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## THE LAWYER AND TITLE INSURANCE

G. ALLAN JULIN, JR.\*

Some of you may know a lot about title insurance. All of you have some knowledge of it, I am sure, for it has been available in Wyoming for a number of years, even though it has not been extensively used here yet.

But the use of title insurance in Wyoming and in surrounding areas is going to increase greatly in the future. As population and business activity in Wyoming grows— as it surely will at a substantial rate—the older, slower, and less satisfactory use of abstracts of title will be superseded by the use of title insurance policies in real estate transactions.

So I think it will be helpful to you if you become acquainted with it before your clients ask you about it. I shall try to cover the most important points, with emphasis on the part that lawyers perform in the use of title insurance. If I stimulate your interest to the point that you will want to know more about title insurance, then I shall have done this properly.

I will mention first, some aspects of title insurance that are often misunderstood—or at least overlooked; second, our experience in Illinois with the growth of title insurance and its acceptance by lawyers there; and last, how title insurance can fit into your practice of law.

Let's turn now to the basic nature of title insurance. We can clear away one misconception by stating what it isn't. It is *not* casualty insurance.

By that I mean the title insurance business is not based solely on loss experience or calculations of risk as is fire or accident insurance. The best comparison of it I have ever heard is that it is like boiler insurance. As you will recall, companies that insure against loss from boiler explosion perform their greatest service to the insured by their strict periodic inspection of boilers. Any obvious or incipient defect found by the insurance inspector—and he is specially trained for the job—is called to the owner's attention. Repairs or replacements to reduce the danger must be made before the insurer assumes liability.

Title insurance companies likewise issue policies only after a qualified lawyer thoroughly reviews each title situation. So far as I know, no corporation has ever been reckless enough to try to go into the title insurance business on a casualty basis.

There are a number of sound reasons why this is so. In the first place, the big life insurance companies and other volume mortgage lenders are

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among the principal customers of title insurance companies. And they would, I am sure, unanimously reject such an approach. So would most lawyers.

Mortgage lenders and purchasers of real estate are primarily interested in knowing that the titles in their deals are technically sound. The life insurance companies operate under home-state statutes which make soundness of title a pre-requisite to every mortgage loan. They maintain substantial staffs of lawyers, who make sure that the evidences of title they get conform to their home-state statutes and demonstrate a title of satisfactory quality.

The loss payment aspects of a title insurance contract are of secondary importance in their consideration. Provisions in a title policy for payment of money in event of a title loss offer a safety factor which is desirable, but which, at most, is definitely secondary to the *quality* of the title . . . and secondary to the duty of the title insurer to defend the title as insured.

The emphasis in title insurance is upon the *elimination* of loss by previous careful examination of title and by the taking of such curative measures as are necessary to prevent losses rather than upon the payment of losses after they have occurred.

Theoretically there ought not to be many losses under title insurance policies. If the examination of the history of the title in each instance has been done by a lawyer skilled in real estate law—and if his examination was based on records accurately compiled—and if the defects he discovers have been cured before the policy issues—the major causes of losses will have been eliminated.

But as a practical matter there are always losses—some of them very substantial in amount. They arise from a great many sources, and passage of time is often slight protection against their occurrence. Common ones arise from such things as human errors, errors and omissions in tax records, dower rights, homestead rights, undisclosed heirs, fraud and forgery.

For example, the title company with which I am associated has been in existence over 100 years. It has worked out a carefully planned system of title indexes and records. It employs lawyers to examine titles after training them thoroughly. Nevertheless, we must have 6 to 8 lawyers who are entirely occupied in just the investigation and defense of claims under the policies we have issued. In addition to them we retain counsel to assist in defending in court.

I do not recall one month of recent years in which we have not expended thousands of dollars in the disproving or payment of claims over and above the salaries and fees of these lawyers. And in our history there have been cases where we paid out hundreds of thousands of dollars to protect the insured's title. I am citing the experience of a company that does business in one state: Illinois. So you see, there *are* risks that remain, even after a careful title search.

As lawyers you will appreciate why title insurance companies defend with extra vigor claims that are fraudulent—even to the extent, sometimes, of spending more than the face amount of the policy. They do not wish that sort of claim to become a popular pastime in the community.

