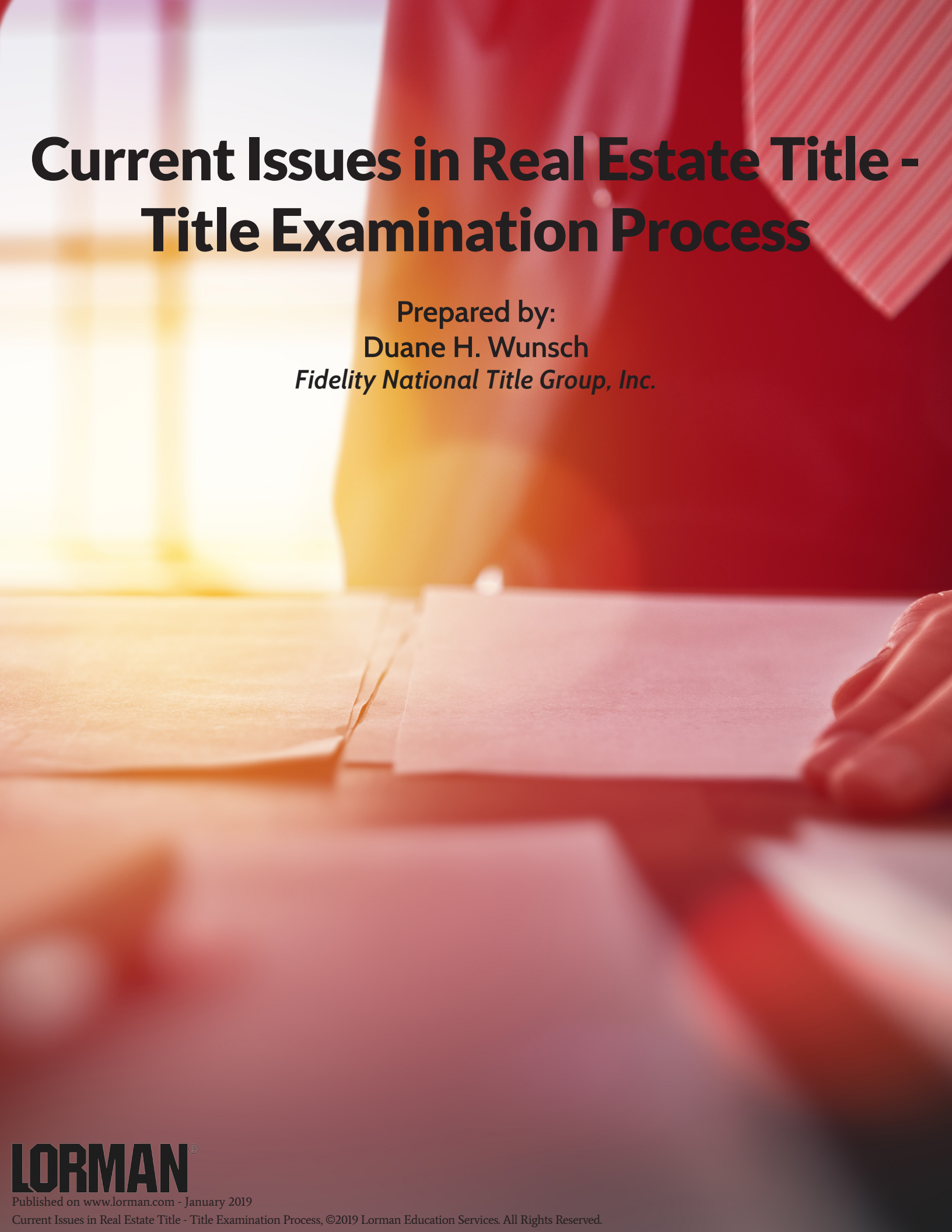

Current Issues in Real Estate Title - Title Examination Process

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CURRENT ISSUES IN REAL ESTATE TITLE AND TITLE INSURANCE

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I. TITLE EXAMINATION PROCESS

A. Title, Title Insurance And Their Role In Transactions

1. Why examine the title?

Prospective purchasers and lenders that neglect to investigate the title and timely negotiate the release of encumbrances are exposed to a host of otherwise unknowable matters. A basic premise of the recording system is that purchasers are charged with notice of liens against the title that were duly recorded, though the purchaser knew nothing about them at the time of purchase. In addition, statutory liens, tax liens and judgment liens constitute liens against real property regardless of the purchaser's actual knowledge. As a practical matter, it is standard practice to timely arrange for a title examination and title insurance prior to the closing or settlement, so that such liens, defects and encumbrances can be avoided and a coverage against a variety of risks associated with conveyances and real estate title obtained.

2. Title Insurance: Local and national perspectives

Title insurance is widely available nationwide, and the prospective purchaser may have a choice of insurer brands and agency issuers. But if the insurer operates a multitude of insurer-owned and independent agency offices with overlapping territories or outlets, which office is best suited to prepare title insurance for the national investor: A title office near the real estate familiar with local laws and procedures, or a title office familiar with the property owner's investment objectives and business operations? Though title insurance forms are standardized, the concepts and risks against which indemnification is provided are often local and jurisdiction-specific. Title insurance often bears the unmistakable imprint of local public land records, including nomenclature unique to county government, recurring legal issues, anecdotal demographic events, and geographical characteristics inseparable from land ownership patterns in the community. Fortunately, title insurance organizations continue to integrate local real estate expertise with national business perspectives, resulting in local and national office collaboration in the transaction.

B. The Search and Examination Behind the Policy

1. Insurance premised upon research, loss prevention

Unlike casualty insurance, title insurance is issued only after a painstaking search and examination of the underlying subject matter, namely the title. Title insurance is a form of indemnity insurance that strives to systematically eliminates risks by requiring those that issue the insurance to first determine if any interests or adverse claims are outstanding, and then by identifying the risks against which the title insurer is unwilling to indemnify until they are released. Title insurance thus assumes that before the insurer commits to insure the title, a skilled individual will timely investigate, that is, search and examine the title. What does a search and examination of the title consist of? What role does the government play, relative to the private sector that is engaged in the search and examination?

2. Real estate title: Document, or a process?

A title to real estate, a non-tangible, is not embodied in a single document, such as a deed or government issued certificate of title. Instead, the term title connotes an ownership time line that requires an analysis by a party trained to search for relevant documents, and whose judgmental ability and experience can be relied upon to raise pertinent issues and avoid future conflicts. The recording system establishes a public depository of records reflecting transcriptions of original documents affecting land ownership. Public offices preserve evidence of ownership and provide notice to all persons who may wish to acquire an interest in particular property.

3. Government and private roles

Though government offices house or maintain myriad real estate ownership records, these offices are largely passive relative to the resources of private professionals that examine them. Under the prevailing transfer system of American states, a private professional party, not a government official or records custodian, is relied upon to ascertain after a search of the public land records that through an unbroken sequence of conveyances, a chain of title, an estate or interest in land is unequivocally vested in an individual or legal corporate entity. Although the documents from which conclusions are drawn are public, the conclusions themselves are not. The conclusions are ultimately rendered in the form of a professional opinion, the attorney's opinion of title, a (proprietary) abstract of title or title report, or title insurance. In varying degrees, the opinion, report, or title insurance policy are a transparency of the underlying title, displaying crucial ownership, lien and encumbrance information of interest to the prospective owner and lender.

