other third person is another way of looking upon the purchaser's or other third party's reliance upon the abstract of title as being not reasonable by the standards of traditional contract law.[242]

However, in jurisdictions that do not adhere to the common law requirement of strict contractual privity, a purchaser or other third party has standing to pursue contract claims against an abstractor for alleged breach

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236. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 91.09(a)(5), at 56, § 92.11(a), at 216-17.

237. *Id.* at 217

238. *See, e.g.*, Williams v. Polgar, 215 N.W.2d 149, 151-52 (Mich. 1974).

239. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.11(a), at 217-18.

240. *Id.*

241. *Id.*

242. *Id.*

of the abstractor's duty to properly compile an abstract of judgment.[243] Put another way, the concept of contract privity as recognized in those jurisdictions encompasses a wider circle of circumstances than the circumstance that falls within the scope of the narrower common law version of the concept of contractual privity. Most jurisdictions that continue to require some form of contract privity, but do not adhere to the strict common law version of contract privity, either judicially or legislatively endow contractual privity in purchasers and other classes of third persons by either regarding the purchaser or other third person as a third party beneficiary[244] or by regarding a purchaser or other third person as a third party who foreseeably, therefore reasonably, relied upon the content of an abstract of title.[245]

In recent years, judiciaries have circumvented the privity requirement under contract law by allowing claims for damages by purchasers or other third parties to be prosecuted against abstractors based upon theories for relief that are part of the law of torts.[246] It appears that the tort theory that has gained the largest degree of acceptance under this approach is negligent misrepresentation.[247] Of course, it is one thing for a plaintiff to allege that relief is due under the tort theory of negligent misrepresentation, for it is another for the plaintiff to prove that all of the numerous elements of that tort exist in the case at hand.[248] The legislative process in some states has resulted in the enactment of statutes that enable designated classes of third parties to have direct relief against an abstractor for injuries suffered by a third party that are the proximate result of an abstractor's failure to properly compile an abstract of title.[249]

Abstracts of title are not the primary method of title assurance in certain sectors of the United States because of the time that must be expended and the expense that is incurred in connection with the compilation of an abstract of title.[250] Title insurance is the primary form of title assurance in

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243. *Williams*, 215 N.W.2d at 152-53. The Michigan Supreme Court includes in its opinion a listing of the following exceptions to the common law rule of strict contractual privity: "abstracter's fraud or collusion; theory of third-party beneficiary contracts; theory of foreseeability of use by a third-party; actual knowledge or notice of third-party; agent for disclosed or undisclosed principal contracting with an abstracter; and re-issuance or re-certification of an abstract." *Id.*

244. *See, e.g.*, Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922); First Am. Title Ins. Co. v. First Title Serv. Co., 457 So. 2d 467, 472-73 (Fla. 1984).

245. *Williams*, 215 N.W.2d at 158.

246. William B. Johnson, Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other than Person Ordering Abstract*, 50 A.L.R. 4th 314, 358-63 (1986).

247. *Id.*; *see also*, *Williams*, 215 N.W.2d at 158.

248. BURKE, *supra* note 216, at 175.

249. Johnson, *supra* note 246; *see also* Oscar A. Hall, *Abstractor's Liability in Examination of Title*, 6 WYO. L.J. 184 (1952).

250. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 93.01, at 225.

those jurisdictions.[251] However, before turning to the topic of title insurance, I present a brief summary regarding attorney opinions of title and attorney liability thereunder because such opinions are part of the custom and practice that is in place in those jurisdictions in which abstracts of title are still used as a form of title assurance. An additional reason for a brief examination of attorney opinions as a form of title assurance is that in some regions of the country, title insurance is issued by or on behalf of a title insurance company based on an attorney's opinion of title that is rendered to the title insurance company.[252]

E. ATTORNEY OPINIONS

Attorneys, like abstractors, are liable for defects in their work product.[253] Historically, attorneys review and analyze the contents of abstracts of title to determine and render opinions on whether the liens of mortgages reported in the abstract have or have not been validly released,[254] whether the enforcement of a particular lien is or is not barred by the applicable statute of limitations,[255] whether an express easement has or has not been terminated,[256] or other matters that have a bearing upon the task of an attorney furnishing an opinion regarding the current state of the title to the property in question.[257] After completing an opinion, the attorney delivers the opinion to the client of the attorney. The opinion can be in the form of either a letter or a certificate.[258]

It appears that attorneys have a great deal of latitude in preparing the format and content of title opinions in the states in which the issuance of title opinions is customary.[259] Most issuers of title opinions either create a standard format over a period of time or adopt a format that is used in a given jurisdiction as a matter of custom and practice.[260] Sample forms of title opinions exist for the benefit of attorneys who take on the task of rendering such an assurance of title.[261] Of course, the practitioner may modify a sample to meet the particular needs of the client.[262]

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251. *Id.*
252. *Id.* § 92.11(b), at 218 n.569.
253. GOLDSTEIN & KORNGOLD, *supra* note 232, at 297.
254. *Id.* at 298 n.2.
255. *Id.*
256. *Id.*
257. *Id.*
258. IV AMERICAN LAW OF PROPERTY, *supra* note 209, §18.99, at 847.
259. *Id.* §18.100, at 849.
260. *Id.*
261. *Id.*
262. *Id.*

The client to whom an attorney renders an opinion of title might be a prospective seller, a prospective buyer, a prospective lender, or a prospective title insurer. For example, a prospective seller is likely to rely upon an attorney's opinion to determine whether to sell the property in question, whether to agree to certain contract covenants or warranties of title, whether to agree to the delivery of a particular type of deed to which various types of warranties of title attach upon a delivery of the deed (usually as of the time of the closing of the transaction).[263]

When an attorney who represents the prospective seller renders an opinion of title, it is possible, perhaps even probable, that a prospective buyer will rely to some extent or another on that opinion.[264] Reasons for a prospective buyer's reliance upon an opinion of title supplied by an attorney who represents the prospective seller include the prospective buyer having to decide whether or not to purchase an interest in a particular parcel of real property under conditions, terms, or provisions proposed by the prospective seller; whether the prospective buyer should or should not negotiate for alternative conditions, terms, or provisions of sale; or whether the prospective purchaser should or should not forego an attempt at consummating the contemplated purchase.[265]

Attorneys who perform searches of chains of title, who render opinions of title, or who perform both on behalf of clients are bound by the traditional negligence standard of reasonable care and skill.[266] Usually, reasonable care and skill is deemed to be the level of care and skill possessed by lawyers in the community in question. However, that does not mean that an attorney will escape liability if the attorney adheres to a customary level of care and skill that is below a minimal standard of reasonableness.[267]

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263. RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON TITLES 2d § 52 (West 1957).

264. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.11(b), at 219.

265. *Id.* at 218-20.

266. GOLDSTEIN & KORNGOLD, *supra* note 232, at 298 n.2.

267. *Id.* (citing Gleason v. Title Guar. Co., 300 F.2d 813, 813 (5th Cir. 1962)). In *Gleason*, Title Guarantee sued an attorney that provided an opinion of title to the title company. *Id.* The attorney certified that he had personally examined the relevant records. *Id.* at 814. The certification was not true. *Id.* In fact, the attorney had relied upon information about the records that was provided to the attorney over the telephone by a representative of the abstract company that had performed the search of the records. *Id.* The attorney rendered an opinion that the title in question was clear. *Id.* The title was not clear because it was encumbered by certain mortgages. *Id.* The title company issued a policy of title insurance in reliance upon the representations made by the attorney in the opinion that the attorney had rendered to the title company. The attorney defended on the basis that the conduct of the attorney was in keeping with the local custom and practice of obtaining information about land title records. *Id.* That defense was rejected. *Id.* The courts held that the attorney could not be insulated from liability for a breach of the attorney's duties regarding the rendering of an opinion of title based upon the attorney's adherence to a custom and practice that is below the minimal standards of reasonable care and skill. *Id.*

Disclaimers that purport to either excuse an attorney from certain types of liability or that purport to limit an attorney's liability under a contract between an attorney and the attorney's client that calls for the attorney to perform a search of public land title records on behalf of the client might not be prohibited by public policy. However, these types of disclaimers are narrowly construed.[268] At least one court has ruled that if an attorney examining title receives information that would give the attorney a basis to suspect that a defect exists, the attorney owes the client a duty of investigation that cannot be disclaimed.[269]

The courts are divided on the issue of whether an attorney who has performed a search of title records or has rendered a title opinion is or is not liable to a person other than the client who retained the services of the attorney if the attorney failed to properly perform the search or failed to render a correct opinion. Circumstances that have given rise to questions of whether an attorney is or is not liable to third parties (i.e., persons who are not a client of the attorney) include:

(1) claims for damages brought by a mortgagor against attorneys for the mortgagee based upon the mortgagor's reliance upon a title search performed or a title opinion rendered by an attorney for the mortgagee,

(2) claims for damages brought by mortgagees against attorneys retained by mortgagors based upon a mortgagees reliance upon a title search performed or a title opinion rendered by an attorney retained by the mortgagor,[270] and

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268. GOLDSTEIN & KORNGOLD, *supra* note 232, at 298 n.3.