Now to another important distinction that title insurance has over other forms of insurance. The payment of money to the insured by the company is rare—preservation of the insured's ownership comes first. This is so because those who get title insurance policies are interested primarily in three things: One, the undisturbed enjoyment of their property; two, unquestioned ability to convey their interest in it; and three, having a prospective purchaser accept the evidence of title as entirely adequate.

Thus when a claim arises under the protection of a title insurance policy the insured looks to the title insurance company for the investigation, defense, and the settling or disproving of that claim. The insured is put to no expense. His possession of the property is not interrupted. The same benefits accrue to the mortgagee named in a mortgage title insurance policy.

Sometimes, in spite of the defense for title, a claimant establishes that he is the owner rather than the insured. If this claimant refuses the payment offered by the title company as consideration for a deed to the insured, then the company pays the amount due under the policy to the insured. But nearly always the title company and its lawyers work out some solution that leaves the insured in possession with clear title.

Another feature of title insurance—distinctive but often overlooked—is that it is paid for by a single premium at time of issuance even though the protection continues as long as the insured has an interest in the property.

It is customary in the Chicago area for the seller of real estate to pay nearly all the cost of the title insurance in a transaction. The usual form of sales contract there provides that the seller will deliver to the buyer a title insurance policy of the Chicago Title and Trust Company, or its preliminary report on title, within 20 days from the date of the contract. It further provides that the seller will pay for this with coverage equal to the sale price, and that the report or policy will be subject only to those matters affecting title as are specifically agreed to in the sale contract.

The seller's attorney orders the title report from us and attends to any curative matters necessary. The deal is usually closed on the basis of our preliminary report, because we are obligated to issue the policy under its terms. After the deed is recorded, the buyer's attorney orders us to continue our searches to cover the deed and to issue the policy insuring the buyer in his title. The buyer pays for this continuation—known locally as a "later date." Typically this costs him about \$15.

Because the title policy is dated on or after the day the deed to him was recorded, the policy protects the buyer against defects or adverse claims arising from the history of the title up to that day. Of course, it does not

protect him from actions he or those claiming under him may do to affect the title thereafter.

Perhaps this a good point to mention two other things that title insurance does *not* do, and to explain why it does not.

Most Owners Title insurance policies do not insure against rights of parties in possession and questions of survey. That is so because in most cases the buyer prefers to inspect the premises and satisfy himself as to such matters. The buyer often requires the seller to provide a survey of the property or to share the cost of a new survey.

If the title company were to insure the owner against loss from such matters, it would in each case have to send an employee to visit the premises to interview the occupants to see what interest they claim and to measure the boundaries of the land. This would increase the title charges to the owner.

Sometimes the mortgage lender wants the title insurance to cover such matters, so that inspection and measurement of the premises is made by the title company. The mortgagee pays extra for this service, although the cost is frequently passed on to the borrower.

It is also universal for title insurance to except loss of title through the exercise of governmental powers such as policy, bankruptcy or eminent domain powers. To insure against such matters would be in the nature of casualty insurance or worse. Who, for example, can look into the crystal ball and foresee that any particular parcel of property will never be condemned for use as a highway?

Now, title insurance has become the predominant form of title evidence in some parts of the United States. It is used almost exclusively now in California, Oregon and Washington. Elsewhere it has developed to a high degree of use only in big cities and their metropolitan areas. But it is on the increase nearly everywhere else. Its growth since World War II has been phenomenal.

About 40 years ago in the Chicago area abstracts of title examined by individual lawyers were the usual mode of title evidence. A substantial part of many lawyers earnings were from fees for examining abstracts. Many of them could see only the loss of this revenue if title insurance gained a foothold.

Other lawyers realized that title insurance was superior to abstracts and individual opinions, but they resisted it because they thought it would eliminate lawyers from real estate transactions entirely.

None of these fears was ever realized to any appreciable degree. Today lawyers are my company's largest single customer group, and almost without exception they are thankful our services are available.

This change in attitude did not occur overnight. Title insurance was introduced in Illinois in 1888 by my company. Yet at the turn of the century abstracts were still used much more than title insurance. It was not until 1922 that our orders for title policies equalled orders for abstracts.

Since then the use of title policies steadily increased until now abstracts of title are being used in only one or two per cent of real estate transactions.

In downstate Illinois, in communities 100 or more miles away from Chicago, abstracts of title are still examined by individual lawyers. But the abstracts are steadily losing ground to title policies there too.

