

TITLE INSURANCE 101 (PART ONE)

By

Phillip C. Querin, QUERIN LAW, LLC

Website: www.q-law.com

What is Title Insurance?

Ownership of property is represented by the intangible concept of "title." A deed, which is the tangible proof of ownership, is the means by which a seller conveys title to a buyer. When buyers purchase property, they require some assurance that the seller is the true owner of the property and that the title is being transferred free and clear of any objectionable claims or interests of third persons. With only limited exception, all interests in, or claims against, land must be recorded on the public record. This requirement is designed to give notice to all interested persons about the condition of title to a property. Generally, Oregon law will not recognize an interest in, or claim against, real property unless it is recorded.

Conveying title to land is accomplished by recording a deed in the public records of the county where the property is located. In Oregon, a deed contains the full names of the seller and buyer, and is personally signed by the seller before a notary public prior to recording. If all deeds to land have been properly recorded, they create a "chain of title" beginning from the earliest and continuing up to the present time. *[A current analogy might be an email chain; if Person #1 sends a message to Person #2, who sends to Person #3, and so on, you could examine the chain, and see the identity of everyone who had received and then sent the message.]*

Similarly, if there are several judgments against a person, and that person owned real property, they would also show up in the chain of title, since Oregon law provides that a judgment acts as a lien against the judgment debtor's real property located in the county in which the lien is recorded. So it is with unpaid property taxes, tax liens, mortgages *[called "trust deeds" in Oregon]*. If there are easements, rights of way, deed restrictions, and other encumbrances on a parcel of land, they too must be recorded, thus giving notice to the world of the condition of title to the affected property. An unrecorded lien or other restriction against law is, in most cases, a nullity, meaning that it has no effect upon the condition of title.

By examining the chain of title, one can get a picture of the legal history of a particular parcel of land before it is purchased. A title examination will disclose who legally owns the land and if there are any interests in, or claims against it. Title which is free and clear of objectionable liens and encumbrances is called "marketable title."

As an essential part of any residential real estate transaction, there must be a "title search," that is, an examination of the public record to make sure that the seller is capable of conveying marketable title to the buyer. This is where title insurance companies come in, since they are experts at examining title.

Title companies provide two essential services to buyers: First, they perform an extensive search of the public record and report the results to the buyer prior to closing. Second, they insure to the buyer the accuracy of the information disclosed in their report.

However, it is important to understand that title insurance is *not* "insurance" in the conventional sense. When we think of fire insurance or auto or health insurance, we think of a policy that provides benefits, usually money, in the event of an unexpected loss. The loss, such as a fire, accident or illness, is the risk that is insured against, since no one really knows if or when a loss will occur. However, title insurance is

not really based upon this concept of "risk," since before the policy is ever issued to the buyer, the title company closely examines the public record and specifically *excludes* from coverage everything which it discovers that could adversely affect the buyer's title. Exclusions from coverage are called "exceptions" to the title insurance policy. Thus, the title company attempts to eliminate every element of uncertainty, or risk, by a thorough title examination in advance of issuing the policy – and when the policy is issued, all known title risks which have been discovered by the company have been listed as exceptions.

Generally speaking, only if a loss arises from an interest or claim on the public record that is *not* shown as an exception on the policy, will there be insurance coverage. If a defect in the chain of title is disclosed (i.e. "excepted") on the policy, there will be no insurance coverage if the insured buyer incurs a loss that arose as a result of that defect.

Thus, a major service the title company provides to its customers is its skill and expertise in examining the quality of title to land. The information it acquires is disclosed to the buyer before closing. Since all sellers are contractually obligated to convey marketable title to their buyers, once the title company's information is disclosed to the parties, it becomes necessary for the seller to remove any title objections prior to closing.