269. *E.g.*, Owen v. Neely, 471 S.W.2d 705, 708 (Ky. 1971).

270. *See, e.g.*, Page v. Frazier, 445 N.E.2d 148 (Mass. 1983). In *Page*, the plaintiffs sued the lender's attorney on the theory that the attorney was liable to the plaintiffs because of negligent misrepresentation. *Id.* at 149. The trial court dismissed the complaint. *Id.* The Supreme Judicial Court of Massachusetts granted plaintiffs' motion for direct appellate review. *Id.* Thereafter, the supreme judicial court affirmed the trial court's judgment of dismissal. *Id.* The supreme judicial court based its affirmation of the lower court's judgment of dismissal upon exculpatory language in the loan application that warned the plaintiffs against relying upon opinions rendered by the bank's counsel even though the plaintiffs would be billed for and be responsible for paying the fees that arose from the services rendered by the bank's attorney on behalf of the bank. *Id.* at 149-50, 154. The loan application also contained a provision that preserved the right of the buyers to retain counsel, at their expense, to represent the interests of the buyers in the subject transaction. *Id.* As a consequence, the court held that any reliance that the buyers placed upon the content of the opinion rendered by the bank's attorney to the bank was not reasonable. *Id.* at 154-55. The supreme judicial court affirmed the holding of the trial court that the attorney was not liable to the buyers under contract law because there was no privity of contract between the attorney and the buyers. *Id.* at 152-53. The court also affirmed the finding of the trial court that the attorney was acting in the capacity of an independent contractor. *Id.* at 151. Consequently, the attorney's errors could not be imputed to the bank under the agency theory of respondeat superior. *Cf. In re* Lanza, 322 A.2d 445 (N.J. 1974) (wherein the attorney represented two parties with conflicting interests); *see also* Westport Bank & Trust Co. v. Corcoran, Mallin & Aresco, 605 A.2d 862 (Conn. 1992). In the *Westport Bank* case, the mortgagee sent a letter to the attorneys for the mort-

(3) claims for damages brought by buyers against attorneys who were retained by the sellers and vice versa.[271]

In many sectors of the United States, a large number of persons who obtain or receive an interest in real property also obtain or receive assurances of title in the form of a policy of title insurance.[272] A person who acquires an interest in real property is likely to rely upon title insurance as a form of title assurance notwithstanding that the person might also be protected under other forms of title assurances as well.

F. TITLE INSURANCE

The business of title insurance began in the United States.[273] The first enterprise to engage in the business of insuring interests in real property started in Philadelphia in 1853.[274] Statutory law enabling title insurance companies to be incorporated was first enacted in Pennsylvania in 1874.[275] Many authorities point to the decision in *Watson v. Muirhead*[276] as being the watershed for that legislation.[277] Very little title insurance is written re-

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gagors requesting that the attorneys provide a title search to the mortgagee. *Id.* at 862-63. The attorneys complied with the consent of the mortgagors. *Id.* at 863. The court held that the attorneys had taken on a dual representation. *Id.* at 865. Thus, the mortgagee and the attorneys were in privity of contract and the court held that plaintiffs had stated a justiciable cause of action that the attorneys were liable to the mortgagee for failure to perform a proper search. *Id.* As a consequence, the supreme court reversed the judgment of dismissal that had been entered by the trial court based on its grant of defendants' motion to strike plaintiffs' complaint and remanded the cause for further proceedings. *Id.*

271. *See, e.g.*, Century 21 Deep South Properties, Ltd. v. Corson, 612 So.2d 359 (Miss. 1992). In the *Corson* case, the buyers sued the sellers' attorney for malpractice. *Id.* at 372. The buyers claimed the attorney was liable for title defects that the attorney failed to discover when the attorney represented the sellers at the time that sellers purchased the property. *Id.* at 363. The attorney defended on the grounds that the buyers lacked contract privity and were therefore barred from pursuing their claim against the attorney. *Id.* at 372. The Supreme Court of Mississippi rejected the attorney's defense. *Id.* at 374. In so doing, the court held that an attorney performing title work will be liable to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's title work and who suffer loss that is proximately caused by the attorney's negligence. *Id.* at 374. Although the buyers were deemed to have stated a cause of action against the attorney, they did not prevail in their prosecution of the cause of action because they were not able to prove that they had suffered damages that were proximately caused by the failures of the attorney for the sellers. *Id.* at 374.

272. LEFCOE, *supra* note 22, at 255.

273. *Id.* at 259.

274. Sumner B. Young, et al., *Report of the Special Committee of the Hennepin County Bar Association Appointed to Study Title Insurance*, 19 MINN. L. REV. 354, 357 (1935); *see also* LEFCOE, *supra* note 22, at 260 n.14 (identifying that company as being the "Law Property Assurance and Trust Society").

275. Young, *supra* note 274, at 357.

276. 57 Pa. 161 (1868).

277. LEFCOE, *supra* note 22, at 259; *see also* BURCHETT, *supra* note 216, § 1.1.

garding properties that are located in jurisdictions outside of the United States.[278]

Title insurance has become the dominant form of title assurance in most of the United States.[279] There are states in which title insurance has replaced abstracts of title and attorney's opinions of title as the only form of title assurance that is relied upon in addition to or in lieu of contract covenants or warranties of title, deed covenants or warranties of title, or both. Beginning in 1948, some states have implemented state administered title guaranty programs.[280] The purpose of these guaranty programs is to preserve the role of private attorneys in examining titles and issuing title opinions.[281] Such guaranty programs are designed to exist in harmony with the business of title insurance as opposed to replacing it.[282]

There is a national organization of title insurance companies known as the American Land Title Association (ALTA).[283] Local organizations of title insurance companies exist in a few areas of the country. The largest local organizations exist in California (CLTA), Texas, and New York.[284] One of the purposes for which these organizations exist is the promulgation of boilerplate forms for the various types of title insurance policies that are issued by or on behalf of title insurance companies.[285] Some policies primarily protect the person insured against defects in title disclosed by the public records.[286] By contrast, other forms of policies protect the insured person against defects disclosed by the public records, inspections, surveys, or by making inquiry of parties in possession.[287] All policies of title insurance protect against certain "hidden" risks.[288]

Many commentators regard the phrase "title insurance" as being close to a misnomer.[289] The act of insuring is usually associated with the concept of an insurer taking on risks concerning circumstances or events that might

278. *Id.*

279. *Id.* at 215.

280. PAUL E. BAYSE, CLEARING LAND TITLES § 3, at 15 (2d ed. 1970); *see also* Michael J. Rooney, *Bar Related Title Insurance,* 1980 SO. ILL. L.J. 263 (1980).

281. MARLIN M. VOLZ, JR., 1 IOWA PRACTICE § 8.22 (3rd ed. 1996).

282. *Id.*

283. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 93.01, at 231-32.

284. *Id.* at 232.

285. *Id.*

286. *See, e.g.*, Lick Mill Creek Apts. v. Chicago Title Ins. Co., 231 Cal. Rptr. 231, 233 (Cal. Ct. App. 1991). During my tenure as legal counsel for title insurance companies, it was the custom and practice in the industry to refer to those types of polices as "standard coverage policies."

287. *Id.* During my tenure as legal counsel for title insurance companies, it was the custom and practice in the industry to refer to those types of policies as "extended coverage policies."

288. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 93.02(a), at 233 n.43.

