

TITLE INSURANCE 201 (PART TWO)

By

Phillip C. Querin, QUERIN LAW, LLC

Website: www.q-law.com

In [Part One](#), we discussed what title insurance is; the difference between standard and special exceptions, as well as preliminary title reports versus the final title insurance policy. In Part Two, we'll dig a little deeper...

Dealing With Title Defects Appearing in the Preliminary Title Report.

Occasionally, a serious defect in the seller's title, such as an unsatisfied lien, shows up on the preliminary title report ("PTR"). For example, assume that a buyer agrees to pay \$225,000 for the seller's home, but the title report discloses that a \$30,000 judgment lien has been recorded against the seller's property. This means that *before closing* the judgment creditor will have to be paid either: (a) From the seller's own resources, or (b) From the seller's closing proceeds.

A title defect may relate to a non-monetary issue, say an unreleased interest in the property relating to a prior owner who passed away, but the estate was never probated.¹ Assuming that the heir(s) can be located and agree(s) to release their interest,² the problem may be easily resolved. But if the heir(s) cannot be located, the closing will likely depend upon whether the title company and seller can agree upon a solution that will result in removing that special exception from the PTR before closing. A discussion of how that might be accomplished is beyond the scope of this article.

TIP ~ Section 5 of the OREF Residential Real Estate Sale Agreement makes the condition of title, as reflected in the PTR, a contingency to closing.³ Following receipt of the PTR there is a limited period of time for the buyer to object to any title defects. Here is the 2013-2014 text of that provision:

"Upon receipt of the Report and CC&Rs, Buyer shall have ___ business days (five [5] if not filled in) within which to notify Seller, in writing, of any matters disclosed in the Report and CC&Rs which is/are unacceptable to Buyer ("the Objections"). Buyer's failure to timely object, in writing, to any matters disclosed in the Report and/or CC&Rs shall constitute acceptance of the Report and/or CC&Rs. However, Buyer's failure to timely object shall not relieve Seller of the duty to convey marketable title pursuant to Section 6 below. If, within ___ business days (five [5] if not filled in)

¹ The probate would be necessary to show that title has passed on the public record from the decedent to an heir or beneficiary. Remember, you always want to see an unbroken chain of conveyances in the chain of title. A missing owner breaks the chain, and must be accounted for before the title company will insure the marketability of the title.

² A [Quitclaim Deed](#) or [Bargain and Sale Deed](#) are the two standard deed forms used to release or transfer the interest.

³ Note: The quality of the seller's title is a "buyer contingency," meaning that it is for the buyer's benefit – not the seller's. In other words, only the buyer – not the seller – can use the title contingency to cancel the transaction.

following receipt of the Objections, if any, Seller fails to remove or correct the matters identified in the Objections, or does not give written assurances reasonably satisfactory to Buyer that they will be removed or corrected, all earnest money shall be promptly refunded to Buyer and this transaction shall be terminated.”

For this reason, buyer brokers and their clients should promptly review the PTR. If exceptions appear on the PTR they do not understand, the first call made should be to the title officer whose name appears on the report. Questions to ask are:

- What does the exception mean?
- Will it be need to be removed before closing?
- If so, what needs to do be done to remove the exception?
- Will this delay closing?
- Should the buyer secure independent review by his or her own attorney?

Remember: Silence is consent. Accordingly, time is of the essence. The failure to object could result in the buyer inadvertently accepting the exception, simply by doing nothing. Lastly, if the buyer timely objects and the matter cannot be resolved according to the terms of Section 5, the transaction terminates and the earnest money deposit is to be returned to the buyer.

Types of Title Insurance Policies.

There are three major types of policies issued by title insurance companies. The primary difference between them depends upon the nature of the transaction involved.

1. Owner's Policy. As the name implies, an “owner's” policy is solely for owners – or more specifically, buyers who become owners upon closing of the purchase transaction. The policy insures the new owner that he or she is fully vested in marketable title, subject only to the standard printed exceptions, and those special exceptions that the parties have agreed will remain following closing. In Oregon, sellers customarily pay for their buyer's owner's policy, and this is what the OREF Residential Sale Agreement provides. If the parties intend a different result, the seller and buyer will have to so state in the Sale Agreement.

