TITLE INSURANCE IN CALIFORNIA[1]

The need for greater protection than is offered by the attorney or abstractor gives rise to divergent methods of assuring the validity of title to land: the title insurance system operated by private companies,[2] and the Torrens system operated by states.[3] While these systems have existed side by side in many states with abstracting playing the predominant role, California for many years has been on a solid title insurance basis.[4] Now that the voters of California for all practical purposes have abandoned the Torrens system,[5] it is time to reappraise title insurance.[6]

NECESSITY OF TITLE INSURANCE

Title to real property in the United States is evidenced by public recording systems. From Colonial times, statutes have provided for the re-

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[2] The immediate cause of title insurance was the case of Watson v. Muirhead, 57 Pa. 161 (1868), where it was held that the rule for liability of an abstractor was analogous to the rule applied with lawyers or doctors; apparently the liability is for gross negligence only. Because of this decision land dealers, purchasing property in anticipation of a rapid rise in value due to the forthcoming Centennial Exposition of 1876 in Philadelphia, employed only the most reliable conveyancers to search title. Since the tremendous increase in business could not be handled without shortening the searching process with consequent incalculable risk, a group of conveyancers banded together and established the Real Estate Title Insurance Company in 1876. See GAGE, LAND TITLE ASSURING AGENCIES IN THE UNITED STATES 81 (1937).

[3] *E.g.*, CAL. GEN. STATS., Act 8589 (Deering 1944) (The Torrens Act); see *The Torrens System*, 25 LAWYER AND BANKER 226 (1932).

[4] Except in Los Angeles County, and some of the surrounding counties, practically no titles have been registered. It is estimated that in California not over one-tenth of one percent either in area or in value is registered. See LANDELS, A BRIEF REVIEW OF THE TORRENS EXPERIMENT IN THE UNITED STATES, an address given at the California Land Title Association Convention, Santa Barbara, California (1938).

[5] Land registered under the Land Title Act may now be withdrawn and placed under the public recording system. §§ 48.1–48.9, CAL. GEN. STATS., Act 8589 (Deering 1949 pocket part), as added by Proposition 11, approved November 7, 1950.

[6] There are many reasons why title insurance has been used in California practically to the exclusion of the Torrens system. The Torrens certificate does not give as much protection as afforded by title insurance. In California, as in nearly all the Torrens states, the initial certificate is subject to attack within one or two years and to jurisdictional defects in the original proceedings, and subsequent certificates are subject to current taxes, bankruptcies, federal internal revenue liens, rights of the state, and short term leases. For a complete enumeration see FINCK, THE TORRENS FALLACY (1935). There is also such unfamiliarity with the Torrens system that lending institutions and individuals are hesitant to deal with property registered under it. In some states mortgage forms and trust deeds have provisions inserted forbidding registration under the Torrens Act and declaring that recordation under the act will constitute a default under the mortgage or trust deed. See 25 LAWYER AND BANKER 226, 245 (1932). Other reasons for the failure of the Torrens system are: inertia, opposition of special interests, initial cost of registration, and dislike on the part of the individual to appear in what is analogous to a lawsuit. 25 LAWYER AND BANKER 237-242 (1932). In addition many are hesitant to rely on the certificate without the aid of counsel. Those more familiar with the system would find little comfort in the certificate if they knew of the plight of Mr. and Mrs. Gill who secured a judgment against the assurance fund after nineteen years of costly litigation only to find that the fund did not contain sufficient funds to pay it. Gill v. Johnson, 103 Cal. App. 234, 284 Pac. 510 (1930); Gill v. Johnson, 125 Cal. App. 296, 13 P. 2d 857 (1932); Gill v. Johnson, 8 Cal. App. 2d 369, 48 P. 2d 139 (1935); Gill v. Johuson, 21 Cal. App. 2d 649, 69 P. 2d 1016 (1937).

cordation of interests in land including liens and encumbrances of all types. The theory is that properly recorded instruments give notice to the world of their contents and claims; only matters on the public records will prevail against a bona fide purchaser for value. Although this system may have been simple and practical in the frontier days, the tremendous increase in population and consequent concentrations of people in various areas has made the records so voluminous that a proper examination of a title often can be handled only by an expert at high cost. With the advent of large cities, scarcities in select land, and absentee lenders, more assurance is required than is furnished by an expert contracting only to skilfully search title.

Uncertainty concerning the validity of title is due to the insufficiency of the recording system. The system is impracticable not only because of the length of the record which often has to be searched; more serious is the objection that not all of the interests which may attach to land are included in the records. Furthermore, although the evidence of title is assembled, no method is provided so that it may be segregated and interpreted.

The title searcher cannot stop with the recorder's office. The public records include those of many other government offices among which are land office records concerning government owned land; numerous records of the state at the capital; tax records of every taxing agency (city's, county's, state, and district) whose levies may constitute a lien on real property; county, city and clerks' records relating to zoning, police and fire regulations; records of the county clerks offices where, among other things, records pertaining to corporations are kept; records of the clerks of courts, state and federal, in which are maintained the files of cases affecting titles, litigation involving real property or its owners, foreclosure of liens, partition suits, probate, guardianship and divorce cases, and bankruptcy.