289. *Id.* § 93.01, at 226.

occur *subsequent* to the time at which the insurance policy became effective.[290] In contrast, title insurance involves a process by which title insurers assume risks regarding circumstances or events that have occurred *prior* to the effective date and time of the policy of title insurance.[291]

Modern policies of title insurance do not include an assurance that a defect in title does not exist.[292] In essence, a modern policy of title insurance is a promise by the insurer to the insured that if title is not in the condition evidenced by the terms and provisions of the policy, the insurer will protect the insured against or reimburse the insured for loss or damage caused by the defect in the title.[293]

Certain types of industry forms of title insurance contain provisions that describe each of those policies as being a contract of indemnity.[294] The prevailing trend of courts is to regard a modern policy of title insurance as being a type of contract of indemnity.[295] Treating policies of title insurance as contracts of indemnity is consistent with the notion that a policy of title insurance is not an abstract of title. The notion that a policy of title insurance is not an abstract of title was codified in California effective January 1, 1982.[296]

In general, policies of title insurance are the product of a risk identification, risk elimination, or risk reduction process.[297] Although title insurers generally fulfill a role in the risk identification, risk elimination, or risk reduction process, there is a split of authority as to whether a title insurer has a duty to issue policies based on an examination of title records.[298] If a title

290. *Id.* at 232-33.

291. *Id.*; *see also* 16 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 92.01[3][b], at 92-9 (Michael A. Wolf ed., 2000).

292. *Id.* §92.01[1], at 92-6.

293. OLIN L. BROWDER, ET AL., BASIC PROPERTY LAW 862 (5th ed. 1989).

294. *Id.* at 870 (citing ¶ 7 of the "Conditions and Stipulations" of an ALTA owner's policy which reads: "This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described"). The same provision is included in ¶ 7 of the "Conditions and Stipulations" of an ALTA lender's policy and a CLTA standard coverage policy. *Id.*

295. *See, e.g.*, Sattler v. Philadelphia Title Ins. Co., 162 A.2d 22, 24 (Pa. Super. Ct. 1960); Contini v. Western Title Ins. Co., 115 Cal. Rptr. 257, 261 (Cal. Ct. App. 1974); L. Smirlock Realty Corp. v. Title Guarantee Co., 418 N.E.2d 650, 653 (N.Y. 1981).

296. CAL. INS. CODE § 12340.10 (1988).

297. Quinton Johnstone, *Title Insurance*, 66 YALE L.J. 492, 516 (1957); *see also* Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators Have Ignored*, 44 SW. L.J. 905, 937-41 (1990) (discussing the discourse on the social utility of a title insurer's role regarding the elimination or reduction of risks in real property transactions and how that role might be compromised if a title insurance company is under the control of a lender).

298. Note: *Title Insurance, The Duty to Search*, 71 YALE L.J. 1161, 1177 (1961-62); *see also* Michael M. Rooney, *Title Insurance: A Primer for Attorneys*, 14 REAL PROP. PROB. & TR. J. 608, 610-12 (1979).

insurer is not under a duty to issue policies based on the examination of title records, it behooves the title insurer to comply with such an underwriting practice on a self-imposed basis.[299] The purpose of such a self-imposed underwriting practice is to avoid the reduction in profits that the insurer experiences when a loss is paid pursuant to the terms and provisions of a policy.[300] Jurisdictions that do not impose a duty upon title insurers to examine title records are apt to adhere to the notion that abstractor's liability does not attach to the issuance of a policy of title insurance.[301] Put another way, if there is a self-imposed duty to search title records implemented by a title insurer as part of its internal underwriting practices, the duty is owed by the title insurer to itself for its own protection and not to the insured or any other party.[302] In that type of jurisdiction, a duty to search would be enforceable against the title insurer by the insured only if the insurer assumes such a duty pursuant to an express or implied provision in the policy of title insurance.[303]

Title insurance is regarded as "an effective means of shifting and spreading both known and unknown title risks."[304] Some commentators point to that concept as being the foundation upon which a one-time premium is paid for the issuance of a policy of title insurance. Of course, the degree to which a title insurer is able to spread risks and losses has limitations.[305]

Unlike other forms of insurance, title insurance is not in effect for a calculable term. Also, unlike other forms of insurance, title insurance does not involve a process whereby an insured is required to seek renewal of coverage at calculable intervals of time that involve the payment of a new premium.[306] Title insurance is designed to remain in force for the benefit of the original insured and certain classes of successors-in-interest of the insured, so long as the circumstances under which a person constitutes an "insured" under the terms, provisions, conditions, and stipulations of the policy of title insurance continue to exist.[307] Anecdotally speaking, many legal

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299. Rooney, *supra* note 298, at 610-12.

300. *Id.*

301. *Id.*

302. *E.g.*, Horn v. Lawyers' Title Ins. Co., 557 P.2d 206, 208 (N.M. 1976); Wolff v. Commercial Standard Ins. Co., 345 S.W.2d 565 (Tex. Civ. App. 1961); Transamerica Title Ins. Co. v. Johnson, 693 P.2d 697, 700 (Wash. 1985).

303. *See, e.g., Horn,* 557 P.2d at 208; Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 653 (Utah 1990).

304. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, §93.01, at 225.

305. *Id.* at 226.

306. 16 POWELL, *supra* note 291, § 92.14, at 92-61 to -65.

307. *Id.*

practitioners and jurists overlook the significance of the premium structure for the acquisition and issuance of policies of title insurance, especially regarding the resolution of issues that pertain to the manner in which a policy provision should be construed or interpreted. The one-time premium structure ought to be a factor when the issue of how a policy provision should or should not be construed or interpreted is put before a court of competent jurisdiction.[308] It appears axiomatic that the one-time premium payment and the amount thereof should have a bearing upon whether a claimed expectation of an insured or an insurer is or is not reasonable.[309]

A policy of title insurance can be looked upon as being comprised of four components. The first component is comprised of the coverage provisions.[310] The second component is the policy conditions and stipulations.[311] The third component is those matters that are routinely excluded from policy coverage by virtue of the printed exclusions from coverage.[312] The fourth component is those matters that are specifically excepted from policy coverage.[313] Taken together, the third and fourth components comprise those matters against which the insurer does not protect the insured.[314]

We turn to a focus upon the question of whether a person who assures a quality of title to an interest in real property is or is not liable for a defect in that title which is the result of conduct on the part of the assured.

III. IS A PERSON WHO ASSURES A QUALITY OF TITLE TO REAL PROPERTY LIABLE FOR A DEFECT IN THE TITLE CAUSED BY CONDUCT ON THE PART OF AN ASSURED?

The commentary that follows explores legal principles or theories upon which a person who assures a quality of title might be insulated from liability for a defect in the title caused by conduct on the part of an assured, and it also explores legal principles or theories upon which a person who as-

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308. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 93.02(a), at 233.

309. *Id.*

310. *Cf.* 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 93.02(c), at 234 (describing a policy of title insurance as being comprised of six parts). The list set forth in the cited authority treats two segments of a policy regarding coverage as separate and distinct parts. *Id.* In contrast, the body of this article refers to those two parts of a policy as a single component regarding coverage. Similarly, the list set forth in the cited authority treats the two parts of preprinted exclusions from policy coverage that appear in many policy forms as being two separate and distinct parts to a policy. *Id.* The body of this article refers to those two parts of a policy as a single component regarding exclusions from policy coverage.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

sures a quality of title might be liable notwithstanding that the defect in question was caused by conduct on the part of the assured.

A. CONTRACT COVENANTS OR WARRANTIES OF TITLE

In the United States, a seller of an interest in real property does not have a duty to prove the seller's title unless the seller has undertaken such a duty under the express or implied terms and provisions of a contract.[315] A seller might agree that the purchaser has a right to cause the contract of sale to be rescinded in the event that liens resulting from conduct on the part of the purchaser would attach to the title conveyed to the purchaser by the seller if the sale in question was consummated.[316] However, it is not customary for that type of express provision to be included in a contract for the sale of an interest in real property. Thus, the question at hand is likely to be resolved by means of a construction or interpretation of a marketable title provision that is customarily expressly or impliedly included as part of a contract for the sale of an interest in real property.

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315. PATTON, *supra* note 263, § 41.

316. Such an express provision might read:

> Title is to be free of encumbrances of record or known to Seller, other than (a) current property taxes, (b) conditions, covenants, restrictions, and public utility easements (provided they do not adversely affect the Property's current use), and (c) items approved by Purchaser. Purchaser may object in writing, within five (5) calendar days of receipt of a Preliminary Report, or any supplement thereto, to exceptions contained in the report or any supplement to the report. Seller warrants that there is no recorded Notice of Default outstanding against the Property. Title shall be conveyed to Purchaser, insurable by the title policy specified in Section 4 of this contract. If seller is unable or unwilling to convey title as stated, Purchaser may terminate this contract and have all unused deposits returned, subject to Section 20(c) of this contract.