Now the important question to you is, how have the lawyers fared where title insurance is used? Well, in Chicago they are still very much a part of real estate deals, and they are paid better for it than are lawyers who still examine abstracts.

Of course legal fees in general are higher in a big city than in rural or small town places. But even allowing for that, the lawyers using title insurance are better off.

Let me enumerate the duties of a Chicago lawyer representing the seller of real estate:

1. Drafting the sales contract and supervising its execution.
2. Preparing the deed of conveyance and advising about its execution and delivery.
3. Ordering the preliminary report of title from the title insurance company.
4. Receiving the preliminary report and taking any needed steps to cure the disclosed defects or liens.
5. Attending the closing meeting with his client.

The lawyer for the buyer has the following duties:

1. Determining, before the purchase price is paid, that all the terms of the contract have been complied with.
2. Determining that no liens or other matters have affected the title between the date of the preliminary report of title and the day of the closing.
3. Figuring or checking the prorations between seller and buyer.
4. Attending to the prompt recording of the deed.
5. Ordering the title insurance company to continue its searches to cover recording of the deed and to issue its policy in the name of the buyer.
6. Receiving the title policy from the title company and checking it for correctness in relation to his client's interests.

At this point you might ask, what prevents the sellers and buyers from dealing directly with the title company?

Well, from time to time some of them do. And we in the title insurance business don't like it, and we always advise such persons to retain legal counsel. From our standpoint laymen are terrible time wasters. They don't understand real estate law. They expect some officer of the title company to devote a lot of time explaining things. Since we do not charge by the hour, it's a losing proposition.

Fortunately, most laymen who try this give up in the middle of their efforts and consult the lawyer they should have gone to in the first place. This almost inevitably happens when the layman discovers that the title company will not draft deeds or other legal documents for him.

Sometimes real estate brokers handle a real estate transaction without any lawyer taking part. If so, their dealing with the title company is the least offensive step from the lawyer's view. It is their drafting of contracts and deeds that is serious from your standpoint. We feel that this is something that bar associations and real estate boards must work out between themselves.

Now to consider your practice here in Wyoming. . . . I do not see why title insurance should prove any less satisfactory to you than it has to lawyers in the Chicago metropolitan area.

First, let me mangle an old Latin maxim to the point of saying: "Abstractus longus, vita brevis" . . . or, "abstracts are long and life is short." It is inevitable, as times goes on, that the history of title to each parcel of land in Wyoming will get longer and more complicated. How profitable will it be for a lawyer to review this history of title each time a sale or mortgage transaction occurs?

By way of contrast, a title insurer never reviews the chain of title any farther back than the date of the prior title insurance policy. So promptness of title service makes it appealing to all concerned.

The lawyer who recommends title insurance to his client does both the client and himself a favor. Suppose, for example, that the lawyer's personal opinion of title issued, and later a loss develops from one of the hidden title risks such as from forgery or from a dower right undisclosed of record. Certainly no goodwill is gained by the lawyer explaining that he is not responsible because he was not negligent, and that the buyer (or the seller, under his warranty) must bear the expense of defending the claim or of paying off the claimant.

These things do not happen often, but it is like fire insurance: we don't expect our buildings to burn, nor do we see it happen often to others, but nearly all of us carry adequate fire insurance. When the loss—fire or title—happens, it is best to have a financially sound corporation obligated to make good.

Personally, I think it is the duty of a lawyer to explain fairly the

features of title insurance to a buyer or mortgage lender. Otherwise the lawyer could be said to be withholding knowledge of a possible form of protection—a protection greater than any individual could assure.

My final point concerns the benefit to a community in general that use of title insurance affords.

Because it is rapidly becoming the universally acceptable form of title evidence, it makes real estate more marketable. It also makes mortgage financing more readily obtainable. Frequently these days local sources of mortgage money are not adequate for extensive homebuilding or commercial building projects. The best source of financing such improvements may be the life insurance companies or other large financial institutions in the East or West Coast areas. Whether they loan the funds directly, or agree to purchase mortgages from a local bank or mortgage broker, they prefer mortgage title insurance. It helps to make the mortgages acceptable.

Similarly, chain stores and other nationwide owners of real estate more and more are insisting upon title insurance. Their help in the growth of local communities, as you know, is an established thing.

Well, I have spoken long enough, although much is left unsaid. I hope that you have found it interesting. If you have any questions, I shall do my best now to answer them.