Faced with this insufficient hodge podge, title companies had to devise a method of systematically collecting evidences of title. The policy of title insurance represents the final result of three successive processes: investigation of title, determination of the amount of insurance required, and insurance against possible losses. In the process of investigating title it is found that title risks emanate from three principal sources: errors in searching the records, errors in interpreting the legal effect of instruments in the chain of title, and facts external to the record. An insurer meets the first two in much the same way as an abstract company, by utilizing a "title plant," trained and experienced employees, and competent legal assistance.[7] Hazards outside the public records, against which title insurance affords distinctive protection, must be met by additional precautions.[8]

The above problems are met in the following manner:

Compilation of records. Title insurance companies, faced with the insufficiency of recordation, devised a system of classifying records in rela-

[7] See *The Title Plant—Systems, Methods, Procedures and Equipment—Building and Rebuilding,* 29 TITLE NEWS 22 (Nov. 1950).

[8] See McIsaac, *Preventing Title Loss Through Examination,* 29 TITLE NEWS 11 (Apr. 1950).

tion to the location of the land rather than the names of the parties. This eliminates the necessity of knowing the names of the parties connected with the property in question and of referring to more than one index.[9] Maps are maintained showing every lot in every subdivision. A casual reference to the relevant map will show the extent of the property affected by any recording.[10]

A major function of the title insurance company is to assemble this information, and to examine, summarize and classify it for greater efficiency.

Interpretation. Construction of the validity and effect of instruments in the chain of title entails determinations of proper execution and acknowledgement, legal sufficiency, identity, and other matters necessary to make the instrument valid and binding.

Inspection. All judicial proceedings which involve or affect land must be examined. Their existence is disclosed by notices of lis pendens, attachment, mechanic's liens and similar records; in fact, all such proceedings are examined and posted because of the off-record coverage.[11] The examination must take into consideration the nature of the action, the necessary parties, the jurisdiction of the court, both as to parties and subject matter, and any limitations upon the power of the court to render specific relief. The search must also include a determination of the exact nature of the relief awarded, its effect upon the title and whether the judgment is final or still subject to direct attack.[12]

Taxes and assessments. Another element in the examination of title is the consideration of all data pertaining to unpaid taxes and assessments. Tax records are scattered in many offices; tax descriptions often vary ma-

[9] Since many recorded instruments do not relate to, or indicate, a particular parcel of land a general index is also maintained. This index contains powers of attorney, declarations of trust, blanket deeds (*e.g.*, instruments conveying all property of the grantor in a county), court decrees affecting status (adjudications of bankruptcy, divorce, incompetency, change of name), judgments creating liens on all property of the debtor, and declarations of homesteads (so that coexisting homesteads may be determined). Abstracts of such matters obviously cannot be entered in reference to any particular parcel of land. They are, therefore, noted in another set of books, alphabtically arranged, according to the names of the persons affected, known as the general index or "names" books. See Myren, *Name Index or General Index,* 29 TITLE NEWS 18 (Jan. 1950).

[10] Title companies assign arbitrary letters or numbers to subdivided property. With the usual public recording system the grantor-grantee index indicates the parties to the transaction and makes reference to the official book and page where the description is recorded. Resort must then be to the description to determine whether a particular transaction relates to property in which the searcher is interested. Since descriptions covering the same property may vary it may be necessary to plot each description on the appropriate map. The beginning point may be dependent on the ownership of a third person. Then it is necessary to plot out the reference property in order merely to determine the beginning point of the property being searched. The whole process becomes even more complicated where the reference property is dependent on the ownership of a fourth person, where new streets have been dedicated, or where the beginning point may be a landmark such as a marked tree near a specified creek. Title companies, over a period of years, have established an elaborate system of maps and indexes which show all previous subdivisions and indicate the location of unconventional beginning points.

[11] As will be shown, these may disclose off-record matters of which title companies take notice, although it may not be required under the recording laws. See text at note 59 *infra.*

[12] See McIsaac, *supra* note 8.

terially from record descriptions;[13] tax deeds are not always issued, and then not always recorded. Protest and invalidity suits, bond foreclosures and treasurer's sales may be in progress. There may be overlapping assessments, or assessments and bonds issued under more than one of the many improvement and bond acts. Examination of taxes and assessments requires great care for the special reason that their enforcement, if valid, results in the creation of a new title and the extinguishment of practically all prior private interests. The insured might easily suffer the complete loss of his property and the insurer be required to pay the full amount of the policy.

Protection against off-record risks. Title to land is determined both by the public records and facts extraneous to the public records. Contrary to popular belief record title is not immune to all off-the-record claims.[14] While title insurance guarantees what is shown of record, some matters off the record are also covered to reduce to a minimum the risks which the purchaser or mortgagee must assume.

Matters which will affect title to real property and of which recording gives no notice include fraud,[15] forgery and false impersonation,[16] alteration,[17] want of legal delivery,[18] questions of fact,[19] wrongful possession of a deed,[20] conditional delivery,[21] identity of persons, copyists' errors, minors and others under a disability,[22] insanity,[23] afterborn children and pretermitted heirs,[24] void judgments and decrees,[25] usury,[26] mechanics liens,[27] adverse possession,[28] unrecorded instruments,[29] visible and existing ease-

[13] Tax descriptions locate property by parcels rather than by lots.

[14] Chapland, *Record Title to Land,* 6 HARV. L. REV. 302 (1893).

[15] Deputy v. Stapleford and Willis, 19 Cal. 302 (1861).

[16] Hopkins v. Fresno County Abstract Co., 36 Cal. App. 699, 173 Pac. 106 (1918) (recording of no effect).

[17] Vaca Valley Ry. v. Mansfield, 84 Cal. 560, 24 Pac. 145 (1890).

[18] Black v. Sharkey, 104 Cal. 279, 37 Pac. 939 (1894).

[19] Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915).

[20] Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509 (1916).

[21] Chapman v. Ostergard, 73 Cal. App. 539, 238 Pac. 1081 (1925).