Selection of a Title Company

Since title insurance is regulated by the [Oregon Insurance Division](#), the cost of an owner's policy is roughly the same regardless of the company used. However, just because their rates are the same, does not mean that all title companies are the same. What usually distinguishes one company from another is the degree of service and expertise it provides its customers. Since time is usually of the essence in most real estate transactions, the ability of a title company to promptly provide current and accurate information is essential.

Title companies usually provide escrow services, where most real estate transactions are closed. Closing is the process whereby a neutral third party acts as a repository to receipt for and account for all monies received and paid out when the transaction is consummated, and then make sure all necessary documents, such as deeds and trust deeds are recorded in the proper county. This additional function compounds the importance of selecting a good title company, since the parties will be depending upon it not only for title insurance, but also for escrow services. If a real estate agent is used in the transaction, he or she generally know which companies provide the most reliable title and escrow service.

TIP ~ There is no rule on which party selects the title company that will be used in the transaction. However, since buyers generally prepare and submit the offer contained in the Sale Agreement to the seller, they have the first opportunity designate the desired company. However, if the home is new, the builder-seller may have worked closely with a particular title company and escrow agent in the past, and the buyer should expect the builder-seller to have some input as to what company will be used.

Reading the Policy - Standard and Special Exceptions

Remember, "exceptions" are simply the title insurance company's exclusions from coverage. If a loss occurs to an insured owner as the result of a title defect [*also known as a "cloud" or "encumbrance" on the title*], the company will be financially responsible only if it failed to list the item as an exception in the policy of insurance. If the item is identified as an exception, it has been excluded from coverage under the title policy.

There are two categories of exceptions, "standard" and "special." Standard exceptions are those exclusions from coverage appearing in a title insurance policy which the company applies to all transactions. These exceptions are not unique to the specific property involved in the transaction and are a standard part of all policies issued to homeowners. *[As will be discussed in Part Two, in some instances buyers may purchase special endorsements that eliminate a standard exception – i.e. it then becomes a risk that the title company agrees to insure against.]* The standard exceptions found in most homeowner title insurance policies include the following:

- **Governmental Regulations** – E.g. zoning, water rights, mineral rights, etc. that are promulgated by federal, state, and local jurisdictions.
- **Title Defects Known to the Insured** – E.g. the insured knows of that there is a pre-existing dispute regarding the validity of a recorded easement or right of way, but does not disclose it to the title insurance company.
- **Matters That a Correct Survey Would Disclose** – E.g. encroachments and other matters that would be revealed by a survey. The title company does not perform a survey prior to issuance of the policy.
- **Unrecorded Liens** – Most unrecorded lien rights do not negatively impact real property, since they must be recorded to be enforceable. However, construction liens in Oregon can be recorded up to 75 days *after* the labor or materials were provided to a property. This means that if the title company performed a title search during that period, the PTR might not show the existence of the lien, since it still had not been recorded. If a sale transaction closed during that period and title transferred to the new owner, a construction lien could still be recorded against the property, potentially forcing the buyer to become responsible for payment of the lien he/she knew nothing about. See discussion of the Homeowner Protection Act, here.
- **Parties in Possession**. E.g. someone occupying the property other than the record owner/seller. This could be an adverse possessor, squatter, trespasser, or tenant under an unrecorded lease.

If a loss arises from an event which falls within one of the standard exceptions, there will be no title insurance coverage.

Special exceptions are those which pertain specifically to the property which is the subject of the transaction. These exceptions are based upon the information gleaned from the title company's examination of the chain of title of the specific property being transferred. This examination is conducted by reviewing the public record.

Not all clouds or encumbrances affecting title are bad; some are actually necessary for the development and use of the land. For example, say a buyer is acquiring a home located in a subdivision. When that subdivision was first platted,¹ certain utility easements² would have been recorded against the property by the developer for installation and repair of the underground utilities and services such as telephones, electricity, sewer and water. These utility easements will appear on the title insurance policy as special

¹ A "plat" is an official map of the surveyed development has been accepted for recording by the county.