2. Lender's Policy. A lender's policy provides insurance to the individual or institution who has lent money to a buyer. It is typically paid for by the borrower-buyer as a condition to the lender making the loan. A lender's policy provides the same type of coverage as the owner's policy, *plus* the following additional coverage:

- **Unrecorded Construction Liens** – As noted in Part One, if a transaction closed sometime during the 75-day period within which a construction lien can be recorded, there is a chance that it might be recorded *after* closing, thus encumbering the new owner's title. Under the owner's standard title insurance exception, that risk would not be covered; but under the lender's policy, it is covered.
- **Accuracy of Legal Description in the Conveyancing Deed** – Also, as noted in Part One, one of the standard title *exceptions* for owners is matters that would be disclosed in an accurate survey. In other words, the owner's policy will *not* insure the homebuyer if there is an encroachment, say

from a neighbor's fence. Why? Because if the buyer had obtained a formal survey before closing, the encroachment would have been disclosed.

- **Rights of Parties in Possession** – This too is excluded from coverage in the standard owner's policy, but covered in the lender's policy.

Why do you suppose that the insurance in the owner's policy contains these three major exceptions to coverage [meaning that they are risks the homebuyer assumes after closing] while lenders have insurance coverage against that risk in their policies? The answer is simple: The lending industry has more clout with the title industry than homeowners. However, the disparity in coverage is not as great as it might seem. This will be discussed in more detail below.

3. Purchaser's Policy. When a buyer purchases property on a land sale contract, the seller retains title until the contract is paid in full, at which time the seller issues a "Fulfillment Deed," conveying title to the buyer at the time of payoff. Hence, at the time of closing the contract purchase, the buyer gets a "purchaser's" policy – not an "owner's" policy. Subject to this variation in nomenclature, the buyer's coverage in a purchaser's policy is the substantially the same as in the owner's policy – except, of course, it shows that the title is still vested in the seller rather than the purchaser. In Oregon, traditionally, sellers pay for the cost of a purchaser's policy, in the same manner as an owner's policy is paid for by the seller.⁴

[Sample title policies can be found at the American Land Title Association website, [here](#).]

Exactly What Risks Are Covered in the Standard Owner's Policy of Title Insurance?

Although, policies may vary somewhat, here is a sample list from one title company:

- Forgery and impersonation;
- Lack of competency, capacity or legal authority of a party;
- Deed not joined in by a necessary party (co-owner, heir, spouse, corporate officer, or business partner);
- Undisclosed (but recorded) prior mortgage or lien;
- Undisclosed (but recorded) easement or use restriction;
- Erroneous or inadequate legal descriptions;
- Lack of a right of access; and
- Deed not properly recorded.

Of course, the one risk that is not mentioned above is probably the most important – the risk that the title company made an error, and neglected to exclude from coverage a defect appearing on the public record.

EXAMPLE ~ Say there was a judgment for \$50,000 recorded against the property – it should have been excluded from coverage in the final policy but wasn't. If, after

⁴ One might be tempted to ask if the seller under a land sale contract should require that the buyer pay for a lender's policy. Typically, in most residential transactions where sellers sell on contract, they don't need this added protection, since they possessed the property being sold to the buyer, and the risks of unrecorded liens, parties in possession, or encroachments, would normally already be known.

closing, the judgment creditor threatened the new owner with foreclosure of their property unless they paid the \$50,000, it would now be a covered claim, and the title company would have to resolve it at their cost.

This is perhaps the real value that title insurance brings to real estate transactions: (a) They do a thorough title search and disclose to the prospective buyer *[in the form of special exceptions to the policy]* everything about the property that appears on the public record; and (b) If the company is wrong, and failed to list a lien or encumbrance clouding title, they – not their insured – must pay to eliminate it.

More About the Coverage Disparity Between Lender's and Owner's Policies.

Is it really “unfair” that lenders appear to have much better coverage than homebuyers? In my opinion, the answer is “No” – *assuming that buyers are vigilant and make intelligent choices when purchasing residential property.* What follows is my analysis of why this disparity of coverage is not that significant.

The Construction Lien Problem. This disparity has largely been mooted by the Homebuyer Protection Act (“the HPA”). *[See discussion, [here](#). The statute is found [here](#).]* The law applies to sellers of the following residential property:

- New single family residences, condominium units or residential buildings containing four or fewer dwelling units; and
- Existing single family residences, condominium units or residential buildings, containing four or fewer dwelling units, if they had improvements, additions or remodeling costing \$50,000 or more completed within 90 days of the date of the sale.