[22] Tucker v. Moreland, 10 Pet. 37 (U. S. 1836) (minors); Morton v. Davis, 105 Ark. 44, 150 S. W. 117 (1912) (old age).

[23] Essary v. Marvel, 274 Ill. 576, 113 N. E. 859 (1916).

[24] See Haymond, *Title Insurance Risks of Which the Public Records Give No Notice,* 1 So. CALIF. L. REV. 422, 435-6, (1928).

[25] Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007 (1904) (extrinsic fraud).

[26] Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022 (1892).

[27] Haymond, *supra* note 24, at 440.

[28] Haymond, *Title Insurance Risks of Which the Public Records Give No Notice,* 2 So. CALIF. L. REV. 139, 141-148 (1928).

[29] Of the various exceptions noted in the standard policy the only exception which could possibly cover this situation reads as follows: "[The company does not insure against] . . . any facts, rights, interests, or claims which are not shown by those public records in the county in which the land or any part thereof is situated which impart constructive notice of matters relating to such land, but which could be ascertained by an inspection of said land, or by making an inquiry of persons in possession thereof, or by a correct survey." Since the word "but" was used, the second part of the exception is intended as a clause of qualification instead of a clause of extension. Had the disjunctive conjunction "or" been used the exception would relate to instruments not of record as well as those which may be determined by inspection, inquiry or survey. A contrary interpretation would restrict insurance to a mere guarantee of the record

ments, streams, lakes, rivers, whether land is riparian or nonriparian, and whether new lands are alluvion, accretion or otherwise,[30] overlapping,[31] and finally exercise of police powers.[32]

Because of the great variation of risks which exist, title insurance companies have felt it necessary to discriminate among them and to develop several types of policies varying in coverage. A standard coverage policy is available which affords protection against off-record risks, while at the same time excluding risks which the insured can ordinarily assume.[33] Other forms of policies have been developed to protect the insured even against the risks he ordinarily can assume but extra premiums are charged because of the additional investigation required.

Title insurance was developed to protect against the hazards of identity and capacity of the parties to the transactions reflected in the chain of title, and to assure the good faith of each transaction. Every standard policy protects a bona-fide purchaser or encumbrancer against loss through forgery, false impersonation, incapacity of parties, and transfers by a person whose name is different than the record owner.[34] It is readily seen that not only do title insurance companies guarantee title to land as shown by the public records, but that they also insure the *validity* of all transactions which are recorded. The effect is that if any of the numerous off-record risks are not discovered, a policy of title insurance gives the insured a safer title[35] than he would have had otherwise.[36]

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title which was not intended. A Los Angeles title insurance company has reported the following experience concerning unrecorded deeds: (1) if the insured owner could have ascertained the prior interest by an inspection or inquiry of persons in possession there is no liability; (2) if the insured could not have so ascertained the interest but had actual notice of the deed and did not notify the insurer, there is no liability since the standard policy requires that this information be conveyed to the insurer; (3) if the insured could not have ascertained the interest as in (1) and had no knowledge of the deed as in (2), the company defends against the attack by the grantee under the unrecorded deed, but will prevail under the recording laws.

[30] Haymond, *supra* note 28, at 150.

[31] *Ibid.*

[32] *Id.* at 153-155.

[33] The standard coverage policy provides that the company insures against loss or damage "which the insured shall sustain by reason of:

1. Title to the land . . . being vested, at the date hereof, otherwise than as herein stated; or
2. Unmarketability . . . unless such unmarketability exists because of defects, liens, encumbrances, or other matters (which are excepted by the policy); or
3. Any defect in, or lien or encumbrance on, said title, existing at the date hereof, not (excepted by the policy); or
4. Any defect in the execution of any mortgage or deed of trust (enumerated in the policy) securing an indebtedness, the owner of which is insured . . . but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon said land . . . ."

[34] Many insurers require the parties to sign statements of identity, containing essential personal information about themselves which is preserved for future reference.

[35] While title insurance is a contract of indemnity and not a guarantee that the insured will receive the land purchased, the title insurance proceeds may be used to pay off the rightful owner. In any event the insured will suffer little or no monetary loss.

[36] Title insurance and title guarantee companies have paid claims because of loss of the land due to the following: false personation of the true owner of the land; forged deeds and releases of wills; conveyance altered before recording; fraud, duress or coercion in securing essential signature; delivery of deed after the death of grantor or grantee, or without consent of the grantor; invalid, suppressed, undisclosed or missing heirs; deeds by persons of unsound mind; deeds by minors; deeds by persons supposedly single but secretly married; home-

Not the least important of the risks covered by a policy are the costs, expenses and attorneys' fees incurred in defending title.[37] This protection is in addition to the stated liability for loss of title and it covers defense of unsuccessful attacks upon the title as well as those having merit. Title insurers also initiate litigation to eliminate claims and clouds on title arising out of matters insured against.[38]

RISKS NOT INSURED

The standard policy does not insure against loss from defects or other matters concerning the title known to the insured at the date of the policy and not communicated in writing to the insurer.