4. Title searching procedures

All titles are not equal, insofar as the time necessary to search and examine them, and to render opinions of title or issue title insurance. Complexity of the title's property description is an important determinant of the time and cost of research: Pariah titles that reveal complex property descriptions may require many hours of investigation by veteran examiners, but suburban subdivision lots lend themselves to an expedited examination within the grasp of staff of lesser experience levels. Naturally, the cost to the issuer of preparing the opinion or title policy and the time necessary to issue the commitment for title insurance will vary accordingly. It should not be surprising that approaches to the search of public land records necessary to produce title insurance undergo periodic evaluation, and that the insurer's subjective claims experience, though not actuarial as such, may result in an increase or decrease of the quantum of records examined. For example, the title insurer's management may decide to abbreviate, for selective properties proven to pose a lower risk of claims, a search of the public land records by eliminating an examination of easements and restrictive covenants that were recorded more than thirty (30) years ago, though rural electrification resulting in the granting of electric utility easements occurred in the 1920's. Or, when issuing commitment for loan policies that insure refinanced loans for residential properties, the title insurer may decide to commence its search of the public land records with the date on which the current owner's deed was recorded. Business strategies concerning the search and examination of title that reduce or enlarge time periods concomitant with variant policy forms and risk assumption measures are beyond the scope of this discussion.

5. Why do title offices charge title "premiums" if risks have been eliminated?

Occasionally, the linguistic genuineness of title insurance is questioned. Why is a form of indemnification that eliminates risks of adverse interests in real estate, and the cost of production of which is the primarily the result of fixed costs and staffing rather than actuarial reserves, characterized throughout as insurance? There are many answers, including, that there in fact exist many disparate residual title risks that are a natural outgrowth of the public records and conveyance practice, and that such title risks are managed but never capable of being eliminated. Regardless how painstaking a search of the public records, invariably instances will occur in which liens and encumbrances of which the purchaser had no knowledge become apparent only after the closing is consummated, requiring an investigation and payment of loss covered by the title insurance policy. Persons who can best appreciate title insurance are those that have observed the progression of such adverse claims, and witnessed their defense or settlement.

C. The Changing Face of Public Land Records

1. Biographical information

Traditionally, a search of the public land records necessary to produce a composite of the title required a search of not one, but several public offices: The office in which conveyances are recorded (register of deeds, county recorder etc.), probate court, courts in which title may have been disputed or involved in judicial proceedings (including divorce, foreclosure, partition, quiet title etc.), property taxes (treasurer, auditor, assessor etc.), and the United States bankruptcy court and federal district court, if any, in the county where the land is located. Laypersons unfamiliar with applicable real estate title laws occasionally express dismay about what they regard as the intrusive nature of the information about them that is gleaned from the public records. In their defense, title searchers are motivated not by lurid motives, but by a need for information that has a direct bearing on real estate ownership. So long as laws provide that tax liens, delinquent child support, civil judgments, divorce and other intrusive events mar the title of a debtor party, title opinions and title insurance will continue to delve into and reveal such matters, sensibilities or no.

2. Limits of public records search

Of equal importance are the public and quasi-public informational sources that, however valuable or instructive, do not have an impact upon the real estate title: Birth, death and marriage records, non-fixture filings under Article 9 of the Uniform Commercial Code, credit reporting sources, public records offices located outside the county where the land is located, United States Department of Interior Bureau of Land Management, United States Forest Service, Environmental Protection Agency, Army Corps of Engineers, railroad company proprietary title record plants, and an on site inspection of the real estate. The records pertinent to title, though vast, are regarded as finite, a concept that remains of particular importance insofar determining the extent to which prospective purchasers are deemed to have been charged with actual or constructive knowledge of the rights or claims of others.

3. Policy definition of public records

From the vantage of the title insurance provider, a bright-line test, regardless of the information's desirability, inevitably defines the scope of the title search, separating pertinent records from those not pertinent. Title insurance does not provide coverage against loss occasioned by governmental regulations regarding the real estate, unless such regulations are recorded in the public land records where deeds, mortgages and other conveyances are recorded, an occurrence though not unheard of which is unusual in most locales. Thus, Covered Risk 5 of the ALTA Owner's Policy (6-17-06) provides coverage against loss or damage sustained or incurred by reason of the violation or enforcement of any law, ordinance, permit, or governmental regulation restricting, regulating, prohibiting, or relating to the occupancy, use or enjoyment of

the land, if a notice is recorded in the "Public Records" and only to the extent of the violation or enforcement referred to in the notice. The policy defines public records as: "Records established under state statutes at Date of Policy *for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge*. With respect to Covered Risk 5(d), 'Public Records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located (emphasis added)."

4. Technology, public policy

Information technology and expanding applications made by public and private records custodians requires that real estate title professionals continually evaluate the extent to which new records sources and databases shall be examined for possible relevance to title. Increasingly, information that title researchers could obtain only by visiting the courthouse edifice is now available on-line. Remote access to electronic records is appealing to records administrators, who can lower the cost of maintaining physical records and office space. Government administrative agencies and departments are not immune to the public pressure to expand by statute or administrative law change, an ever growing number of information sources, so that unpaid taxes, fines or forfeitures are collected when real estate of the debtor is sold, or that real estate improvements be brought into compliance with ordinances and regulations at point of ownership transfer.

D. Role of Title Standards

1. Practicing attorneys and the analysis of titles

Attorneys have had a longstanding central, professional role in the examination of real estate titles. Historically, the attorney's role in real estate transactions included the practice of reviewing a sequence of deeds or obtaining from an abstractor an abstract of all documents of record pertaining to the particular real property. The attorney would then render an opinion of the validity of the chain of title and would state who owned the property, and what other outstanding encumbrances affected the property. Where applicable statute and case law did not provide sufficient directives over potential title issues, there was room among counsel for the parties to differ about a wide array of issues that grew out of the examination, though routine, of the title.

As a measure to resolve such issues, in many states the state bar association adopted mandatory title standards for members of the bar. In those states where title standards remain in effect, title standards are designed to require that examining attorneys, whose opinions are in turn relied upon by clients, which include title insurers and title agencies, adhere to a prevailing statewide approach or to encourage consistency. The following is an example of a title standard:

Problem: Can one partner execute a conveyance on behalf of the partnership?

Standard: Yes. When real property is held by a partnership, and a conveyance is made on behalf of the partnership by one or more but less than all of the partners and the conveyance appears to be executed in the usual course of partnership business, it is presumed, in the absence of evidence to the contrary, that the conveyance was made by the partner or partners executing it for the purpose of carrying on in the usual way the business of the partnership. No further evidence of the authority of such partner or partners to execute the instrument should be required by the title examiner.