HARRY D. MILLER, 1 MILLER & STARR, CALIFORNIA REAL ESTATE FORMS 3D, § 1:51, at 11 (West Group 2000). *Notwithstanding any provision in this contract to the contrary, Purchaser may terminate this contract in the event that Purchaser becomes aware of the existence of a recorded abstract of judgment against Purchaser, or a recorded judgment lien against Purchaser, or a recorded tax lien against Purchaser, or other matter recorded against Purchaser that will become an encumbrance against the title to the subject real property if Purchaser completes the purchase of that title from Seller.* The non-italicized portion of the foregoing sample provision is based upon the sample contract provision that appears in the above-cited authority. I have included the italicized portion of the sample. The italicized portion is an example of a provision by which a buyer might have an express right to rescind pursuant to the express terms and provisions of a contract for the sale of an interest in real property under the circumstances described in the enabling contract provision. I have not included any provision for the buyer to have a right to a return of the buyer's earnest money deposit or other form of down payment. I believe that a seller would agree that a buyer have such a right of rescission only if the buyer would agree that the seller has the right to retain the earnest money deposit or other form of down payment. The seller's retention of the earnest money deposit or other form of down payment would be designed to compensate the seller for the loss of opportunity that the seller would likely suffer while the property in question was "off the market" during the executory period of the contract rescinded by the buyer under the above-described circumstances. 12 THOMPSON ON REAL PROPERTY, *supra* note 13, § 99.05(c), at 236.

1. *Implied Covenants or Warranties of Marketable Title*

In the United States, every contract for the sale of an interest in real property includes a covenant by the seller to deliver marketable title to the buyer.[317] Such a covenant can be expressly set forth in a contract of sale. If the seller's covenant to deliver marketable title to the buyer is not expressly set forth in the contract of sale, the inclusion of such a covenant in the contract of sale is implied.[318] Professor Malloy and Professor Smith note:

> Marketable title disputes arise in many different contexts. Courts have used the term to address the merits of purchasers' objections to all the following matters: defects in the record chain of title, outstanding possessory rights, future interests, mortgages, liens, easements, real covenants and equitable servitudes, zoning ordinances and other land use regulations, eminent domain, adverse possession claims, boundary disputes, encroachment of improvements, and access to land. With such a tremendous variety of fact situations, it is not surprising that judicial definitions of marketable title are often opaque and sometimes circular.[319]

Regardless of the degree of clarity of a particular judicial definition of marketable title, a clear and common thread exists between all current judicial definitions of an implied promise by a seller to deliver marketable title to a buyer. That common thread is that each judicial definition pertains to a state of title owned by the seller up to the time immediately prior to the tender of delivery of that title from the seller to the buyer.[320] It follows that encumbrances that attach to the title upon or after the seller's delivery of title to the buyer are matters that are beyond the scope of the seller's implied promise to tender a marketable title to the buyer. Authorities note that the essence of the seller's implied promise to deliver marketable title is a promise that the *seller's* title is marketable.[321] It follows that abstracts of judgment against the buyer, judgment liens against the buyer, and tax liens against the buyer are not encumbrances against the title owned by the seller prior to the moment at which the seller transferred that title to the buyer. Consequently, those are not matters against which the seller is regarded as having made an implied promise to protect the buyer. A buyer does not and

317. DUKEMINIER & KRIER, *supra* note 5, at 579; *see also* LEFCOE, *supra* note 22, at 126.

318. *Id.*

319. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS PROBLEMS, CASES AND MATERIALS 273-75 (2d ed. 2002) (setting forth a sampling of judicial definitions of marketable title with cites to various cases in which those definitions have been applied).

320. *Id.*

321. *Id.*

should not have a right to cause a contract for the sale of an interest in real property to be rescinded under such a set of circumstances.[322]

Although a reacquisition of title to a parcel of real property by a previous owner of that title might be considered a rarity, transactions involving a reacquisition of title do occur from time to time. It is possible that the buyer created an encumbrance or some other cloud upon the title to a parcel of real property at a time when the buyer was a prior owner of that title, therefore, a predecessor-in-interest of the seller. The buyer can seek a rescission of the contract of sale claiming that an encumbrance, lien, or other adverse claim is a defect in the seller's title that relieves the buyer of the obligation to purchase notwithstanding that the "defect" was created by the buyer. It appears that no reported case law exists concerning such a contention on the part of a buyer. That being so, I offer observations regarding the manner in which a buyer's claim would likely be resolved if such a claim were put before a court of competent jurisdiction.

A contract for the sale of an interest in real property expressly or impliedly includes a covenant by each party to the contract to deal fairly and in good faith with every other party to the contract.[323] An attempt by a buyer to rescind a contract of sale on the grounds that an encumbrance or other adverse claim constitutes a defect in the seller's title notwithstanding that the defect arose from conduct on the part of the buyer would likely give rise to the question of whether such a course of action is a violation of the covenant of good faith and fair dealing.[324] A resolution of that issue would likely depend upon whether the issue is adjudicated as a matter of law or a matter of fact.[325]

If the issue is resolved through the judicial process as a matter of law, a policy that a court would likely take into account is the preservation of the sanctity of contracts.[326] Under that approach, it is likely that a buyer would not be allowed to complain about a burden that arose from conduct of the buyer while the buyer was a prior owner of the title in question. As a matter of law, seeking to preserve the sanctity of the contract in question, a court would probably conclude that there would not be any justification to allow a buyer to complain about a quality of title that was previously owned

322. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 96.15(a)(5), at 748-52.

323. *Id.* § 96.11(a), at 637 n.477 (citing Nafstad v. Merchant, 228 N.W.2d 548 (Minn. 1975)).

324. *Id.* § 96.15(a)(5), at 748-52.

325. *Id.*

326. *Id.* § 96.11(a), at 637 n.477 (citing Nafstad v. Merchant, 228 N.W.2d 548 (Minn. 1975)).

by the buyer.[327] A court would probably hold that the buyer is bound under the terms and provisions of the contract to consummate the buyer's reacquisition of the subject title. Put another way, it is likely that such a quality of title would be deemed marketable. Hence, the seller would not be in breach of the seller's implied covenant to deliver marketable title to the buyer.

However, if the issue of whether the buyer may cause the contract of sale to be rescinded under the aforementioned circumstance is treated as a question of fact, a court might take the following factors, among others, into account: whether the purchase price is commensurate with a transfer of the subject title free of the alleged defect, the time that has expired between the creation of the "defect" and the time at which the buyer became aware or should have become aware of the continuing existence of the encumbrance or other adverse claim, and whether the encumbrance or other adverse claim that is under scrutiny was the product of innocent or wrongful conduct on the part of the buyer.[328]

To avoid the possibility of a buyer being able to cause the contract of sale to be rescinded because of an encumbrance or adverse claim rendering the seller's title as unmarketable notwithstanding that the buyer created the "defect" as a predecessor-in-interest of the seller, the seller should negotiate for and include a provision in the contract that precludes the buyer from being able to rescind the contract due to matters created, suffered, assumed, or agreed to by the buyer.[329] Of course, if a seller, presumably with the aid of legal counsel, thinks to negotiate for such a contract provision, it is probable that the seller will want such a provision to be included as part of an express marketable title contract clause.[330]

A buyer and seller may agree to an express contract provision that defines or refers to the quality of title that will constitute a marketable title for purposes of their sale transaction in place of an implied adoption of a judicial or statutory definition of marketable title.[331] The most common types of express contract provisions that serve the aforementioned purpose are characterized as insurable title provisions, record title provisions, and title subject to buyer's approval provisions.[332]

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327. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 96.15(a)(5), at 748-52.

328. *Id.*

329. *Id.*

330. *See supra* notes 21-58 and accompanying text.

331. *Id.*

332. MALLOY & SMITH, *supra* note 319, at 275-79; *see also* LEFCOE, *supra* note 22, at 128-34.

2. *Express Covenants to Tender Insurable Title*

An express promise on the part of a seller to tender "insurable title" to a buyer can result in a title being tendered to the buyer that is equal in quality to that which constitutes marketable title under the controlling judicial definition.[333] On the other hand, title that is insurable can differ in quality from that which constitutes a marketable title under the controlling judicial definition of marketable title.[334]

Insurable title can differ from title that constitutes marketable title as determined by controlling decisional law in one of two ways. First, insurable title can differ from a judicial definition of marketable title where a title insurer is not willing to assume a title risk that is considered under the controlling decisional law as a matter that does not render title unmarketable.[335] In that situation, the contract standard of insurable title is narrower in scope than the judicial definition of marketable title.[336] Second, marketable title can differ from judicial marketable title where the contract standard of an insurable marketable title is broader in scope than the judicial definition of marketable title.[337] The contract standard is broader in scope when a title insurer must assume the risk of a title matter that would render the title unmarketable if the judicial definition of marketable title controlled.[338]

Under customary "insurable title" contract clauses, a seller agrees to deliver to a buyer a quality of title that an approved title insurer is willing to insure for the benefit of the buyer.[339] Thus, if an approved title insurer is

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333. MALLOY & SMITH, *supra* note 319, at 275-79.