² An "easement" is a right of use, which is generally limited to a specific purpose.

exceptions. They generally are not objectionable,³ and will always show as encumbrances against the title, even after it has been transferred to the buyer.

Other types of special exceptions which could show up on a title insurance policy are known as "liens." A lien is a charge against the property which, if unpaid, could result in a foreclosure of that property to satisfy the debt. There are many different types of liens, some voluntary, such as mortgages and trust deeds (e.g. for the purchase money to buy the home), and some involuntary, such as money judgments for child support and alimony. Other types of liens can include contractor's liens for labor and material supplied to the property, and state and federal income tax liens. With only a few exceptions, most buyers will not purchase a residence until all existing judgments and liens have been paid off or otherwise removed from the title. If they are not removed at the time of closing, judgments and liens remain as an encumbrance against the title to property even after it has been conveyed to the buyer. Since a lien acts as a monetary claim against the land, the creditor has the right to foreclose the affected property regardless of the identity of the owner. For this reason, all prospective buyers need the title insurance company to assure them, in advance of closing, that there are no judgments against the property.

The Preliminary Title Report

The OREF Residential Real Estate Sale Agreement says that the seller will provide and pay for a title policy insuring marketable title to the buyer. Well before closing, the title company will issue a "preliminary" title report ("PTR") describing all of the matters on the public record affecting the seller's title. [\[See, sample PTR here.\]](#) The PTR is not an insurance policy, but merely an initial written description of the condition of the title. It may, and frequently does, change before issuance of the title insurance policy.

TIP ~ Buyers should read the preliminary title report closely. Appearing at the end of the report is the name of the title officer who is responsible for the title search. That person should be contacted if the buyer has a question or concern. Although only attorneys are permitted to impart legal advice, there is much information and assistance that the title company staff can provide in understanding the information contained in a preliminary title report.

As mentioned above, the information contained in the report may change prior to closing. For example, the seller may have a recorded trust deed on the property. If the buyer will be getting their own loan, a portion of the purchase price being paid for the property will pay off the seller's existing trust deed. Thus, even though the preliminary title report may show the seller's trust deed as an encumbrance against the title, at closing, it will be removed and the buyer's trust deed will be recorded. Another change to the preliminary title report might be a judgment lien which shows up against the seller's title. The seller will have to make arrangements before closing to have it either paid off or otherwise removed as a lien against the title. As these items are cleared from the public record before closing, the title company will issue periodic updated reports, showing the latest status of the seller's title.

The Title Insurance Policy

At the time of closing, that is, when the purchase price is paid and the title is transferred, the seller, buyer and title insurance company should be in agreement as to the exact condition of the title. By then, all objectionable liens and encumbrances should be removed from the title.

³ If they are objectionable to the buyer, the matter will have to be resolved with the seller before closing.

TIP ~ Today, there is no such thing as perfect, pristine, title. Buyers should understand that there are many things appearing on the public record which need not, or cannot, be removed. Their presence does not adversely affect the marketability of the seller's title. For example, as discussed above, most utility easements are necessary and will remain on the title even after closing. Deed restrictions, which have been recorded by the developer at the time of platting the subdivision and which describe the uses to which the property may be put, typically will remain on the title. Reservations in old land patents which were issued when the federal government first conveyed title to the settlers, will remain on the public record in perpetuity, regardless of who purchases the land.

At the time of closing, the title company will make one final check of the public record, just to make sure there are no new interests in, or claims against, the seller's title, which may have shown up since the latest records check. If everything is satisfactory, and all objectionable liens and encumbrances have been removed, the seller's deed is filed in the county records, showing that the property has now been conveyed to the buyer. The title company will thereafter provide the buyer with a formal insurance policy, guaranteeing the quality of the legal title subject to the standard exceptions, and those special exceptions the seller and buyer have agreed will remain on the title after closing.

[Next in Part Two: A discussion of different types of title policies.]

© 2013 QUERIN LAW, LLC