Iowa Land Title Standards, Iowa State Bar Association, January 15, 2006 (8th ed.) 63.

In other states, bar association title standards originate with county bar associations, are advisory only or, depending upon the property's valuation and the insured's property interest, have comparatively less influence upon title insurance providers that issue title insurance. Several states focus directly on title insurance providers, by prohibiting the issuance of title insurance unless and until the title insurer has caused to be made a reasonable examination of the title. One state prohibits insurers from issuing title insurance altogether. Evidence suggests that in recent years, regardless of title standards and applicable laws, title insurers have streamlined public land records search procedures when insuring lenders, while retaining traditional search procedures when insuring owners, resulting in a growing divergence of premium rates for each.

2. Statute laws

Search procedures adopted by experienced real estate counsel and title insurance providers are invariably dependent largely upon the statutes of the state, and in particular, upon any marketable title legislation and statutes of limitation that time-bar property rights and lien enforcement. For example, if state statute law bars the enforcement of mortgages after the passage of thirty (30) years from the recordation of the mortgage, then real estate counsel and title insurance providers will adhere to a standard that a search of the title extend to a minimum of a thirty-year time-span, so that all mortgages not time-barred are revealed by the title search. However, marketable title laws of the states, in contrast to corporation and commercial law, are decidedly non-uniform, resulting in title businesses that flourish statewide but only when technical or professional staff proficient in procedures and laws of the jurisdiction is available. Title offices remote from the site of the real estate they insure put themselves and their insurers at risk of claims exposure when conducting business in jurisdictions with which they lack expertise.

3. Recurring title issues

Title counsel and examiners are unlikely to excel at affording representation or analysis unless they develop and maintain a high degree of proficiency in the laws of the jurisdictions in which their firm practices or does business. Generally, the examiner must observe and adhere to statutes that address a wide array of recurring title issues, including:

- Claims of owners: Is the estate or interest of a party whose name appears in the chain of title as an owner, but who has not by a recorded deed relinquished or conveyed its right, time-barred barred by applicable statute?

- Unsatisfied mortgages: Has the time within which a foreclosure of a mortgage shall be brought elapsed?

- Restrictive covenants: Does applicable statute set a fixed duration for the enforcement of forfeiture and non-forfeiture restrictions, and if so, has the time elapsed? Does the statute provide for a renewal or extension of the restrictions, and if so, has the renewal period elapsed?

- Easements: Does applicable statute set a fixed duration for the enforcement of easements burdening real estate, and if so, has the time elapsed? Does the statute provide a recording requirement to preserve or extend the easements, and if so, has the recording requirement been met? Are any easements, such as prescriptive easements and utility easements, excepted from the time-bar of the statute?

- Concurrent ownership classifications: Subsequent to the recordation of a deed that identified two grantees by name but that lacked any concurrent ownership classification, a grantee has become deceased. Has the surviving grantee succeeded to the decedent's ownership interest by a right of survivorship, or alternatively, is the decedent's interest the property of the decedent's heirs at law and subject to administration in probate?

- Married persons: Does the failure of the spouse of the owner to have joined in by execution the owner's conveyance render the conveyance void or subject the grantee to rights of the spouse?

- Lack of authority: Is a conveyance bearing the signature of corporation officers without any accompanying resolution of the board of directors or shareholders sufficient evidence of the officer's authority to convey? Is a conveyance bearing the signature of limited liability company ("LLC")

members without any accompanying LLC operating agreement or articles of organization sufficient evidence of the member's authority to convey?

- Constructive notice: Does the recording but improper entry in the recorder's index, of a conveyance impart, notwithstanding the improper indexing, constructive notice of the estate or interest of the grantee?

- After-acquired title: Does the lack of proper sequence in execution and recording of multiple conveyances among successive owners, including deeds and mortgages, some of which lack any warranties of title, subject the end grantee's interest to invalidity?

- Property descriptions: Does the failure of the description in a conveyance to adhere to statutory criteria pertaining to the description subject the conveyance to invalidity?

- Statutory liens: Has the time within which foreclosure or enforcement of statutory liens (e.g. mechanics' liens), tax liens and judgment liens shall be brought elapsed? Has the applicable statute of limitation been tolled or extended by subsequent action?

E. Unusual Titles That Defy Conventional Standards

Land titles are for the most part the creature of state laws: Public land records administration, purchase agreements and conveyances, and civil litigation concerning their enforcement are governed by the statutes of the state in which the land is located. In contrast to the insular historical context of property laws, American society is increasingly mobile, with individuals and institutional investors domiciled in one jurisdiction acquiring, financing and contesting real property in another. Under circumstances where the laws of two or more states affect, directly or indirectly, ownership and conveyance of real estate, the law of the state where the land is located and the state of the owner's domicile, which laws govern matters relating to the title of the land? In addition, certain lands are governed by Congressional Act, Executive Order, Indian tribal law, treaty, or a combination thereof, and as a result, the title to these lands require an analysis of the kind not readily available to the parties.

1. Railroad titles

Problematic for title examiners accustomed to obtaining their research concerning land ownership from local public land records is the phantom railroad title. The title of a railroad or railroad entity may not necessarily be attributable to an instrument discoverable in the public land records where conveyances are customarily found. The source of the railroad's title may have been a Congressional grant, state grant or condemnation, instruments that are not of record and the retrieval of which is difficult or impossible. Assuming that the title of the railroad can be established from satisfactory sources, a further issue is that of the railroad's estate or interest: Does the

railroad hold a fee simple title or an easement? Regardless the nature of the railroad's interest, is the railroad's interest transferable?

Finally, in the event that the railroad's use of the land is to be discontinued or abandoned, in whom does the title to the land encompassed by the former right of way vest? Federal law applies to Congressional grants, and thus an extensive examination of the chain of title is a prerequisite for any determination of the land's ownership. In 1988 Congress adopted the National Trails System Improvements Act, 16 U.S.C. §1248(c), which encourages the preservation of railroad rights-of-way. The effect of the Trails Act has resulted in many decisions. In Hash v. United States, 403 F.3d 1308 (2005), the Federal Circuit held that the United States did not retain a reversionary interest to land under former railroad right-of-way after having disposed of the land by land grant patent under the Homestead Act. In contrast, the Seventh Circuit held that the Trails Act provides for the disposition of the railroad right of way upon abandonment, changing the disposition of federal interests by causing them to revert to the United States rather than to be transferred to adjacent landowners. Mauler v. Bayfield County, 309 F.3d 997 (7th Cir. 2002). However, in a subsequent case, the Seventh Circuit distinguished Mauler and held on the facts of the case that the United States retained no reversionary interest. Samuel C. Johnson 1988 Tr. v. Bayfield County, 649 F.3d 799, 803–04 (7th Cir.2011). Finding that the Trails Act does not hint at a reversionary interest, the Court asked: who searching the chain of title of a lot never owned by a railroad would suspect a lurking governmental right so unsettling to the security of private property rights? In Marvin M. Brandt Revocable Trust v. United States, ___ U.S. ___, 134 S.Ct. 1257 (2014), the United States Supreme Court resolved a split among the circuits by holding that the railroad right of way under the 1875 Act was terminated by the railroad's abandonment, leaving the abutting owner's land unburdened by the right of way. In that case, in 1911 the railroad constructed its railway over the right of way. In 1987, the railroad sold the rail line to another railroad. When operation by the purchaser railroad did not prove profitable, the railroad notified the federal Surface Transportation Board of its intent to abandon the right of way. The railroad then tore up the tracks and ties and after receiving Board approval completed abandonment in 2004. In 2006, the United States initiated an action seeking a judicial declaration of abandonment and order quieting title in the United States to the abandoned right of way. The United States named as defendants the owners of 31 parcels of land crossed by the right of way. The Supreme Court held that the federal government's reversionary right terminated when the railroad right of way was abandoned.

