

INTRODUCTION

WHY SHOULD THE ATTORNEY RECOMMEND TITLE INSURANCE?

The attorney must advise the client of the best title insurance policy and enhancements (such as endorsements) available in order to properly represent the client and to avoid malpractice.

The U.S. Department of Housing and Urban Development's booklet, "Shopping for Your Home Loan," emphasizes the importance of title insurance for the homebuyer:

Many lenders require a lender's title insurance policy to protect against loss resulting from claims by others against your new home. A lender's title insurance policy does not protect you. If a title claim occurs, it can be financially devastating to an owner who is uninsured. If you want to protect yourself from claims by others against your new home, you will need an owner's policy.¹

Similarly, the NAIC (National Association of Insurance Commissioners) Consumer Alert² says that title insurance can help provide the homebuyer and lender with necessary protection against defects in the title to property occurring before the real estate closing.

In many states, the seller pays for an Owner's Policy for the purchaser. This policy may not include extended coverage (for example, survey and mechanic's lien coverage), which the purchaser could separately request. The policy to be purchased may be an American Land Title Association (ALTA) Owner's Policy, or it may be the ALTA Homeowner's Policy, which provides substantial additional coverage.

1. U.S. Dep't of Hous. & Urban Dev., Shopping for Your Home Loan: HUD's Settlement Cost Booklet 20 (2009), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12617.pdf.

2. Nat'l Ass'n of Ins. Comm'rs, NAIC Consumer Alert, available at http://www.naic.org/documents/consumer_alert_title_insurance.htm.

Under Section 9 of the Real Estate Settlement Procedures Act (RESPA),³ the seller may not require the buyer to purchase an Owner' Policy from any particular title company, so the buyer can shop for the owner's policy if the seller is not paying for it.

The general advantages of a title insurance policy over reliance on a warranty or simple title examination should be obvious and clear:

- Title insurers are regulated by their state of domicile and each state in which they do business in order to assure proper business conduct and continued solvency of the title insurer (although some title insurers do become insolvent).
- Warrantors may cease to exist or die, in which case the idea of relying on the grantor's warranty may be illusory.
- Title examinations are only rarely based on sovereignty searches (alone or in combination with starter files), whereas the title insurer insures against any outstanding defects, liens, or encumbrances on the title, regardless of when created.
- Title examinations may or may not be backed by an errors and omissions policy, but that coverage may lapse as well.
- Title insurance will provide a defense to the insured and indemnity against loss; defense will probably not be provided by a warrantor or title examiner.
- The warranty deed may be a special or limited warranty, which warrants only as to matters arising under the grantor and does not warrant that the grantor owns the title.
- The warranty deed may actually be a quitclaim that conveys only the interest of the grantor and thus provides no actual warranty of title.
- The warranty deed may contain broad limitations on the warranty, such as "subject to all exceptions, reservation, covenants, conditions, restrictions, easements, and rights appearing in the public records" or "subject to any and all matters appearing of record that affect the land."
- The warrantor is not bound by a suit against the grantee if the warrantor is not joined in or notified of the claim. The covenantee must establish that the title of the third-party is paramount. However, the warrantor, if made a party to a suit or informed that the grantee is sued for title, must defend.⁴
- The general rule is that only successful claims asserted against a grantee justify recovery of defense costs if the grantor fails to defend; the grantee may not recover defense expenses in a successful defense of title, since no wrongful acts of the grantors had precipitated the litigation.⁵

3. 12 U.S.C. § 2608.

4. *Brader v. Zbranek*, 213 S.W. 331 (Tex. Civ. App. — Galveston 1919) [Affirming dismissal of writ of error for want of jurisdiction.].

5. *Outcalt v. Wardlaw*, 750 N.E.2d 859 (Ind. Ct. App. 2001).

The majority rule for damages recoverable for breach of warranty is an amount that bears the same proportion to the consideration paid as the actual value of the part of the land lost bears to the actual value of the entire land.⁶ Generally, the measure of damages for breach of warranty in the event of complete title failure is the consideration given for the land, plus interest and attorneys' fees to establish title.⁷

Reliance on a warranty deed is a tenuous position, given the limitations on the warranty that may apply and given that the warrantor may not be financially solvent when called upon to compensate the grantee (or its successors). The warrantor is subject to none of the many financial regulations that are intended to provide the insured with a sound insurer and a reliable title policy.

Absent an express provision to the contrary in a contract, a warranty deed may be required in a sale. In the absence of a contrary provision in the contract of sale, the contract is generally construed as requiring marketable title. Some cases construe a contract as not requiring that the deed contain warranties, unless it expressly provides so.⁸ A contrary view is that when a party contracts to convey the land and nothing is said as to the particular manner of conveyance, the law implies the covenants of general warranty.⁹ This view is accepted in Texas: “[I]n Texas the use of the word ‘deed’ in a bond or contract to convey land means a deed with a general warranty.”¹⁰ “By having given a bond for title . . . the vendor has contracted to make to the purchaser a good and valid legal title with the usual covenants of warranty.”¹¹

Reliance also may not be placed on a policy issued to a lender. Significantly, the mortgagor is not a third-party beneficiary of a Loan Policy issued to its lender even if the borrower paid for the policy.¹²

A substantial number of states, such as Florida, Louisiana, Maryland, Nebraska, New Jersey, Ohio, and Texas, require a title insurer or title insurance agent that will issue a Loan Policy to insure a purchase money mortgage or deed of trust to provide notice to the borrower of the availability of an Owner's Policy at a simultaneous issue rate. A typical

6. *Merchs.' Nat'l Bank v. Otero*, 1918-NMSC-080, 24 N.M. 598, 175 P. 781.