Also excepted from the standard policy are: "Taxes or assessments which are not shown as existing liens by the records of any taxing agency or by the public records; and easements, liens, or encumbrances which are not shown by the public records."[39] These exceptions are necessary for three reasons. First, concerning the public records, a good faith purchaser is entitled to rely on them, and title acquired in good faith and for value without knowledge of off-record interests and liens will be superior. Secondly, apparent easements or liens may be determined by observation. Thirdly, liens in connection with improvements which are projected or under construction are ascertainable only by inspection, or by delving into the files of the municipal budget and planning departments. Since an in-

stead rights; birth or adoption of children after date of will; mistake in recording legal documents; false representations in appointment of guardians and administrators; community property rights not of record; liens for unpaid estate, inheritance, income and gift taxes; want of jurisdiction over persons in judicial proceedings; invalidity of tax title because of irregularity of proceedings, reversal of court decision or lack of decision on points of law; destruction or mistakes of record which may later appear by the original paper, or false or misleading statement of fact; errors in copying or indexing; defective foreclosure of mortgages; old unsettled estates or errors by administrators and executors; insufficiency of evidence to establish title by inheritance or falsification of records; unauthorized or fraudulent acknowledgement; illegal acts of trustees; and unauthorized delivery of instrument by escrow agents. There are other hazards, too numerous to mention, against which the property owner is protected by the standard policy. See Fisher, *What is Title Insurance?*, 21 OKLA. B. J. 275, 277 (1950); McKee, *What is Title Insurance?*, 16 LAWYER AND BANKER 101 (1923); and McNeal, *The Broad Scope of Title Insurance*, 17 LAWYER AND BANKER 157 (1924).

[37] The California Land Title Association Standard Coverage Policy Form provides that: "The Company at its own cost shall defend the insured in all litigation consisting of actions or proceedings against the insured, or defenses, restraining orders, or injunctions interposed against a foreclosure or sale of said land in satisfaction of any indebtedness, the owner of which is insured by this policy, which litigation is founded upon a defect, lien, encumbrance, or other matter insured against by this policy . . . ."

[38] While the company has the right to initiate proceedings, it is ordinarily required that the customer assume the burden of prosecution if the need is discovered before the policy is issued. If the discovery is made after the policy is issued and does not seriously affect marketability, it is generally considered the better policy to "let sleeping dogs lie."

The California Land Title Association Standard Coverage Policy Form provides that: "The Company shall have the right to institute and prosecute any action or proceeding or do any other act which, in its opinion, may be necessary or desirable to establish the title, or any insured lien, or charge, as insured . . . . Whenever requested by the Company the insured shall assist the Company in any such action or proceeding, in affecting settlement, securing evidence, obtaining witnesses, prosecuting or defending such action or proceeding . . . ."

[39] From California Land Title Association Standard Coverage Policy Form, Schedule B, exception 1.

spection of the land would be necessary in order to insure against these off-record easements and liens,[40] these matters are covered by extra-coverage, extra-premium policies.[41]

The standard policy does not protect against "rights or claims of persons in possession of said land which are not shown by the public records."[42] Rights from the fact of possession alone may be as effective against persons dealing with title to the land as rights evidenced by the public records.[43] A person acquiring an interest in property is deemed to have notice of all facts which inquiry would disclose. Such risks are not assumed by the insurer since they require inquiry of the parties in possession.

The standard policy does not cover "Any facts, rights, interests, or claims which are not shown by the public records, but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof or by a correct survey."[44] This exception is not limited to claims of persons in possession; the insured is deemed to have constructive notice of facts within the knowledge of those in possession.[45] Since the insured also assumes the risk of matters which a correct survey may show, a careful survey is necessary if the purchaser plans to build close to the apparent boundaries. Title companies do not ordinarily render such services, but, in special instances, will insure against such matters if furnished a correct survey.

The standard policy does not cover "Mining claims, reservations in patents, water rights, claims or title to water."[46] Often mining claims may be determined by a careful inspection of the land. Reservations in patents were not included in the original Mexican land grants. Title companies exclude all reservations in patents, for the reason that certain reservations became effective by operation of law although omitted from the patent. These exceptions appear to be founded on the two broad exceptions of the standard policy: matters which may be determined by inspection of the land, and governmental acts such as zoning. Water rights depend upon too many elusive factors to make it possible to insure them in the standard policy, and even a good record title to a certain amount of water gives no assurance that the supply is adequate or available.

The standard policy does not protect against "Any laws, governmental acts or regulations, including but not limited to zoning ordinances, restricting, regulating or prohibiting the occupancy, use or enjoyment of the land

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[40] *E.g.*, lumber on the land may be an indication that construction is in progress which could result in a mechanic's lien.

[41] See text *infra* at note 49.

[42] From California Land Title Association Standard Coverage Policy Form, Schedule B, exception 2.

[43] Garrett Co. v. States, 3 Cal. 2d 379, 44 P.2d 538 (1935).

[44] From California Land Title Association Standard Coverage Policy Form, Schedule B, exception 3.

[45] See note 29 *supra*.

[46] From California Land Title Association Standard Coverage Policy Form, Schedule B, exception 4. A mining claim can only legally exist on unpatented public domain. Principle attention of the companies is centered on projection of the extra-lateral rights of the owner of a mining claim.

or any improvement thereon, or any zoning ordinances prohibiting a reduction in the dimensions or area, or separation in ownership, of any lot or parcel of land; or the effect of any violation of any such restrictions, regulations or prohibitions."[47] While these matters are important in relation to the use of the property, no attempt is made to insure against them, principally because they are constantly changing. Coverage would be of use on the day the policy was issued.[48]

As contrasted with the standard policy, maximum protection is offered by the American Title Association Loan Policy—Additional Coverage,[49] which is available only to lenders, and the Extended Coverage Policy Form which is issued to individuals.

The ATA policy is a uniform policy drafted by the American Title Association and used throughout the United States.[50] It is the outgrowth of the demand by life insurance companies for uniform policies which do not contain the printed exceptions found in the standard coverage policy.[51] There is, however, space reserved in the policy for notation of defects, liens, encumbrances or other matters against which the company will not insure. These matters conform more closely to an enumeration of what defects may actually exist rather than blanket exceptions covering matters which the company does not insure.[52] This form represents the fullest protection offered.