334. *Id.*

335. *Id.*

336. *See, e.g.*, Conklin v. Davi, 388 A.2d 598 (N.J. 1978). The sale contract before the court in *Conklin* required the seller to deliver "marketable and insurable" title to the buyer. *Id.* at 601. Although a title insurer was willing to insure the title seller tendered to buyer, the buyer rejected the tender on the grounds that said title was not marketable because a portion of the title was based on an unperfected claim of adverse possession. *Id.* at 600, 602. The New Jersey Supreme Court held that title based on an unperfected claim of adverse possession is marketable as a matter of law provided the seller can make a *prima facia* case for adverse possession. *Id.* at 601-03. If a title insurer had not been willing to insure the title tendered by seller, the title would not have been marketable under the terms of the contract even though such a title was marketable as a matter of law. *Id.* at 601-02.

337. *Id.* at 601.

338. *See, e.g.*, Howard v. Schaniel, 169 Cal. Rptr. 678, 682 (Cal. Ct. App. 1980). In the *Howard* case, the seller's title was unmarketable because it was based on an unperfected claim of adverse possession. *Id.* Based on the court's discussion in *Howard*, if a title insurer is willing to insure title in the buyer that is based on an unperfected claim of adverse possession, the buyer will not have grounds to rescind because the seller's title is marketable under the marketable title clause agreed to by the buyer. 12 THOMPSON ON REAL PROPERTY, *supra* note 13, §§ 99.01-.03, at 227-34.

339. *Supra* note 34 and accompanying text.

willing to issue a policy of title insurance to the buyer pursuant to the terms and provisions of the contract of sale, the buyer is under an obligation to accept the seller's tender of that title.[340] For example, if the policy of title insurance required by an "insurable title" contract clause excludes or excepts a general lien[341] recorded against the buyer or a specific lien, encumbrance, or adverse claim[342] previously created by the buyer while the buyer was a predecessor-in-interest to the seller, the "insurable title" criteria specified under the terms of the contract in question will have been met.[343] As a consequence, the buyer will not have grounds to successfully claim that the seller has breached the marketable title clause of the subject contract. Thus, the buyer cannot cause the contract to be rescinded based on the quality of the title tendered to the buyer by the seller.

3. *Express Covenants to Tender Record Title*

A contract clause pursuant to which a seller agrees to transfer "record title" to a buyer might give rise to the question whether the seller's title can be based upon an unrecorded deed, a will that is yet to be probated, or an unperfected claim of title by adverse possession.[344] The states are split on the question of whether a seller's title that is based on an unperfected claim of adverse possession[345] is or is not marketable under an implied marketable title provision of a contract for the sale of an interest in real property.[346] A number of states deem title based on an unperfected claim of adverse possession as being unmarketable.[347] In the other group of states, title based on an unperfected claim of adverse possession is deemed marketable.[348] In the latter group of states, a buyer can be compelled to accept the tender of title by a seller where the seller establishes a prima facie case for adverse possession.[349]

One of the means by which a buyer can avoid being obligated to accept title based on an unperfected claim of adverse possession in the latter group of states is by negotiating for the inclusion of a marketable title clause in

340. In *Conklin*, the approved title insurer is described in the contract in question as "any reputable title insurance company licensed to do business in the State of New Jersey." Conklin v. Davi, 388 A.2d 598, 601 (N.J. 1977).

341. 16 POWELL, *supra* note 291, § 92.03[2][a], at 92-27.

342. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.04(b), at 101-04.

343. *See Conklin*, 388 A.2d at 601.

344. LEFCOE, *supra* note 22, at 129.

345. 10 THOMPSON ON REAL PROPERTY, *supra* note 14, §§ 87.01-.19, 71-204.

346. LEFCOE, *supra* note 22, at 129.

347. *Id.* (citing Howard v. Schaniel, 169 Cal. Rptr. 678 (Cal. Ct. App. 1980).

348. *See, e.g., Conklin*, 388 A.2d at 601.

349. *Id.*

the contract of sale that requires the seller to tender "record title" to the buyer.[350] Title based on an unperfected claim of adverse possession is not a "record title" because a certified copy of a decree, whereby the claim of adverse possession is perfected and the title based thereon confirmed, is yet to be obtained and recorded by the seller or a successor-in-interest to the seller.[351]

It is axiomatic that encumbrances, liens, or adverse claims of record that were created by the buyer as a predecessor-in-interest of the seller do not render the seller's record title as being unmarketable. Suppose, however, that a buyer asserts that a seller is not able to tender a "record title" as required by the contract of sale because an unbroken, record chain of title in the seller does not exist.[352] Also suppose that the "break" in the record chain of title in question was caused by conduct on the part of the buyer.

When a "break" in the record chain of title is the result of conduct on the part of a buyer, the seller should be able to successfully assert the affirmative defense of unclean hands[353] against the buyer's attempt to gain equitable relief in the form of a rescission of the contract notwithstanding that it appears that such a set of circumstances has not been the subject of any reported case.[354] The seller should also be able to avert the buyer's claim based on a cross-claim against the buyer that the buyer is in breach of the implied covenant of good faith and fair dealing, which is part of every contract for the sale of an interest in real property.[355] It follows that the seller should be able to obtain a decree on a cross-claim for specific performance against the buyer provided that a valid, enforceable contract of sale exists between the seller and buyer and the seller has not expressly agreed to suffer the consequences of the existence of the "break" in the record chain of title caused by conduct of the buyer.

General liens recorded against the buyer are not part of the seller's record title. Consequently, a buyer would not have grounds to successfully assert that the presence of recorded general liens against the buyer render the seller's record title unmarketable.

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350. *See supra* note 346 and accompanying text.

351. 10 THOMPSON ON REAL PROPERTY, *supra* note 14, § 87.16, at 185.

352. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.05(a)(4), at 114; DUKEMINIER & KRIER, *supra* note 5, at 560-62, 666, 695-96.

353. *See* Annotation, *He who comes into equity must come with clean hands*, 4 A.L.R. 44 (1919) (regarding the doctrine of unclean hands in general).

354. *See* Andrea G. Nadel, Annotation, *Necessity of Real-Estate Purchaser's Election Between Remedy of Rescission and Remedy of Damages for Fraud*, 40 A.L.R.4th 627 (1985) (regarding general application of the doctrine of rescission to real estate contracts); Annotation, *Examination of real property by purchaser before entering into contract as precluding rescission on ground of falsity of representation*, 70 A.L.R. 942 (1931).

355. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 96.11(a), at 637 n.477.

4. *Express Covenant to Tender Title Subject to Buyer's Approval*

In his text on real estate transactions, Professor Lefcoe writes:

> Most buyers prefer when the title standard is subject to the *buyer's satisfaction*. This doesn't mean the buyer can be arbitrary. If it did, such a standard could make the contract unenforceable as illusory. Instead, some courts impose an objective standard – what a reasonable buyer would require. Other courts allow the buyer a degree of subjectivity but limit the buyer's discretion by invoking the familiar concepts of good faith and fair dealing. Thus, even under the "satisfactory to the buyer" standard, the buyer can't escape a contract when there is nothing really objectionable about the title (emphasis in original).[356]

Applying the objective standard referred to in the above-quoted comments of Professor Lefcoe gives rise to the question of whether a reasonable buyer would require a seller to undertake the costs of curing a defect in the seller's title caused by the action or inaction of the buyer.[357] If the reasonableness or unreasonableness of a buyer's demands are determined by the subjective standard described by Professor Lefcoe, the question is whether a buyer is acting within the scope of the implied covenant of good faith and fair dealing, to which all parties to a contract are bound, if the buyer seeks to hold the seller responsible for a defect in the seller's title caused by conduct on the part of the buyer.[358] Absent a specific agreement on the part of the seller to the contrary, the buyer should be deemed to be acting unreasonably or in a manner that is a breach of the implied covenant of good faith and fair dealing if a buyer attempts to force responsibility for a defect in title caused by the buyer upon the seller.[359] To resolve such an issue in favor of the buyer when the seller has not expressly agreed to assume the consequences of the buyer's conduct arguably would result in an unjustified windfall to the buyer.[360]

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356. LEFCOE, *supra* note 12, at 129.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*

B. CAN A TRANSFEROR UNDER A WARRANTY DEED BE LIABLE FOR TITLE DEFECTS THAT ARE THE PRODUCT OF CONDUCT ON THE PART OF THE TRANSFEREE?