2. Native American titles

The North American continent was occupied prior to settlement, by Native American tribes in succession. Treaties between the tribes or bands and the United States resulted in the cession of Native American land and the aboriginal title thereto, typically in exchange for an agreement by the United States to preserve other lands for the exclusive use of the tribe or band. Indian reservations were thus established by treaty, Congressional Act or Executive Order. Indian tribes also retained in ceded

land treaty rights to hunt, fish, trap and gather in off-reservation locales, rights that survive to the present day. Indian reservations were initially set aside as communal lands to be inhabited and used exclusively by Indian tribal members under the protection of the United States government. Beginning in 1887, however, the Department of Interior proceeded to survey and to allot plots of reservation land to individuals or allottees, until the supply of available reservation land might be exhausted. Treaties establishing the reservations contemplated that allotments would involve a process having distinct stages: A *selection* expressed by the individual describing the plot he or she desired, a *certificate* issued by the Department approving the selection, and ultimately, a *fee simple land patent* issued by the President of the United States. However, allotments were often not consummated as anticipated, because prior to the land patent's issuance, the allottee perished or assigned their selection to non-Indian settlers or land speculators, resulting in the passing, paradoxically, of significant Indian reservation land ownership into non-Native American hands.

Native American land tenures are, in some regions, not necessarily of historical footnote status. Title controversies of various types have arisen over the issuance and sale of allotments. For example, tax sales of tax-exempt property held by the United States in trust for allottees, inter vivos transfers of trust allotments by allottees without approval by the President, and testamentary transfers by executors or heirs of decedents without approval by the Secretary of the Department of Interior, are of suspect validity. Native American title issues arise in the review of past transfers of tribal land, and also when tribal members and tribal entity owners currently hold title: Lenders financing lands held by the United States in trust for tribal member and tribal entities, where the member or entity obtains a mortgage loan, must obtain the approval of the United States Department of Interior Bureau of Indian Affairs, and in appropriate instances, tribal authorization, waiver of sovereign immunity and approval of the remedy of foreclosure in tribal, federal or state courts. Generally, mortgages of tribal lands held in trust in fee are prohibited by federal law. A search and examination of land held in trust is not complete unless a parallel search of the official repository of all federal Indian title documents, the Bureau of Indian Affairs Titles and Records, records for which are not open to the public but prepared by the BIA staff as a Title Status Report. Prospective purchasers of lands in localities where Indian reservations and off-reservation allotments are historically located should obtain counsel or title insurance with the requisite coverage before negotiating for the purchase of such properties.

3. Mineral rights

Severance of minerals is accomplished by conveyance of the minerals only or by a conveyance of the surface, reserving to the grantor all minerals and mineral rights. Thus, the surface and the minerals are held by separate and distinct titles. Upon severance, each estate is a freehold or estate in fee simple. In most cases, the minerals were reserved or conveyed many years ago. The passage of time has created many daunting problems for the title examiner, including the divestiture of the

surface by tax forfeiture, the disappearance of the mineral estate holder, a deceased individual or defunct corporation, and the recordation of subsequent conveyances purporting to reserve mineral rights to a succession of grantors.

4. Riparian lands

The federal government (Army Corps of Engineers), states and municipalities regulate the placement of improvements in wetlands and public waters, including docks, piers, marina slips, sea walls and buildings. Under the public trust doctrine, the State and members of the public are entitled to enforce rights in public waters pose risks to private riparian owners that the location and use of structures in public waters will be contested. Where such structures are regulated or prohibited as purprestures, prospective purchasers may seek pre-closing assurances or title insurance coverage concerning the future enforcement of the structure's removal or modification in accordance with applicable law. Generally, the records of construction of riparian structures do not lend themselves to title insurance coverage. Though the State and Army Corps of Engineers may have retained evidence of permits that authorized their construction, there is a general lack of pedigree or title history of waterfront improvements, such that compliance of the applicable law on the date of construction is not necessarily verifiable.

5. Federal law

Federal law and a state law are not always readily reconciled when issues about the title to land involve liens in favor of the United States. Which law controls on a question that relates to the title in real estate?

a. Right of redemption

When the mortgagee or a lien holder is a department or agency of the United States, and a foreclosure barring the interest of all parties including the junior lien of the United States is consummated, is the right of redemption of the United States determined by federal law or state law? The United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period is 120 days or the period allowable under state law, whichever is longer. 28 U.S.C. §2410(c). See, e.g. U.S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979). Thus, the U.S. Small Business Administration (SBA) and the U.S. Department of Housing and Urban Development (HUD) enjoy a right to redeem one year after the sheriff's sale. The existence of a right of redemption that spans a time period beyond that applicable to lien holders other than the United States is occasionally inadvertently overlooked by the title examiner.

b. Federal liens

Federal law also determines the nature and extent of liens in favor of the United States. The property interest of a person is determined under state law. Aquilino v. United States, 363 U.S. 509 (1960). State law, however, does not control the property to which the federal lien attaches. Once state law creates a property right, the federal tax lien attaches to it. U.S. v. Bess, 357 U.S. 51 (1958). Thus, in community property states, when both spouses are liable for delinquent taxes, each is considered to own one-half of the community property interest in the designated property, and the community property of both spouses is bound to satisfy joint federal tax liability. United States v. Mitchell, 403 U.S. 190 (1971).

A lien for federal estate tax is created on the land of a decedent based on the amount of the decedent's gross estate. The lien is a secret lien: The federal government need not file or record a lien, and the lien remains valid for ten (10) years from date of death. 26 U.S.C. §6324.

Federal law also affects lien duration. Under Section 3201 of the Federal Debt Collection Procedures Act, 28 U.S.C. §§3001-3309, a judgment shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of judgment in the manner in which a notice of tax lien would be filed. The judgment takes its priority from the date of its recording and shall last as a lien for an initial 20 years period with the possibility of an additional twenty year extension. 28 U.S.C. §3201(b) and (c).