The California Land Title Association recently made available a California Land Title Association Extended Coverage Policy Form which offers to owners essentially the same protection offered to lenders by the ATA policy.[53] Some companies have used a similar form for many years.[54] It

[47] California Land Title Association Standard Coverage Policy Form, exception 5.

[48] For criticism and recommendation concerning this exception see text *infra* at note 58.

[49] This form is usually referred to as the ATA policy.

[50] The ATA policy insures the owner of the indebtedness secured by a mortgage or deed of trust against loss or damage which the insured may sustain by reason of (1) any defect in the execution of a mortgage or deed of trust, but only insofar as the defect affects the lien upon the land insured; (2) the invalidity of the lien upon the land; (3) the title to the land being vested other than as stated in the policy; (4) the unmarketability of the title of the mortgagor or trustor; (5) any defect in, or lien or encumbrance on the title at the date of the policy; (6) any statutory lien for labor or material or assessments for street improvements under construction or completed at the date of the policy, which has or may gain priority, other than defects, liens, encumbrances and other matters which may be excepted or noted in the policy; or (7) by reason of the priority of any lien or encumbrance at the date of the policy except as otherwise excepted in the policy, subject, however, to the conditions and stipulations annexed to the policy. The policy also provides that any assignments which may be noted in the policy are at the date of the policy, insured to be good and valid and vest title to the mortgage or deed of trust in the insured free and clear of all liens whether recorded or not.

[51] The only exceptions are that the company does not insure against "defects, claims or encumbrances created or suffered by the Insured claiming such loss or damage, or existing at the date of this Policy and known to the Insured . . . but not known to the Company or disclosed to it in writing . . . ;" or action by any governmental agency for the purpose of regulating occupancy or use of land or any building or structure.

[52] See text *supra* note 39 for examples of exceptions.

[53] The Extended Coverage Policy Form contains the same provisions of assurance as found in the ATA Form.

[54] A Los Angeles title insurance company has reported that it issues a substantial number of extended coverage policies each month, usually upon manufacturing sites being acquired by eastern concerns where the purchaser is represented by an attorney. According to this company

must be emphasized, however, that this insurance is not available in all localities nor is it issued by every company.[55] This is based on the fact that in order to isue an ATA or extended coverage policy an inspection of the land must be made by the title company.[55a] Furthermore, since the extended coverage policy is not necessary in most cases[56] and is not requested by many owners, its use is not widespread.[57] The various title companies in California have made no special effort to sell it.

While there are no blanket exceptions in the ATA and extended coverage policies the exception against governmental regulations is retained. One argument for maintaining that exception is that any information given in the policy concerning laws, governmental acts or regulations is good only on the day the policy is issued. However, if the prospective purchaser had knowledge of a zoning ordinance or other matter within this exception that would make the property unsuitable for his requirements, he would refuse to purchase the property. A regulation precluding his intended use may be an even greater loss than that caused by some other defect against which

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losses have been rather high, largely because of underground and non-visible easements, and encroachments of buildings and fences which the surveyor erroneously failed to detect.

[55] A survey shows that the extended coverage policy is available in at least 25 of the 58 California counties. One company reported that this type of policy has been available for the last 56 years. To date only 12 requests have been received. Another company reported that in the 43 years the policy has been available only one or two requests have been made. Others report that they have received no requests for the extended coverage policy. In metropolitan or highly populated areas the policy is generally available, while in the sparsely populated areas it is not. In the Russian River territory, for example, the policy is available but none have been issued. In that area one company reported that no ATA policies have been issued because of the extreme inaccuracy in the basic survey. The "Mother Lode" area is faced with the same difficulty. One company in that section reported that only one request has been received. Their requirement of a survey with improvements spotted, together with an extra inspection charge caused that request to be changed to the standard coverage policy. Of particular interest was a report from Placer County. A company in this area reported that while the extended coverage policy was available none have been issued. The report stated that the basic survey cost to locate the property initially for a proper inspection preparatory to the issuance of ATA coverage eliminates the question of whether or not they will issue such a policy. Counties such as Placer are faced with the problem that many easements such as irrigation ditches and roadways (originally stage coach trails) came into being before public recording was initiated. In addition to this, descriptions and boundaries are vague. In those counties where the extended coverage policy has been used some companies issue the policy only when there is a preferred risk. A Los Angeles company reported that in some cases additional exceptions to cover particular hazards may be inserted. In issuing an extended coverage policy on ranch lands, for example, the exception against water rights would probably be included.

[55a] Inspection of the property may reveal encroachments over street and title lines by walls, corners, footings, guy wires, easements in use, utility meters, or even lessees in possession.

[56] In the majority of cases the prospective purchaser makes an inspection of the land and with the aid of his broker, real estate agent or attorney is able to assure himself that no loss will occur due to any exceptions that may be found in his policy.

[57] This may be due to the fact that many people are not cognizant of the existence of the policy. Those who are familiar may decline to ask for it since the cost is approximately twice that of a standard policy. Title insurance companies, faced with the problem that requests for extended coverage policies are not constant, do not advertise this form of policy, or maintain the staff of employees needed to make inspections. On the other hand, all lenders require ATA policies where available and the requests are fairly constant.

he is insured.[58] Therefore consideration might well be given to the removal of even this exception.