When covenants or warranties of title are expressly or impliedly part of a deed, the deed may be referred to as a warranty deed.[361] Thus, the term "warranty deed" does not pertain to quitclaim deeds because no express or implied covenant or warranty of title attaches to a quitclaim deed.[362]

Upon delivery of a general warranty deed by a transferor to a transferee, the transferor warrants against title defects that have arisen either by conduct on the part of the transferor or by conduct on the part of a predecessor-in-interest of the transferor.[363] A bargain and sale deed "with full covenants" is the functional equivalent of a general warranty deed.[364] In contrast, when a transferor delivers a special warranty deed to a transferee, the transferor warrants against only those title defects that arise from conduct on the part of the transferor.[365] A bargain and sale deed that contains covenants or warranties against defects arising from the conduct of the transferor only is considered as being the functional equivalent of a special warranty deed.[366] A grant deed can be considered as the functional equivalent of a special warranty deed.[367] Consequently, the issue at hand will be considered in two segments. The first segment is an assessment of the question under circumstances where a general warranty deed or its functional equivalent is transferred to a transferee. The second segment is an assessment of the question under circumstances where a special warranty deed, or its functional equivalent, was transferred to a transferee.

1. *General Warranty Deeds*

The issue presently under assessment must be answered in the negative when a transferee under a general warranty deed is *not* a predecessor-in-interest of the transferor. This conclusion is so because any defect in title that would exist as the result of conduct on the part of the transferee would be beyond the scope of the transferor's deed covenants or warranties.[368] However, a closer examination of the instant question is necessary when a transferee under a general warranty deed is also a predecessor-in-interest of

361. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(a)-(b)(2)(i), at 386-92.
362. *Id.*
363. 14 POWELL, *supra* note 8, § 81A.03[1][b], at 81A-27 to -29.
364. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(1)(iii), at 389-90.
365. *Id.* § 94.07(b)(2)(i), at 390-92.
366. 14 POWELL, *supra* note 8, § 81A.03[1][b][iii], at 81A-28 to -29.
367. LEFCOE, *supra* note 12, at 177-79.
368. 14 POWELL, *supra* note 8, § 81A.03[1][b], at 81A-27 to -29.

the transferor because it is possible that the warranties of title made by the transferee when that person was acting in the capacity of a prior transferor are enforceable against that transferee by the immediate transferor.[369] At least two factors come to mind that would likely be taken into account by any court of competent jurisdiction that is called upon to adjudicate the instant question. These factors are actual or constructive knowledge of the transferee of the continuing existence of the encumbrance previously created by the transferee and whether the transferor is a person protected by any prior covenant or warranty of title made by the transferee.[370]

a. Transferee's Knowledge of the Defect

The transferee under a general warranty deed might have expressly created the title defect during the transferee's prior ownership of the property in question.[371] An example is where the transferee granted a right of use of the property to another person in the nature of an express easement. Without question, the transferee had knowledge of the creation of the easement. However, it is not a foregone conclusion that the transferee has actual knowledge of the current status of the easement. If the owner of the easement right has never used it and if that mere nonuse does not constitute an abandonment of the easement then the transferee should not be charged with constructive knowledge of the continuing existence of the easement. Suppose that no reference to that easement appears in any of the title information provided to the transferee prior to the delivery of the general warranty deed by the transferor, and its existence is not evident from any reasonable inspection of the servient tenement. Also suppose that the transferee is regarded as having acted reasonably in relying upon the title information provided to the transferee, and upon the results of the inspection of the property in question. Further suppose that the transferee acted reasonably in formulating the understanding that the easement that had been previously created by the transferee does not exist any longer. Should the transferor be liable to the transferee for a breach of the covenant or warranty against encumbrances? May an insulation of the transferor from such liability be justified?

There is conflict among the authorities as to whether a transferor can or cannot defend a claim of breach of a warranty against encumbrances that

369. *Id.*

370. *Supra* notes 98-128 and accompanying text.

371. *See* DUKEMINIER & KRIER, *supra* note 5, at 211 (regarding the "bundle of rights" theory to which some scholars and practitioners adhere regarding ownership of property that include the rights of property owner to encumber or hypothecate property).

affect the title to the property in question based on the mere fact that the transferee had knowledge of the encumbrance prior to or at the close of the transaction.[372] The transferee's knowledge of the prior creation of the "defect" might be the reason for the transferee having negotiated for the delivery of a general warranty from the transferor to the transferee.[373] It is one thing to have knowledge about the creation of an encumbrance, but it is another thing to desire and receive an assurance that the encumbrance in question is no longer a burden against the subject property.[374] If the transferee has not breached the same type of covenant or warranty of title that is enforceable against the transferee by the transferor, there does not appear to be any compelling reason why a transferee who had actual knowledge about the creation of an encumbrance should not be able to rely upon, and receive the benefit of, a transferor's covenant or warranty to the effect that the prior encumbrance ceased to exist and did not encumber the property in question as of the time of the delivery of the general warranty deed.[375]

A transferor under a general warranty deed can limit the scope of liability that would otherwise apply to the standard forms of covenants or warranties that attach to such a deed.[376] To avoid being liable to the transferee under this type of circumstance, the transferor can expressly exclude "defects" caused by conduct on the part of the transferee from the scope of liability undertaken by the transferor in connection with the transferor's delivery of a general warranty deed to the transferee.[377] There does not appear to be any compelling public policy that would prevent a transferor from being insulated from liability based on such an exclusion being included as part of the deed provisions.[378]

Some jurisdictions adhere to the rule that a transferor under a warranty deed is not liable for an alleged breach of the warranty against encumbrances when the transferee had knowledge of the encumbrance in question at the time when the transferor delivered the deed to the transferee.[379] Apparently, this view is applicable regardless of whether the defect of which the transferee had knowledge was created by conduct on the part of the

372. *Id.* at 619-20 (quoting Jones v. Grow Inv. & Mortgage Co., 358 P.2d 909, 910-11 (Utah 1961)); *see also* 20 AM. JUR. 2D *Covenants, Etc.* §§ 83-89 (1995).

373. LEFCOE, *supra* note 22, at 176.

374. *Id.*

375. *Id.*

376. A. JAMES CASNER & W. BARTON LEACH, CASES AND TEST ON PROPERTY 784 (3d ed.1984).

377. *Id.*

378. *Id.*

379. 20 AM. JUR. 2D *Covenants, Etc.* § 77 (1995).

transferee.[380] It appears that the knowledge of the transferee is regarded as a manifestation of intent on the part of the transferee that the encumbrance in question was acceptable to the transferee.[381] It follows that if the transferee did not want to accept title to the property in question that is clouded or encumbered by the "defect," the transferee should not have allowed the transaction to close until the "defect" was removed or other arrangements satisfactory to the transferee put into effect.[382]

b. The Effect of a Transferee's Liability as a Remote Transferor

The common-law rule is that a breach of a present deed covenant or warranty of title "does not run with the land."[383] Under the common law, a transferee would not have any liability as a remote transferor to the immediate transferor because the chose-in-action that arises from a breach of a present deed covenant or warranty of title is not assignable.[384] It follows that the right of enforcement under such a chose-in-action would not have been assigned to or otherwise received by the immediate transferor of the transferee.[385]

Some states do not adhere to the common law prohibition against an assignment of a chose-in-action.[386] A chose-in-action in the nature of a breach of a deed covenant or warranty of seisin, right to convey, or against encumbrances is assignable.[387] It is possible for an immediate transferor under a general warranty deed to have previously acquired the right to enforce a breach of a present deed covenant or warranty of title committed by the immediate transferee under the transferor's warranty deed when the immediate transferee previously transferred title to the property in question by means of a warranty deed.[388] Arguably, the immediate transferee's liability under such a set of circumstances would be either a complete bar to or a set-off against a claim by the transferee that the transferor is liable to

380. *Id.*

381. *Id.*

382. For example, the transferor might agree to hold the transferee harmless and indemnify the transferee against loss or damage that the transferee might otherwise sustain due to the existence of the "defect" in title—the encumbrance in question.