Under Subchapter C of Chapter 227 of the Anti-Terrorism and Effective Death Penalty Act of 1996, 18 U.S.C. §3613(c), a lien in favor of the United States arises at the time of the entry of judgment, and upon filing in the office of the register of deeds for the county the lien attaches to all property of the person in the county where filed. Under the Act, the lien expires the later of 20 years after entry or judgment, or 20 years after the release from imprisonment of the person fined, or upon the death of the person fined. Thus in the event the debtor receives an extended sentence, the lien's duration could conceivably extend well beyond the time that state marketable title laws bar title claims generally, a consequence which could eventually impair land titles that would otherwise be marketable under state law.

c. Perishable Agricultural Commodities Act

A beneficiary under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499c(c)(1), a trust automatically arises in favor of a produce seller upon delivery of produce. The trust provision has priority over any secured creditor, including a mortgagee, on the purchaser's commodity-related assets to the extent of the amount of his claim. The purpose of PACA was "primarily to eliminate unfair practices in the marketing of perishable agricultural commodities in interstate commerce in the case of a declining market by making it difficult for

unscrupulous persons to take advantage of shippers by wrongful rejection of the goods upon arrival at a point where it is expensive and impractical for the shipper to enforce his legal rights." Martinelli & Co. v. Simon Siegel Co., 176 F.2d 98, 100 (1st Cir.1949). Where produce wholesaler sued borrower and bank for recovery of loan payments, bank had knowledge of borrower's line of business and was aware borrower was financially insolvent or becoming financially insolvent, when receiving repayment, and as a result bank failed to prove its bona fide purchaser defense. Movsovitz & Sons of Florida v. Scotiabank, 447 F. Supp. 2d 156 (D. Puerto Rico 2006).

6. Jurisdictional issues

As a result of any number of civil actions, the courts of a state other than that in which the real estate is located may ultimately rule on important property rights of the owner or its principals: Divorce, probate, bankruptcy, corporate dissolution, and civil forfeiture. Application of the laws of the jurisdiction where the decree was rendered could lead to drastically different results from that of the jurisdiction where the real estate is located. For example, a court having jurisdiction over the administration of the estate of a decedent in a same-sex domestic partnership or civil union where such relationships are recognized may not necessarily be enforced in a state whose laws do not recognize such relationships. Real estate counsel or the title insurance provider will, in evaluating the title, endeavor to determine the extent to which the courts of the state can be expected to apply the laws of or afford full faith and credit to the judgment of the foreign jurisdiction. Counsel for the parties or the title insurer may require an examination of the docket and record of the court, or alternatively, if the court's jurisdiction or choice of law is in doubt, require a parallel proceeding, such as ancillary probate, or a conveyance by all parties having a potential

7. Personal property or real property: Applicability of Revised Article 9

a. Will the title to improvements pass with the deed?

Real estate transactions occasionally proceed on the assumption that all improvements located on the land, unless they are specifically excepted from the scope of the purchase agreement, will become the property of the purchaser upon delivery and recordation of a deed that displays a perimeter description of the surface of the land. Thus, the deed that conveys vacant land is usually indistinguishable from the deed that conveys land plus improvements: When preparing conveyances, the parties regard real estate as having been adequately described as though the description affords that solely of an aerial viewer: A horizontal perimeter that "closes," namely, that forms a continuous line capable of location on the ground. Except for condominiums, which require a cubicle of airspace, the parties do not regard a real estate conveyance that conveys land and improvements as necessitating any express *vertical* criteria (E.g. "Lot 7, Cordial Manor Subdivision, including all airspace above and below between the heavens

and the center of the earth, including the existing three story office building located thereon, and all appurtenant structures, including signage.").

b. Does the standard ALTA policy insure the title to improvements?

ALTA policies insure "land." The term "land" is defined by the Conditions of the 2006 ALTA Owner's and Loan Policies. "'Land': The land described in Schedule A, and affixed improvements that by law constitute real property. The term 'Land' does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy." Thus, the policy thus defers to state law, not to subjective needs or expectations of the insured, the test of whether improvements constitute real property. In the event that the question of whether improvements will be included within the coverage of the policy is inconclusive, the insured should make timely inquiry and secure any pre-closing assurance. In the event that title insurance pertaining to the improvements is not available or limited in scope, then the insured will be advised to obtain a search and opinion of outstanding security interests applicable to the improvements before proceeding.

c. Distinguishing fixtures from severed improvements and personal property

Although most structural improvements constitute a part of the land on which they were constructed, and title thereto passes with the conveyance, not all buildings or improvements, such as equipment, located within or attached to buildings constitute a part of the real estate. Occasionally, leases, severance agreements and non-fixture filings are revealed that require attention to the classification and ownership of improvements on the premises. States have adopted differing tests on the question whether an improvement affixed to the real estate constitutes a part of the land, and appropriate statute and case law, particularly in commercial transactions, must be carefully reviewed. If under applicable state law, the improvements are trade fixtures, the improvements are the property of a lessee, and are subject to the terms and conditions of the lease, including the right of the lessee to remove the improvements upon termination of the lease. Similarly, in the event that the improvements constitute equipment, or property that was severed from the land of which the prospective purchase has knowledge, the titling of the improvements may be subject to Revised Article 9, such that a bill of sale rather than a deed may be a prerequisite title document, and a financing statement rather than a mortgage may be a prerequisite to secure the lender's interest.

d. Revised Article 9 and non-fixture filings; manufactured housing

Acquisitions and financings of property interests that are in fact subject to Revised Article 9 necessitate a parallel search of the appropriate filing office, so

that the existence of all security interests can be timely ascertained and any filings terminated. Certain types of improvements, judging from transfer and financing documentation, tend to possess a chameleonic character, so that they constitute personal property in some settings but real property in others. Transactions that involve manufactured housing, including mobile homes, require a review of laws applicable to the titling of manufactured housing units, and a transfer or surrender of the certificate of title for the unit may prove necessary. Though the property description of conveyances usually suggests that the boundaries of the land are two-dimensional or horizontal, when the title to improvements or structures located on the land requires, due to questions of their inclusion, clarification, the purchaser may be well served to insist that the conveyance include an a detailed description of the improvements the purchase agreement characterized as a part of the real estate.

e. Insurability of security interests under Revised Article 9

Is title insurance available to insure security interests filed under Revised Article 9? Title insurance policies occasionally contain exceptions for financing statements that were filed in the public land records for the land described in Schedule A. Generally, however, title insurance is not available to insure the enforceability of non-fixture filings, financing statements, under Revised Article 9. There is a fundamental distinction between policies that insure and policies that except fixture filings, and the reader must take precautions to avoid confusing the two. Instances of policies that alluded to, or alternatively omitted, non-fixture filing financing statements have resulted in contentious coverage disputes. See, e.g. In re: Biloxi Casino Belle, Inc., 368 F.3d 491 (5th Cir. 2004). (A rider attached to Schedule A of a loan policy of title insurance included references to several UCC-1 financing statements.) In an important development, beginning in 1999, title insurers began to issue UCC insurance that provides coverage to secured parties having security interests under Article 9. For example, a UCC 9 loan insurance policy from one title insurer insures against loss or damage sustained or incurred by reason of "the failure of the Insured Security Interest to Attach to any portion of the Collateral for any reason." Such coverage is available in most jurisdictions, though actual distribution does not approach that of loan policies that insure mortgages and deeds of trust.