TITLE INSURANCE PRACTICES—THE "REAL" LAW V. REAL PROPERTY LAW

In the previous discussion the attempt has been made to show that title insurance inclusions and exclusions are precise and highly technical. It is obvious that in a state where most titles are insured the "real" property law tends to be made by title companies and not by courts. According to the statutory and case law the title may be vested in the client. But faced with the practical necessity of obtaining property loans or giving a marketable title he usually is forced to comply with the stricter requirements of title company practice.[58a] Further, since title companies maintain a recordation system which is superior to the public records, knowledge is gained of matters outside as well as within the chain of title.[59] This information when conveyed to the insured becomes actual knowledge which may affect the bonafides of his title.[60]

[58] Even in the absence of the exception, however, no protection may be offered against governmental regulations; for zoning ordinances and governmental regulations are not encumbrances, defects or liens. Since some question existed as to whether zoning ordinances prohibiting a reduction in the dimensions or area, or separation in ownership, of any lot or parcel of land would affect marketability which the companies do insure, an amendment to the standard coverage policy form was recently made by the California Land Title Association specifically excepting insurance against such ordinances.

[58a] One expert comments: "The real difficulty in these cases lies not in the policy-making of the title company, but in the uncertainties which the lawyers have allowed to exist in the definition of what constitutes a *marketable title* under California law. Where the attorney for the owner does not see eye to eye with the attorney or title committee of the title company, then the title company is accused of 'making' law and of enforcing standards more rigid than those imposed by the court and legislature . . . . As a matter of fact . . . there is no arbitrary refusal on the part of title companies to insure even in such cases. Where the off-the-record investigation reasonably assures the existence of a title good in fact, there is very general readiness to insure the title under a form of policy merely deleting the word 'merchantable' among the items insured. Most companies, however, feel that in this situation they have an ethical duty to advise the prospective insured that a bank or insurance company would not be allowed to loan upon the security of such title and that a contract buyer would have a technical defense against an action for specific performance. In other cases, even those which may involve a complete break in the chain, most title companies are willing to issue their standard form of policy without deletion of the word 'merchantable' where the location of the property and the minimal values involved suggest that no factual difficulties from technical non-merchantability are reasonably to be anticipated. In still other cases, special situations are covered by special endorsement 'riders' after the style of other classes of insurance." Letter from Robert Mack Light, Vice-President and General Counsel of the Pioneer Title Insurance and Trust Company, San Bernardino, California, dated April 12, 1951.

[59] This is simply one aspect of the geographical system and is due to the fact that the recorded instrument is indexed by lot and tract rather than by parties.

[60] Lawton v. Gordon, 37 Cal. 202 (1869) (notice of prior unrecorded deed given by county recorder); Robinson v. Muir, 151 Cal. 118, 90 Pac. 521 (1907) (actual knowledge of prior unrecorded deed).

In the event the company has knowledge, but does not convey it to the insured, Rice v. Taylor, 220 Cal. 629, 636, 32 P.2d 381, 384 (1934), held that no agency existed. The court said: "The insured and insurer deal at arm's length. There is no room for the operation of a fiduciary relationship. The title company is in business for profit. It may be willing to assume risks that the insured might think imprudent. The duty to report its finding as to the nature of the title of the property involved to him is nowhere enjoined. The fact that the company often reports its findings preliminarily to him is not evidence that it is compelled to do so. The wisdom of doing this, except in cases where the insurer demands the correction of defects

In some cases doubt may exist as to the extent of the ownership of the record owner. An example is a case where *C* joins with *A* and *B*, the record owners, in executing a deed of trust. After a reconveyance of the property to *A*, *B*, and *C*, *A* and *B* sell to *D*. If *X* wishes to buy from *D* and requests title insurance, the company is likely to request either a quitclaim deed from *C*, or an affidavit from *C* as to his interest. If a quitclaim deed or affidavit cannot be obtained, the company will simply note in the policy that it does not insure against any outstanding interest of *C*.[61]

In a case where the equitable title is good, but the record title is defective,[62] the company will make notations of the deficiency in the policy and will not insure against them. Thus the practical effect is that title insurance companies require more than the recording law. Although this may help to cure defective titles, it may also preclude a person from selling or borrowing money on his property.[63] The importance and power of title insurance companies may be appreciated from the fact that, although there is no legal necessity of obtaining a policy, title insurance is the only practical and sure method of ascertaining real property ownership in California today. Loans and transfers are dependent upon title insurance.[64]

Where there exists in a single county more than one title company with active competition, this power may be reduced. Even in these counties, however, there are uniform practices which require more than does statutory or case law.[65]

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of title before issuing its policy, is not apparent. Under such a hypothesis, it could be said that in every insurance transaction of whatsoever type, the insurer is the agent of the insured. Much more reasonable would be a holding the reverse of this contention." In the *Rice* case, however, the escrow agreement provided: "It is understood your liability under the evidence of title herein referred to shall be based upon the record title only and that you shall not be liable for secret defects of title not appearing of record, nor for forgery, nor for false personation, either as to instruments already of record or those involved in this escrow." The *Rice* holding, then, is probably limited to cases where the search is restricted to record title only by the instructions. This fact was acknowledged by the court which pointed out that: "Anything learned about matters not affecting the record title would not in any event be imputed to the principal. If the instrument in question was not properly of record, the title company on its own account, or as agent had no duty to perform respecting it." In the absence of an agreement restricting search to record title, the question may still be open since search under present company practice is not restricted to record title.

[61] Usually no loan will be made until the exact interest of the owner is ascertained, although this depends on the particular lending institution.

[62] Examples would be

(1) A defective description has been recorded. In such a case a title company may require a correction deed.

(2) Property is sold at a trustee's sale and there is procedural error such as improper publication.

(3) A person may have a good legal title through adverse possession, yet the record title would be defective.

[63] Not only do lenders require title insurance, but they require an ATA policy which gives the greatest amount of protection now available. It may be safely stated that if a title insurance company refuses to issue a policy no loan will be available.