383. *Supra* notes 108-15 and accompanying text.

384. Rockafellor v. Gray, 191 N.W. 107, 108 (Iowa 1922).

385. *Supra* notes 108-15 and accompanying text.

386. *Supra* notes 116-19 and accompanying text.

387. *Id.*

388. *Id.*

the immediate transferee for the immediate transferor's breach of a present deed covenant or warranty of title.[389]

The transferor should not be liable to the transferee under such a circumstance because the covenants or warranties that attach to the warranty deed delivered by the transferor to the transferee should not be construed as constituting a waiver by the transferor of any liability that the transferee might owe to the transferor.[390] For similar reasons, the transferor should not be estopped from asserting that the immediate transferee is liable to the immediate transferor instead of the situation being the other way around.[391] Of course, the foregoing proposition would be controlling only if the provisions of the applicable statute of limitations do not bar the prosecution of the claim of the immediate transferor against the immediate transferee.[392]

2. *Special Warranty Deeds*

Even if a transferee under a special warranty deed is a predecessor-in-interest of the special warranty deed transferor, the transferor will not have any liability to the transferee for defects in title that are the product of conduct on the part of the transferee.[393] There is limited liability because the covenants or warranties of title expressly or impliedly made by the transferor under a special warranty deed pertain only to conduct on the part of the transferor and not any conduct on the part of any predecessor-in-interest of the transferor.[394]

C. CAN AN ABSTRACTOR BE LIABLE TO A PURCHASER FOR TITLE DEFECTS THAT ARE THE PRODUCT OF CONDUCT ON THE PART OF THE PURCHASER?

1. *Contract Theory*

An abstractor is under a contractual obligation to prepare an abstract of title.[395] Traditionally, a person must be in privity of contract with the abstractor in order to have standing to hold the abstractor liable for a failure to

389. *Id.*

390. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(i), at 390-92.

391. *Id.* at 392.

392. 9 THOMPSON ON REAL PROPERTY, *supra* note 70, § 82.10(d), at 622-23.

393. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 94.07(b)(2)(i), at 390-92.

394. *Id.*

395. CAL. INS. CODE § 12340.10 (West 1988); *see also, e.g.*, Williams v. Polgar, 215 N.W.2d 149, 157 (Mich. 1974); First Am. Title Ins. Co. v. First Title Service, 457 So.2d 467, 472-73 (Fla. 1984).

perform a proper title search or for a failure to properly compile an abstract of title.[396]

A purchaser is in privity of contract with an abstractor if the purchaser was the person who contracted with the abstractor for the latter to compile an abstract of title or if the purchaser is a third party beneficiary of a contract between the abstractor and the seller.[397] Duly recorded easements, liens, or other encumbrances voluntarily created by or against the purchaser while a prior owner of the property are within the seller's record chain of title.[398] Consequently, a contract between a purchaser and an abstractor requiring the abstractor to prepare an abstract of the seller's record chain of title imposes a contractual duty upon the abstractor to include reference to recorded easements, specific liens, or other such encumbrances previously created by the purchaser.[399] A failure on the part of the abstractor to report any such item in the abstract of title issued to the purchaser could expose the abstractor to liability.[400]

The purchaser's knowledge of the creation of the omitted item can be a bar against the purchaser holding the abstractor liable for a breach of the abstractor's contractual obligation because reliance upon that omission by the buyer might be unreasonable or unwarranted. A resolution of such an issue is likely to be accomplished by an application of the rule that "there must be real uncertainty or a difficulty of ascertainment" in order for the matter to affect the marketability of the title tendered or transferred to the purchaser.[401] An application of that proposition would likely impose an obligation on the part of the purchaser to submit an inquiry to the abstractor and obtain a response to that inquiry as conditions precedent to the purchaser being able to arguably place a reasonable reliance upon an abstract of title that does not contain a summary of the omitted, recorded encumbrance or other recorded matter previously created by conduct on the part of the purchaser while a prior owner of the title in question.

An abstractor would not be liable for not including reference to general liens recorded and indexed under the name of the buyer in the abstract of title issued by the abstractor to the buyer if the contract between the abstractor and the buyer does not require the abstractor to search for and re-

396. *Supra* notes 230-49 and accompanying text.

397. *Williams*, 215 N.W. at 157; *First Am. Title Ins. Co.*, 457 So.2d at 472-73.

398. *See* DUKEMINIER & KRIER, *supra* note 5, at 695-96 (defining the phrase "chain of title").

399. *Supra* notes 230-49 and accompanying text.

400. *Supra* notes 227-35 and accompanying text.

401. PATTON, *supra* note 263, § 46.

port such matters.[402] Of course, the opposite might be true if the abstractor undertook the contractual duty to search for and report the existence of any such general liens to the prospective buyer who contracted with the abstractor.[403] In the latter circumstance, the buyer is presumably interested in knowing whether any such liens would attach to the title transferred to the buyer if the buyer were to contract for and consummate the acquisition of title to a particular parcel of real property from a prospective transferor.[404]

In some sectors of the United States where abstracts of title are in use, prospective sellers contract for the issuance of an abstract of title as a matter of custom and practice.[405] A prospective buyer is not in contract privity with the abstractor in that type of a situation. As a consequence, a buyer would not have standing to hold the abstractor liable for the abstractor's failure to properly discharge the abstractor's duties if the traditional privity requirement is controlling.[406] However, case law and statutory law exists pursuant to which a buyer is either accorded the status of a third party beneficiary of the contract between the abstractor and the seller or is deemed to have standing to assert liability against the abstractor based on principles of tort law.[407]

Inasmuch as a contract between a prospective seller and an abstractor for the issuance of an abstract of title usually does not include the imposition of an obligation on the abstractor to search for and report recorded general liens against a prospective or potential buyer, a buyer normally would not have a justifiable claim against an abstractor based on the fact that general liens against the buyer are not included as matters affecting the title described in accordance with the terms and provisions of the contract between the abstractor and the seller.

If a defect in title is caused by wrongful conduct on the part of the buyer, an abstractor should not be liable to the buyer if an abstract of title upon which the buyer relies does not include a summary of that matter.[408] Relieving the abstractor from liability for a defect caused by wrongful conduct on the part of the buyer will avoid the buyer receiving an undue windfall from the buyer's wrongful conduct.[409] Holding the abstractor liable to

402. *Supra* note 235 and accompanying text.

403. *Id.*

404. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.11(a), at 216-18.

405. MALLOY & SMITH, *supra* note 319, at 423.

406. *Supra* notes 230-49 and accompanying text.

407. William B. Johnson, Annotation, *Negligence In Preparing Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract*, 50 ALR4th 314 (1986); *see also* PATTON, *supra* note 262, § 44, at 150-55.

408. *See, e.g.*, Johnson, *supra* note 407.

409. *Id.*

the buyer under such a set of circumstances would run afoul of the basic maxim that people cannot take advantage of or be benefited by their wrongful conduct.[410]

2. *Tort Theory*

In some jurisdictions, the traditional requirement of contractual privity has been circumvented by the courts of those jurisdictions allowing a purchaser a tort claim against the abstractor because the abstractor knew that the purchaser would rely on the content of the abstract.[411] It appears that the prevalent tort theory in these jurisdictions is negligent misrepresentation.[412] A person who is not in contractual privity with an abstractor and who is attempting to hold the abstractor liable in tort for an alleged breach of the abstractor's responsibilities must establish that either the abstractor knew the complainant would rely on the abstract or that it was foreseeable that the complaining party would rely upon the abstract of title.[413] An adjudication of the issue of whether it was foreseeable that the complaining party who is not in contractual privity with an abstractor would rely upon an abstract of title issued by the abstractor is dependent upon a determination of whether the reliance by the complaining party was reasonable or unreasonable.[414]

3. *Statutory Law*

Some states have enacted statutes that enable specified classes of third persons who are not in contractual privity with an abstractor to seek direct relief against the abstractor for injuries suffered by the third party that are the proximate result of the abstractor's failure to properly compile an abstract of title.[415] It appears that those statutes do not include a provision that precludes a third party from holding an abstractor liable for a title defect caused by the conduct of the third party.[416] However, it is likely that a purchaser whose conduct gave rise to a title defect omitted from an abstract of title would be barred from holding the abstractor liable if the injuries suffered by the complaining party are proved to be the proximate result of the

410. CAL. CIV. CODE § 3517 (West 1997).

411. *See, e.g.*, Williams v. Polgar, 215 N.W.2d 149, 154-57 (Mich. 1974).