7. *Holmes Dev., LLC v. Cook*, 2002 UT 38, 48 P.3d 895.

8. *Lounsbery v. Locander*, 25 N.J. Eq. 554 (1874) (an agreement to provide good title is implied in every contract, but no obligation to provide warranties of title is implied unless the title is imperfect and the equity then imposes an indemnity); *Epdee Corp. v. Richmond*, 75 N.E.2d 238 (Mass. 1947) (a contract is interpreted to require the conveyance of good title in the absence of a provision, but the obligation can then be satisfied by a deed without the covenants of warranty if the contract does not address the form of deed); *Potter v. Tuttle*, 22 Conn. 512 (1853) (“No form of conveyance was agreed upon, and therefore, any deed, by force of which a clear title in fee would be vested in the plaintiff, would be a compliance with the agreement, whether a quitclaim, or a deed with covenants.”); L.S. Tellier, Annotation, *Nature of deed which may be required of vendor who is unable to convey title for which he has contracted*, 13 A.L.R.2d 1462.

9. *Skinner v. Stone*, 222 S.W. 360 (Ark. 1920).

10. *Abbott v. Galveston*, 79 S.W. 1064, 1066 (Tex. 1904).

11. *Vardeman v. Lawson*, 17 Tex. 10 (1856) (the law also implies a good title in every contract).

12. *McKenzie v. Columbian Nat'l Title Ins. Co.*, 931 S.W.2d 843 (Mo. Ct. App. 1996).

example is Maryland's Insurance Code, which requires a title insurer or title insurance agent that will issue a Loan Policy insuring a purchase money mortgage or deed of trust to provide notice to the borrower of the availability of an Owner's Policy at a simultaneous issue rate.¹³

Similarly, it would appear that, because of the materiality of title insurance as protection for the borrower, the attorney also must explain that the Loan Policy will not protect the borrower and that the borrower or purchaser should secure title insurance for his or her protection.¹⁴

The attorney's duty reaches further and should require that the attorney explain the risks that will be covered by the title policy. "When an attorney's performance falls below the standard of competence and expertise usually exercised by other attorneys in handling such matters, the attorney is liable for any damage to the client caused by his substandard performance."¹⁵ Thus, even though the buyers signed a waiver of an owner's title insurance policy, the attorney who conducted the closing was guilty of legal malpractice because the buyers were not advised of the hazards related to possible mechanic's liens on recent construction.

It has been asserted that an attorney will be guilty of malpractice in representing a home purchaser if the attorney does not require a commitment and a title insurance policy, absent a full and complete disclosure to the client of the risk in not securing title insurance. The duty of the attorney would extend to available coverage and would compel the attorney to explain the coverage and consequence of failure to secure such coverage. The cautious attorney would then decline to represent a purchaser who does not acquire title insurance.¹⁶

A claim for legal malpractice must establish the following elements:

(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.¹⁷

An attorney may owe a duty of care to a person who is not a client if the attorney knows or should know that such a person will rely on the attorney's representations and the person

13. MD. CODE ANN., INS. § 22-102.

14. See *Gifford v. New England Reinsurance Corp.*, 488 So. 2d 736 (La. Ct. App. 1986).

15. *Sherwin-Williams Co. v. First La. Constr., Inc.*, 2004-0133 (La. App. 1 Cir. 05/06/05), 915 So. 2d 841, 845.

16. Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407 (2000).

17. *Ambriz v. Kelegian*, 53 Cal. Rptr. 3d 700, 708 (Cal. Dist. 2007), *modified*, 2007 Cal. App. LEXIS 203 (Cal. App. 4th Dist. Feb. 15, 2007).

is not too remote.¹⁸ The effect of this principle is to discard the former privity requirement and permit recovery against an attorney by a non-client for negligent misrepresentation.

A lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself.¹⁹

Attorneys who hold themselves out as experts or specialists are subject to the standard of a reasonably prudent expert.²⁰

However, the attorney is not strictly liable for an unfavorable result.

If an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.²¹

Given these responsibilities of the attorney, it is reasonable to assume that the duty of care includes a recommendation that the client acquiring a residence secure the following:

- an Owner's Policy, which would be an ALTA Homeowner's Policy where available;
- extended coverage;
- a closing protection letter; and
- available and relevant endorsements, such as the ALTA 9.2-06 (Covenants, Conditions, and Restrictions—Improved Land—Owner's Policy), ALTA 28.2-06 (Encroachments—Boundaries and Easements—Described Improvements), and ALTA 35.1-06 (Minerals and Other Subsurface Substances—Improvements).

On commercial transactions, the attorney faces a greater burden in adequately representing the client and should recommend

18. *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

19. *McCamish v. F. E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

20. *Rhodes v. Batilla*, 848 S.W.2d 833 (Tex. App. 14th 1993, *writ denied*).

21. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

- an Owner's Policy or Loan Policy;
- extended coverage;
- a closing protection letter, with verification of issuance and continued validity;
- available and relevant endorsements, such as endorsements relating to
 - covenants;
 - survey issues;
 - minerals and subsurface substances;
 - loss determination;
 - taxes;
 - special use (for example, zoning);
 - special mechanic's lien coverage;
 - project use;
 - unusual loan document issues (for example, shared appreciation, swaps, re-characterization); and
 - the standard ALTA 9.06 (Restrictions, Encroachments, Minerals—Loan Policy), ALTA 9.2-06 (Covenants, Conditions, and Restrictions—Improved Land—Owner's Policy), ALTA 28.2-06 (Encroachments—Boundaries and Easements—Described Improvements), and ALTA 35.2-06 (Minerals and Other Subsurface Substances—Described Improvements); and
- consideration of the financial depth and durability of the title insurer.