[64] See *The Torrens System*, 25 LAWYER AND BANKER 226, 245 (1932).

[65] While title companies may refuse to issue a policy of title insuurance, arbitrary refusals are not made.

REGULATION OF TITLE INSURANCE COMPANIES

The gradual growth in importance of title insurance, as well as its financial aspects, have naturally caused state regulative efforts. Regulation of title insurance as might be expected varies on the basis of the importance and extent of its use within the particular jurisdiction.

Some states provide no regulations other than those generally applicable to corporations. In other states title insurance is regulated by the laws applicable to insurance. Most consider title insurance to be different and subject it to special regulation. The current statutory regulation in the majority of states is limited to provisions concerning financial stability.[66]

California's statute is a typical financial stability statute.[67] Before a company engages in business it must have a capital of at least $100,000. Furthermore, the sum of $100,000 must be on deposit with the Insurance Commissioner. The company is required to set aside a sum equal to 10 percent of all premiums until a fund is created which equals 25 percent of the aggregate of the subscribed stock. The maximum of capital and surplus which may be invested in facilities necessary for the conduct of business is limited to 50 percent. In this last respect California is not typical since many states place no restrictions on investments in plant. No reinsurance is required except where a company is withdrawing from the business. An annual report must be submitted to the Insurance Commissioner, which must show among other things, the sources and amounts of profits and losses.[68] In addition the schedule of fees and charges must be made public. However, rates and policy provisions are unregulated.[69]

The only comprehensive title insurance law is that of Texas which regulates the actual operation of title insurance companies. They are subject to general insurance laws, to regulations providing for financial stability, and to regulation of rates and types of policies to be issued.[70] The Texas legislation and the court decision upholding it show that title insurance companies are treated as semi-public utilities.[71] The Texas statutes provide that title insurance policies must be approved by the Board of Insurance Commissioners before use, and must be uniform as to all companies. The board fixes rates to be charged, and once this has been done no rates may be changed without a public hearing.

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[66] See Gage, *op. cit. supra* note 2, at 124.

[67] CAL. INS. CODE §§ 12350, 12359, 12370, 12371, 12373, 12374, 12392, 12393, 12401. See *id.* §§ 900 *et seq.* for provisions applying to all insurers.

[68] The commissioner is authorized to make inspections relative to capital requirements and other matters contained in reports which must be filed. See CAL. INS. CODE § 733 *et seq.*

[69] CAL. INS. CODE § 1851(d) specifically exempts title insurance companies from its rate making provisions.

[70] TEXAS STAT. art 1302a (Vernon 1948). It should be noted that the situation in Texas differs greatly from that of California in the following respects: Texas never had any United States public domain; the land was never surveyed by the United States Land Office; the source of all title from what became the state of Texas was through patent or confirmation.

[71] In Daniel v. Tyrrell and Garth Inv. Co., 127 Texas 213, 218, 93 S.W. 2d 372, 375 (1936), the court said that ". . . title insurance is a business of public interest, affected by public use; and, this being true, the Legislature has the power to provide reasonable rules and regulations governing its policy forms and rates . . . ."

RATES, LOSSES AND EARNINGS

An examination of the title insurance rate structure is appropriate in view of the fact that only one state, Texas, has attempted state regulation. The rates for title insurance throughout the United States vary greatly. Differences are due to the following factors: differing protection, inclusion or exclusion of escrow charges, varying local conditions and varying competition.

Although these factors may cause variation, rates are consistently based on three considerations: the cost of maintaining current information on all local property, the cost of examination, and the cost of insuring the correctness of the examination.[72] The cost of examination is susceptible of exact determination, but the cost of insuring is not, for risks are not constant. When title companies first came into existence, they utilized their abstracting experience to determine the cost of examination. To this amount they added an estimated amount to cover loss due to improper examination and other risks assumed by the company. As the company gained experience and conditions changed rates were accordingly increased or decreased.

Rates can be determined more precisely with other types of insurance. In part, this is due to the fact that risks are more constant. Moreover, records have been maintained for a longer period, which is essential to determining rates.

Title insurance rates represent an average cost, since any other method would entail an unnecessary cost of determining in each case the amount of time taken to examine the title. In addition to this, the risk of loss does not necessarily increase in direct proportion to increase in value, and the cost of the search, the chief item involved, does not increase in direct proportion to the value. Title insurance rates are therefore based on a gradually decreasing percentage of the value of the property involved. No account is taken of actual cost of search in fixing the rate. The consequence is that alienability of land is promoted, since those who are more able bear the higher rate.[73]

Naturally there are different rate schedules for each type of policy issued. As between owner and loan policies, some companies provide a single rate while others have a dual rate, the owner rate being approximately one and a half times that of the loan rate. The reason for this difference seems to be that the risk of loss is less with the loan policy. Since the mortgagor stands between the insuring company and the loss, the risk can arise only when the mortgagor has defaulted on the loan covered by title insurance. Payment under the policy to the insured is conditional on both a loss cov-

[72] Companies that also provide escrow services may combine escrow charges with those for examination and insurance.

[73] Not only is this system practical, so far as title insurance companies are concerned, but it is fair to the public in general. That is, although an examination of property worth only $500 may cost $200, and an examination of a piece of property worth $60,000 may only cost $20.00, in the first case a charge based on the *actual* costs would be prohibitive. The rate actually charged in Alameda County to insure the first piece of property is approximately $23.00 and for the second, approximately $306.00.

ered by the policy and the default of the mortgagor. The ATA rate is approximately one and a half times that of the standard policy because of the extra inspection and the greater risk. The extended coverage policy rate is twice that of the standard policy plus the cost of survey, since not only is there extra search and greater risk, but loss is not dependent upon default of another party as in the case of the loan and ATA policies. The amounts and causes of losses constitute the great mystery of the title insurance business. Very little has been done until recently to exchange loss experience.[74] Reports to state insurance departments are meager and incomplete, and title companies have not disseminated loss history perhaps for fear of adverse publicity. This might be either because of the low percentage of losses or because the information tends to make the company appear careless.