F. The Commitment for Title Insurance: How to Review

1. What is a commitment?

The commitment for title insurance or, as it is sometimes known, binder or preliminary report, is prepared and issued for the purpose of advising the proposed purchaser or lender of the status of the title before the transaction is closed and committing the title insurer, upon whose agreement to indemnify the transaction ultimately hinges, to issuing a policy. The commitment for title insurance, though it entails insurance, has a strong land informational component, in that it constitutes a

detailed composite or profile of the subject matter, the underlying real estate title: The name of the owner, property description, a listing of mortgages or deeds of trust, liens, taxes and matters ordinarily satisfied or released prior to a transfer of the title, and lastly, easements, restrictive covenants and other matters that usually survive the transfer of ownership. A proposed insured is well advised to timely obtain a commitment so that they know for a certainty what liens and encumbrances affect the title and make arrangements or begin negotiations with the appropriate parties for their payment or release.

2. Component parts of the commitment

The ALTA promulgates commitment forms. In June, 2006, ALTA promulgated two alternative commitment forms, the standard Commitment form and the ALTA Plain Language Commitment form. Both promulgated forms consist of schedules and conditions. There are three distinct schedules: Schedule A, Schedule B –Section I (or "Schedule B – Section 1"), and Schedule B – Section II (or "Schedule B – Section 2"). Each schedule is of indeterminate length, page or image numbers, and may be modified to incorporate by reference any number of attachments or documents. ALTA acknowledges that there will be regional variations in the commitment form. Depending upon the locale, title insurance providers may incorporate in the ALTA Commitment additional schedules (e.g. "Schedule C"), exhibits or attachments, and provide copies of applicable easements, restrictive covenants, condominium declarations etc. Regardless the form or locale, the reader of the commitment must assure themselves that the commitment document that he possesses is in fact the complete, not merely a portion of the, commitment, so that their examination of the commitment will in turn prove complete and accurate.

3. Schedule A

Schedule A of the commitment consists of the following:

a. The Effective Date

The Effective Date is the date through which the title has been searched and examined by the title company staff. The Effective Date is not the date on which the commitment was issued, but rather the date through which the public land records are certified by the public records custodian, court clerk and taxing authority as having been indexed, that is, transformed into a searchable condition. Because counties, due to changing staffing and budgetary considerations, vary considerably in the quality of their indexing, commitment effective dates can be expected to vary considerably from month to month and county to county. The effective date, when it is not a recent one, poses a significant risk to the proposed insured: In the event that liens or encumbrances are created after the effective date, they may cause a loss to the insured not covered by the policy. Because the passage of time inevitably increases the likelihood that the title will be marred by recent liens and encumbrances: The older the Effective Date, the greater the risk

to the insured. Note: As of August 1, 2016, the ALTA promulgated a new Commitment for Title Insurance. The previous Commitment (06-17-06) is scheduled to be decertified effective 12-31-2017. The "Effective Date" used by the previous Commitment was replaced with the "Commitment Date."

b. Type of policy

Schedule A indicates, or should indicate, the form or version of the policy the title insurer has committed to issue. In many states, the prevailing owner's policy form is now the ALTA 2006 Owner's Policy, though in the event that the real estate is residential property, the ALTA Residential Policy and the ALTA Homeowner's Policy, or an insurer's proprietary form may also be available. In certain states or localities, there is only one available policy form, but in others, there are a multitude of policy forms, the coverage of which varies, and the choice concerning which the proposed insured may conceivably exercise considerable latitude. Because the underwriting criteria of the title insurer as pertains to policy form will vary, the insured should assure itself prior to closing that the desired policy form is clearly specified at Paragraphs 2(a) or 2(b), or it may find that after the closing, its request for a different form will be rejected due to inadequate documentation needed by the title insurance provider.

c. Name of owner

The commitment is of little value unless it unequivocally identifies the name of the property owner and the estate or real property interest (usually a fee simple estate, but sometimes a lesser estate, so long as it is recognized by state law) that the owner holds.

i. Sensitivity to name spelling

If there is an aspect of title examination in which there is or should be no tolerance of misspelling or typographical error, the owner's name is it. In many states, the entry of a judgment against the name of a debtor gives rise to a lien against all real property of the debtor in the county where entered and docketed. The judgment lien is indexed not by property description, but by *name*. Title personnel accordingly search the parties' names for judgments and federal tax liens by name. Therefore, the spelling of an owner's full name, correctly, will have the effect of generating a reproduction of all liens against the real estate. A misspelling in events leading up to the closing of a transaction, of an owner's name, or the use of an alias or inadequate name, may have the effect, usually unintended, of a failure to discover liens against the real estate, with the result that a transfer occurs subject to the unsatisfied liens.

ii. Public record error

It is not only in the pre-closing transmission of name information that misspellings may occur. The court judgment record or docket too may reflect a misspelling of the debtor's name. State courts have adopted various positions with regard to the validity of judgment liens, some determining that the judgment lien is invalid unless the debtor's name is spelled correctly, and others enforcing the lien under the theory of idem sonans: The judgment lien is valid if the debtor's name sounds the same as that spelled in the court judgment docket. "The doctrine of idem sonans is that though a person's name has been inaccurately written, the identity of such person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation as written. Therefore, absolute accuracy in spelling names is not required in legal proceedings, and if the pronunciations are practically alike, the rule of idem sonans is applicable." 46 Cal. Jur.3d, Names, 4, p. 110 (footnote omitted). A judgment against "E. G. Seibert" was a lien against the real property of "Eleanor G. Sibert." Green v. Meyers, 98 Mo. App. 438, 72 S.W. 128 (1903). Judgments against "Ed. J. Borstad" were liens against the real estate of "Edward J. Borstad." Stephenson v. Cone, 124 N.W. 439, 440 (S.D. 1910). A judgment against "W. Czerionak" was not a lien against the real property of "Walenty Cierniak", even though the names were idem sonans. Tomczak v. Bergman, 269 Ill. 330, 109 N.E. 1003 (1915). A judgment against "William Duane Elliot" and "William Duane Eliot" was not a lien against the real estate of "William Elliott." Orr v. Byers, 198 Cal. App. 3d 666, 244 Cal. Rptr. 13 (1988).

The federal tax lien attaches to "all property and rights to property." IRC §6321. Do the same standards that apply to name variations involving judgment liens apply to federal tax liens? State law is used to determine whether the taxpayer possessed rights in a particular property at the time the general tax lien arose. However, federal standards will determine issues related to priorities, perfecting of liens, whether liens are sufficiently "choate", and how first-in-time, first-in-right principles apply to lienors. David A. Schmudde, Federal Tax Liens, 4th ed. (2001) §1.10(c)(2), 21. A federal tax lien filed in Florida against "Freidlander" was held adequate, under the doctrine of idem sonans, as against the property of "Friedlander." Richter's Loan Co. v. United States, 235 F.2d 753 (5th Cir. 1956).