412. *Supra* note 242 and accompanying text; *see also* GOLDSTEIN & KORNGOLD, *supra* note 232, at 303-04.

413. *See, e.g.*, *Williams*, 215 N.W.2d at 154-57.

414. *Id.*

415. Johnson, *supra* note 407, at 363-67.

416. *Id.*

conduct of the complaining party and not any failure on the part of the abstractor to properly compile the abstract of title.

D. CAN AN ATTORNEY BE LIABLE TO A PURCHASER FOR TITLE DEFECTS THAT ARE THE PRODUCT OF CONDUCT ON THE PART OF THE PURCHASER?

Attorneys, like abstractors, are liable for defects in their work product.[417] The language of assurance contained in opinions of title issued by attorneys varies.[418] Examples of such language include:
(1) "I am of the opinion that . . . there were no taxes or judgments, and no liens of any kind or description against the said property, excepting . . .";[419]
(2) "The property described in SCHEDULE 'A' hereof is free and clear from all interests, encumbrances, and defects of title and all other matters whatsoever of record . . . impairing or adversely affecting the title to said property, except the following: . . .";[420] and
(3) "I find that on said date good title of record to said property was duly vested in . . . free from encumbrances or defects, except as follows: . . . ."[421]

Typical boilerplate exclusions from the assurances provided by an attorney's title opinion include:
(1) rights or claims of parties in possession not shown of record,
(2) defects of title disclosed by an accurate survey,
(3) restrictions created by zoning and building laws and ordinances,
(4) mechanic's liens not shown by the public records,
(5) special assessments not shown by the public records, and
(6) rights of dower or curtesy of the spouse of the owner.[422]

It appears that the customary exclusions from the assurances provided by an attorney's opinion of title do not include defects of title that are the product of the conduct of the assured.[423] Consequently, it seems that an attorney should include such an exclusion from the assurances provided by the attorney for the purpose of an attempt at avoiding liability that might otherwise arise from a claim that the attorney has rendered a faulty opin-

417. GOLDSTEIN & KORNGOLD, *supra* note 232, at 297 n.1.
418. IV AMERICAN LAW OF PROPERTY, *supra* note 209, § 18.100, at 850-52.
419. *Id.* at 850.
420. *Id.* at 851.
421. *Id.* at 852.
422. *Id.* at 853.
423. *Id.*

ion.[424] Whether an item is or is not a defect depends upon the circumstances under which the item was created and the scope of the services required of the attorney.[425]

Whether an attorney is liable to a buyer who did not contract with the attorney for the latter's issuance of a title opinion depends upon whether the laws of the jurisdiction allow third-party claims by people who are not in contractual privity with the attorney.[426] An attorney would not be liable to a buyer for losses proximately caused by a general lien against a buyer who was never a prior owner of the subject property because such a general lien would not be part of the seller's chain of title.[427] A general lien against a buyer would not constitute a lien against the seller's title unless the lien had attached to the title that was transferred to the seller by the seller's transferor and it continued to exist as an encumbrance against the seller's title.[428]

It appears that an attorney would be liable to a buyer for a failure to include reference to a defect in title caused by willful or wrongful conduct on the part of the buyer if the attorney is not relieved from such liability pursuant to a principle of equity or a public policy.[429] When a defect in title is caused by wrongful conduct on the part of the buyer, an attorney should not be liable to the buyer. Relieving the attorney from liability for a defect caused by wrongful conduct on the part of the buyer will avoid the buyer receiving an undue windfall from the buyer's wrongful conduct. Holding the attorney liable to the buyer under such a set of circumstances would run afoul of the basic maxim that a person cannot take advantage of or be benefited by wrongful conduct on the part of the wrongdoer.[430]

E. CAN A TITLE INSURER BE LIABLE FOR A DEFECT IN TITLE THAT IS THE PRODUCT OF CONDUCT ON THE PART OF THE INSURED?

"Exclusions from Coverage" of an ALTA policy of title insurance reads:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:[431]

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424. *Supra* note 419 and accompanying text.
425. *Id.*
426. *Supra* note 270 and accompanying text.
427. *Supra* note 399 and accompanying text.
428. *Id.*
429. 11 THOMPSON ON REAL PROPERTY, *supra* note 18, § 92.11(b), at 219 n.575.
430. *See, e.g.*, CAL. CIV. CODE § 3517 (2003).
431. BROWDER, *supra* note 293, at 865 (quoting ATLA form of policy of title insurance).

. . . .

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant.[432]

"Exclusions from Coverage" of a California Land Title Association form of policy currently reads:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

. . .

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant.[433]

The CLTA exclusion purports to specifically pertain to defects, liens, encumbrances, adverse claims, or other matters regardless of whether they are recorded or not in the public records.[434] The ALTA exclusion does not include the phrase "whether or not recorded in the public records."[435] As a result, a title insurer under an ALTA form of policy of title insurance may be liable for a recorded title matter created, suffered, assumed, or agreed to by the insured where reference to the recorded title matter is not included in the schedule of exceptions from policy coverage.[436]

Courts that have construed the foregoing exclusions from coverage provided under the terms, provisions, conditions, and stipulations of a policy of title insurance appear to be in accord that defects in title that arise from mere negligence, accidental conduct, or innocent conduct on the part of the insured are not within the scope of these exclusions.[437] To come within the scope of these exclusions, a defect must be the product of deliberate, dishonest, illegal, or inequitable conduct on the part of the insured.[438]

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432. *Id.* at 866.

433. *Id.*

434. *Id.*

435. *Id.* at 865.

436. *See, e.g.*, HARRY D. MILLER, 3 MILLER & STARR, CALIFORNIA REAL ESTATE 3rd, § 7:45, at 126 n.1, § 7:55 at 145 (West Group 2000).

437. Smith, *supra* note 10, at 516-21.

438. *Id.* at 520.

Whether an abstract of judgment or judgment lien is excluded from policy coverage depends upon whether the judgment against the insured was the product of negligent or accidental conduct of the insured or the product of deliberate, dishonest, illegal, or inequitable conduct on the part of the insured.[439] If the abstract of judgment is not an excluded matter, the title insurance company would be liable to the extent provided under the terms, provisions, conditions, and stipulations of the policy of title of insurance for loss, damages, attorney's fees, or costs incurred by the insured that are the proximate result of the "missed" abstract of judgment or judgment lien.[440] However, if the abstract of judgment or judgment lien is an excluded matter, the title insurer is not liable to the insured for any loss, damages, attorney's fees, or costs incurred by the insured that are the proximate result of the abstract of judgment or judgment lien.

An insured need not have actual knowledge of an abstract of judgment or judgment lien that has been recorded against the insured in order for the exclusions from coverage to be effective.[441] Adherence to a requirement of knowledge on the part of the insured in all instances would render the policy provisions that are under review meaningless.[442] Requiring a "defect in title" to be the product of deliberate, dishonest, illegal, or inequitable conduct of the insured in order for the defect to be excluded from coverage is arguably keeping with the reasonable expectations of an insured on the one hand while adhering to the public policy against people benefiting from their wrongful conduct on the other hand.

IV. CONCLUSION

The protection afforded to persons under various forms of assurances of title that comprise part of the law of real property that is in effect in the United States are not without limits. Therefore, it behooves a person who is contemplating the acquisition of an interest in real property to arrange for a combination of the protections in force in the jurisdiction in which the subject real property is located. The achievement of that goal is likely to occur only when the person who is contemplating the acquisition of an interest in real property has retained the services of an attorney with respect to that process. The retention of the services of a competent real estate attorney for that purpose should result in the attorney practicing a form of preventive law on behalf of the client. The practice of preventive law by an attorney is

439. *Id.* at 518-24.
440. *See, e.g.*, 3 MILLER, *supra* note 436, § 7:16, at 64-65.
441. Smith, *supra* note 10, at 523.
442. *Id.*

usually less costly for a client than when the client must rely upon an attorney to provide legal services that constitute a practice of curative law.

Portions of this article also demonstrate that there are circumstances under which a person who assures a quality of title may be liable to the assured for defects in the title caused by conduct on the part of the assured. However, those situations may be characterized as exceptions rather than the norm. It appears that the legal doctrines that are used to resolve such an issue are sufficient to produce outcomes that are arguably within the reasonable expectations of the parties and which prevent people from receiving a benefit their improper or wrongful conduct.

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