In the absence of available figures as to total premiums and losses sustained by individual title insurance companies the best measure is the ratio of loss to premiums paid. A survey in 1920 with 63 companies reporting revealed that the percentage of loss varied from a low of 0.5 to a high of 5.5, with an average of 1.5.[75] A survey eight years later showed the percentage of loss to premiums to be 0.96%. Of the 71 companies reporting, 42 reported no loss, and the remainder gave percentages from 0.4 to 9%. A survey[76] made in 1937 in 15 states showed a percentage of loss to premiums of 3.21.[77]

Comparison of title insurance losses with those of fire and casualty companies indicates that title insurance losses are indeed small, since 55% of the premiums received by fire insurance companies and 60% of the premiums received by casualty companies are paid out for losses.[78]

This great disparity is explained by the difference between title and other forms of insurance. The greatest part of the title insurance premium is apportioned to the cost of examination, not to anticipated loss. Some companies have estimated the ratio of examination to insurance to be 50-50, while others have estimated the ratio to be as high as 95-5. Since the losses are so low it is to be hoped that the latter figure is more nearly correct.

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[74] Gage, *op. cit. supra* note 2, at 108.

[75] Winfree, *Title Insurance Losses*, 15 LAWYER AND BANKER 247 (1922).

[76] Gage, *op. cit. supra* note 2, at 112.

[77] The breakdown was as follows:

State	Number of Companies	Years of Record	Percentage of Loss to Premiums	State	Number of Companies	Years of Record	Percentage of Loss to Premiums
Arizona	2	12	.40	New Jersey	48	10	2.64
California	20	27	1.46	Tennessee	4	5	3.43
Florida	3	8	8.12	Texas	11	3	3.81
Kentucky	2	5	1.43	Utah	1	3	4.95
Maryland	2	11	1.68	Virginia	2	7	7.75
Michigan	2	12	4.77	Washington	6	10	1.95
Minnesota	1	5	2.62	Wisconsin	1	6	.85
New York	1	41	3.29		108		Average 3.21

The above figures would be more representative if the loss ratios were calculated on the basis of the premiums in the year the policy was issued rather than in the year of payment of loss.

[78] See ZARTMAN AND PRICE, YALE READINGS IN INSURANCE 238 (1921); MICHELBACHER, CASUALTY INSURANCE PRINCIPLES 247 (1930).

Until figures are available to show both the ratios of the cost of examination and of risk to total premiums, no conclusion can be reached as to what extent the charges made are justified.

Earnings of title insurance companies constitute another mystery of the title insurance business. This condition exists since the reports required by many states are not available for public use. In cases where the reports are available, they are often unintelligible.[79] In addition very few companies report their earnings to private agencies.[80] Of the reports which are available no determination may be made as to the reasonableness of title insurance premiums since the source of earnings includes not only title insurance, but also charges for other services and interest on invested reserve.

CONCLUSION

Proposals for strengthening the present regulative policy in the title insurance field are not within the scope of this comment. However, it can be predicted that wherever title insurance becomes as important as it has in California, its purveyors will be subject to close legislative scrutiny. For in California, attorneys, lenders, borrowers, buyers and sellers have come to depend solely on title insurance companies for the investigation of titles. As a result the companies have become semi-public utilities.

As might be expected under such conditions the large lending institutions with their superior buying power have been able to extract far more in the way of service and protection than the general public. The bank demands and is given the superior ATA policy; the average buyer takes what is offered him, the standard policy with its innumerable exceptions.[81]

More extensive regulation of title insurance would undoubtedly mean strict supervision of the policy forms. This has been the case in the regulation of life and casualty insurance. The numerous exceptions in the present

[79] Gage, *op. cit. supra* note 2, at 115.

[80] Mr. Gage was able to find only six companies whose profit statements were available. The percentage of net earnings to total investment was found to be 7.43%, but no information was available as to how closely the net income reported was determined, or how the assets were valued. *Ibid.* Even if it be assumed that the figures are correct it cannot be said that the companies are representatives of the business. Insurance company accounting practices may easily result in the overstating of reserves for possible losses, with the resulting understating of annual earnings.

The following figures for 1949, taken from WALKER'S MANUAL OF PACIFIC COAST SECURITIES (1950), give a rough idea of the extent of the profits of the title companies.

Company	*Capitalization*	*Net income*	*%*
Cal. Pacific Title Ins. Co.	$ 3,282,455	$ 297,435	9.1
Security Title Ins. & Guar. Co.	5,237,590	337,567	6.4
Title Guarantee Co.	3,701,715	360,289	9.7
Title Ins. & Trust Co.	25,328,364	2,519,506	10.0

The totals for capitalization include preferred and common stock, capital and earned surpluses. The figures for net income are *after* federal income tax, except possibly in the case of Security Title, where the information is not shown.

It should be noted that the 1949 net income figures averaged only one-half of those of the "boom" year of 1946.

[81] Many title insurance company employees are unaware of the existence of the extended coverage policy. Furthermore, while the policy is available in some localities, inquiry shows that it is available only in the case of preferred risks. The premium, double the standard policy fee plus the cost of survey, may often be unreasonable.