So that they do not inadvertently omit a search for judgments and tax liens, depending on the locale, title companies occasionally search for such liens by implementing parallel searches of both full name and name abbreviations (Rebecca and Becky), language equivalences (Efstathios and Steve), and phonetic equivalences (John and Jon).

iii. Distinction between nominal title holder and owner's legal name

Unfortunately, title insurers do not have access to a nationwide or statewide database of names from which they can discern or trace the current legal name of the landowner. Names may change, but the public land records usually do not instantaneously reflect the name change. Thus, the name of the owner as it appears in Schedule A is not necessarily the name that the owner, if she is an individual, uses or likes, but rather the name that appears in the chain of title in the public land records. Similarly, if the owner is a business entity, the name may have become changed as a result of corporate merger or acquisition, records pertaining to which the title insurer was not privy when the commitment was issued. Occasionally, after having examined the title the issuing title insurance provider is unable to ascertain to a requisite certitude the name of the owner, and thus a combination of names or title contestants is tentatively listed, from which conveyances will be required.

d. Property description

i. Statutory imperatives

Property descriptions of the kind displayed in Schedule A are not rudimentary or generic in style, but the description that, under the laws of the state, the conveyance that gives rise to the interest insured by the policy will be required to contain in order to be accorded validity. All states have enacted laws, or Statutes of Frauds, that contain the formal requisites that all conveyances are to contain, including the requirement that there exist a description having minimal identifying criteria, in order for a conveyance to be valid. Other statutes that pertain to condominiums, subdivisions and similar land divisions, in turn may require specific criteria. For example, the state's condominium laws may require that the conveyance of a condominium identify the condominium by unit number, building and condominium name. Property descriptions used in conveyances therefore tend to be textually exacting, if not culturally obscure, relative to descriptions used by government agencies and by other professions and businesses.

ii. Descriptions displayed by the title insurance commitment

Title insurers adhere strictly to such statutes, resulting in a certain industry-wide orthodoxy, so that commitments issued by competing title insurers appear remarkably similar. Street addresses, post office box numbers, property tax parcel numbers or letters, colloquial descriptions, or place names, though indispensable or convenient for various purposes, will not meet the criteria necessary under applicable state law for conveyances, and are unlikely to satisfy the title insurer for the purpose of designing Schedule A. Nonetheless, Schedule A can also serve as a place to engraft onto the perimeter description of the property, appurtenant easements in (and

descriptions for) other land, covenants that run with and benefit the insured land, rights of access to abutting public highways, manufactured home serial numbers, and other identifying information that enhances or more clearly expresses coverage.

iii. Who should review the property description in the commitment?

The fact that property descriptions, out of statutory dictates, tend to be unchanging and of rigid syntax does not mean that the description as it appears in the commitment for title insurance, need not be carefully reviewed by the parties before closing. Occasionally, the seller will have entered into an agreement to sell less than all of the land it owns and will retain adjoining land. There is always a risk that the title insurance provider will, when preparing the commitment, describe more or less land than the seller has agreed to convey. The title insurance provider, whose staff does not visit property sites and may not have received for review the purchase agreement, is unlikely to have the same intuitive grasp of the parties' intentions that real estate brokers and counsel often do. Because drafters of conveyances typically mimic the legal description contained in the commitment, a pre-closing failure to timely detect a surplus of land in the commitment is likely to result in a conveyance of more land than the seller intended to convey, followed by a demand or suit that the property be re-conveyed to the seller. The real estate broker and seller's attorney should read the commitment to make sure that the description is in accordance with the seller's intentions. In the event there is any uncertainty about the description's accuracy, a survey of the property should be obtained and reviewed.

4. Schedule B - Section 1

a. Regional variations

The ALTA promulgates the commitment form, which consists of Schedule A, Schedule B – Section 1, and Schedule B – Section 2, but acknowledges that it is not always the case that a Schedule B – Section 1 ("Schedule B-1") will be issued. An explanatory note to users displayed by the ALTA Commitment for Title Insurance (6-17-06) states: "In areas where it is not the custom for title companies to state requirements for insurance, the Commitment would be printed without paragraph numbered I of Schedule B and only paragraph numbered II would be shown as a caption for Schedule B."

b. Instrument creating the estate or interest to be insured

Schedule B-1 of the commitment, in the states where it is used, contains the *requirements* that must be complied with before the title insurer will issue the policy. Because title insurance is prepared in contemplation of as yet unconsummated transactions rather than to parties that already own and have no

intention of acquiring any interest in real estate, the commitment will invariably contain at a minimum, one requirement of singular importance: A requirement specifying the conveyance that is necessary to create the interest of the proposed insured. An explanatory note to users displayed by the ALTA Commitment states: "Note: Appropriate language should be inserted to set forth the requirements of the Company. In many areas, a sub-caption may be used such as: 'Instruments in insurable form which must be executed, delivered, and duly filed for record:'"

c. Due diligence: Identity, capacity and authority

As transactions vary, so does Schedule B-1: A sale will necessitate a deed, and a financing a mortgage or deed of trust, hence appropriate requirements will vary on the basis of how much detail the title insurance provider is given about the impending transaction. Schedule B-1 may also contain secondary and tertiary requirements: A conveyance by an individual may be accompanied by a requirement that the individual's spouse, if any, join in the conveyance. A conveyance by an entity, such as a corporation, may be accompanies by a requirement that a resolution authorizing the conveyance shall be provided. A conveyance by the estate of a decedent, estate in bankruptcy, receiver, trust, general partnership, government entity, and any number of disparate owners, may conceivably be paired with a requirement refined to direct what additional documentation the title insurer requires in evaluating the insurability of the interest of the grantee of the conveyance instrument to be recorded.

d. Mortgages, liens and taxes

Unless they are listed in Schedule B – Section 2 as exceptions, Schedule B-1 will reveal and require the satisfaction or release of mortgages and liens and payment of taxes, which will be described specifically, as by identifying the recording document number, court case number, or creditor, where applicable. It is in this, the enumeration of liens, that those unfamiliar with title insurance may be tempted to observe that the commitment displays matters that are inappropriate, irrelevant or unnecessary. For example, the commitment may reveal a requirement (or exception) for a judgment against a name that is the same or similar to the name of the owner; the title insurer may not know whether the judgment is a valid lien. Similarly, the commitment may reveal a deed purporting to convey by a stranger to the transaction, or an affidavit asserting an interest in the real estate that appears not credible. After having searched and examined the title, title insurance providers tend to reveal all that they have found from which an inference of liens, defects or encumbrances can be drawn. The ALTA Owner's Policy and Loan Policy insure against loss or damage by reason of unmarketable title. Such matters are revealed because they have the potential of impairing the marketability of the title. "A title is marketable only if there is a reasonable certainty that it will not be called into question, so as to subject the purchaser to the hazard of litigation." Javna v. D. J. Fredricks, Inc., 41 N.J.

Super. 353, 357, 125 A.2d 227, 229 (1956). "The marketability of a title turns not only on what interest can be successfully asserted as against a prospective buyer, but also on what a prudent buyer might reasonably though erroneously apprehend to be the resolution of a doubtful question affecting the title." Target Stores v. Twin Plaza, 277 Minn. 481, 153 N.W.2d 832, 843 (1967).

In reporting liens, defects and encumbrances, the commitment will thus be in a sense equivocal on the question of the item's ultimate validity. The commitment does not, by reporting such matters, certify that the items constitute interests or liens that are in fact enforceable and must be paid; on the contrary, the commitment indicates that they are simply matters against which the title insurer is, for the moment, unwilling to insure. Unless the matters are disposed of to the title insurer's satisfaction, the items will remain exceptions in the policy. Ultimately, the title insurer may agree to delete the item on the basis of affidavit, indemnity, or information that establishes that the matter does not affect or impair the title. Custom and practice may allow for a conventional way of handling the removal of spurious claims, defective liens, or judgments against common names. However, the proposed insured should never assume, regardless of custom and practice, that the matter will be removed by the title insurer on the basis of documentation that the proposed insured subjectively believes will be satisfactory: The title insurer reserves the unilateral right to retain or delete the matter by appropriate endorsement, and thus the insurance provider should be requested to delete the item before, not after, the consummation of the closing.

e. "Below the line" notes and information

Finally, Schedule B-1 may, depending upon the locality, issuer, and custom and practice, out of convenience or necessity refer or allude to any of an array of matters perceived as pertinent to conveyances or financing practicalities, including local recording requirements, recording fees, regulations and ordinances relating to property transfers or land divisions, building codes, occupancy permits, future assessments contemplated but not levied, historic preservation, highway access regulations, sanitation, water quality, environmental laws and regulations, the Foreign Investment in Real Property Tax Act (FIRPTA) (26 U.S.C. §1445), Privacy Act (15 U.S.C. §§6801-6809), and Department of the Treasury, Office of Foreign Assets Control regulations dealing with the implementation of the USA PATRIOT Act. Historically, title insurance providers took measures to distinguish such non-requirement information from requirements by physically separating the two by a horizontal line, hence the term, "below the line notes." Such information, intended to relate to uninsured matters, is not of the type that will ordinarily appear in the policy when issued.

5. Schedule B – Section 2

a. Exceptions

Schedule B – Section 2 of the commitment ("Schedule B-2") contains *exceptions* that will appear in the policy, provided the requirements are complied with. Though both limit or remove coverage, exceptions are distinguishable from exclusions, which will appear elsewhere in the policy: *Exclusions* are direct limitations on coverage that exclude certain matters the policy was never designed to cover, such the insured's own acts or unenforceability of the mortgage caused by usury or failure to comply with truth in lending laws. *Exceptions* are matters for which coverage is not given though the policy would ordinarily insure and indemnify against a loss arising from the matter excepted. "Title insurance policies contain Exclusions from Coverage which limit the coverage clauses to make it clear that there is no coverage for matters that are, by their nature, outside of the scope of a title insurance policy. In general, these exclusions relate to matters that cannot be insured against on other than a pure casualty basis…", Raymond J. Werner, The Basics of Title Insurance in Title Insurance: The Lawyer's Expanding Role 19 (James M. Pedowitz ed. 1985).

b. Standard exception: Unfiled mechanics' and materialmen's liens

Perhaps the quintessential risk appropriate to a standard exception is that of unfiled mechanics' and materialmen's liens, or as they are known in some states, unfiled construction liens. These are liens that, due to their inchoate nature and their undetectable status regardless of an exhaustive search of the public records, pose a risk to purchasers and lenders incapable of exact measurement or quantification without resort to an investigation and indemnification process that is subjective to the transaction. Though title insurers contemplate that such risks may indeed come to be covered under the appropriate circumstances, at the point in time that the commitment is ordinarily issued, an investigation of the appropriate circumstances will not yet have been commenced, hence the need for the standard exception.

c. Negotiable

The commitment for title insurance is, in contrast to the policy, a work in progress, and its content is subject to discussion or negotiations as the transaction approaches settlement. Negotiability extends to Schedule B – 2 and the exceptions. A practical distinction between exclusions and exceptions is the degree to which title insurers have authorized their removal by authorized agencies: Title insurers generally do not authorize their agencies to delete or modify policy exclusions without the title insurer's specific authorization. However, title insurers do authorize their agencies to delete or modify policy exceptions, a practice that has a direct impact upon the successful marketing of title insurance. Although exclusions and exceptions alike describe matters against

which there exists no coverage, exceptions tend to characterize substantive real property defects, liens or encumbrances, the existence of which is capable of investigation, and the risk of which is in many cases subject to elimination.

d. Two types of exceptions

Exceptions are of two types: Special exceptions and standard exceptions. *Special exceptions* include easements, restrictive covenants, mineral estates, and other matters that usually transcend the transfer of ownership, that are attributable to instruments revealed by a search and examination of the title for the insured property. Special exceptions are, by definition, site specific and vary considerably by region. *Standard exceptions* are exceptions that the title insurer has designed to remove from coverage matters that affect the title but which are not attributable to instruments, liens or encumbrances found in the public land records. There are regional variations in standard exceptions. The exceptions, grammatically austere as they are, may appear unaccompanied by explanation, or they may be followed by a tutorial that expounds upon the meaning of the exceptions and explains what the title insurer will accept as a basis for removing the exceptions.

6. Conditions

In addition to requirements and exceptions, the commitment for title insurance contains conditions. The conditions incorporate by reference the Conditions and and Exclusions of the policy form committed to be issued: In the event the proposed insured is unfamiliar with the policy form, it should immediately seek and obtain it for review, for these are the provisions to which the commitment refers. Also, in the event that the proposed insured has knowledge of any defects or liens other than those shown in Schedule B and does not disclose such knowledge to the company, the company will not be liable for loss resulting from such failure to disclose. The company is liable for actual loss only to the named insured, and for loss that the insured incurred in relying upon the commitment, provided the loss arises from the insured's attempt to comply with the requirements or the insured's expense in eliminating exceptions or to acquire or create the estate or interest or mortgage covered by the commitment.

G. Clearing Exceptions and Requirements: How to Negotiate

Issuance of the commitment for title insurance will result in a dialogue between the owner, the proposed insured or their respective counsel, and the title insurance provider over the commitment's requirements and exceptions. Communications between the parties and the title insurance provider tends to revolve around what they can agree will prove sufficient to remove the requirements and exceptions, or to afford affirmative coverage. If after these negotiations the title agent comprehends that the transaction as proposed entails enhanced risks to the title insurer, the title agent and title insurer offices may in turn carry on a discussion on any number of issues. Negotiating the removal of

special exceptions will be discussed in the following section, “Resolving Common Title Problems.” Negotiating the removal of standard exceptions will be discussed in Section IIIA., “ALTA Extended Coverage vs. Standard Coverage.”