The HPA was designed to protect home buyers against the risk of having to pay for liens where construction work had been completed within 75 days of closing, but no lien had yet been filed on the public record at the time of closing. The seller is responsible for compliance with the law and must provide the buyer with a Notice of Compliance form *[see sample [here](#)]* identifying the alternative they have selected to protect the buyer. There are several options, but in new construction the main one requires builders to assume responsibility for having the title company insure the buyer against the risk of unpaid contractors filing liens after closing. Under this alternative, the title company will give the buyer the additional coverage, so they have the same protection against unrecorded liens as lenders have in their policies.⁵

TRAP ~ Note, in the occasional case in which the new home buyer is paying cash, i.e. when there is no lender, the HPA still has to be followed. However, in such cases, the seller and buyer will have to reach some agreement upon what protection the buyer will have. For a list of the options, see the discussion in my article, [here](#).

⁵ Interestingly, it costs the builder-seller nothing. Why? Because the title company already insured against that risk in the lender's policy, so they do not charge the builder-seller again for providing the same coverage to the borrower-buyer.

TIP ~ In the case of a sale of a pre-owned home, buyers should pay careful attention to the Seller Property Disclosure Statement, which specifically asks if there have been any additions, conversions, or remodeling. Unfortunately, it fails to ask when the work was completed. [This is only one of many examples of oversights, errors, and generally poor drafting found in this state-mandated form.⁶] If that question is answered in the affirmative, buyers would be well-advised to follow up with the seller to find out when the work was completed. If the work was completed within the last 90 days, it may be necessary for the seller to fill out the Notice of Compliance form, referred to above. Alternatively, if the property is located in the city of Portland, the online site, [Portland Maps](#), is quite helpful in providing information regarding recent permitted construction activity. [Similar online resources may be available in other cities or counties.]

The Encroachment Problem. Again, buyers should pay close attention to the Seller’s Property Disclosure Statement. It asks if there are any “...encroachments, boundary agreements, boundary disputes or recent boundary changes.” While certainly if there was an agreement, dispute, or recent boundary change, the seller would know and it should be disclosed. However, it is possible that there could be an encroachment the seller is unaware of. Here are some common examples;

- Encroachments from a house, garage, or outbuilding;
- Fences and hedgerows; or
- Driveways that were incorrectly placed across a portion of another’s property when the subdivision was first developed.

Based upon the amount of time the encroachment has remained in place without the knowledge of either property owner, it can often ripen into adverse possession – meaning the title to the property encroached upon may become legally vested in the encroaching party. A further discussion of Oregon adverse possession laws can be found [here](#).

What can a homebuyer do to reduce the risk of purchasing a property where there might be an issue? This is where a little common sense and vigilance come in. Here are some tips for buyers:

- Look for lines of occupancy, - that is, lines to which the seller has exercised his or her ownership, e.g. by fences, shrubs, and trees. Are they consistent with what appear to be the actual perimeters of the lot?
- Buyers normally receive a copy of the tax assessor’s map compliments of their Realtor® or title company. Does the configuration of the lot appear consistent with the lines of occupation?
- Check Portland Maps or other online governmental resource showing the configuration of the lot – does it appear consistent with the lines of occupation?
- Walk the lot with the seller [*Realtors® are – rightfully so – hesitant to actually point out “boundary lines” to their clients*].
- If possible, locate the corner pins placed there from the initial, or latest, survey.
- Ask if the seller has ever had a survey, and if so, obtain a copy either from them, or through the local surveyor’s office.

⁶ This is the only form in the OREF library of forms *not* drafted by OREF. Its content is dictated by the state statute, [ORS 105.464](#).

- Be aware that while encroachments can exist in residential subdivisions, the bigger issue is with rural property and acreage. Boundary fences can remain in the wrong spot for years, and, as noted above, may raise adverse possession issues later. If there is a concern, a survey should be obtained – *or at least*, have a surveyor locate the corners of the parcel being purchased.

The Persons in Possession Problem. The main reason title companies exclude this from coverage in their owner's policies is because neither the title examiner nor the lender inspect the property prior to closing. The examiner's responsibility is to make sure the title is marketable – not to make sure the person occupying it is the same person who is selling it. Title examiners do not routinely visit the residential property they are insuring.

But this is not normally a risk to buyers, who would be expected to know, before closing, who is occupying the property they are purchasing. If the person in possession is not the seller, e.g. a renter, it would/should be disclosed to the buyer from the public listing information. It would also become apparent upon the first visit to the property. So, of the three standard owner policy exclusions, the fact that this one is not a risk insured against is of little consequence – assuming that the buyer or the buyer's representative visits and inspects the property.

Lastly, although it is beyond the scope of this article, when sellers convey title by [warranty deed](#), they are actually warranting to their buyer that the three risks discussed above do *not* exist on their title. In other words, in the event that a serious post-closing problem arises that is not covered under the buyer's policy of title insurance, he or she may nevertheless have a claim against their seller.⁷ Thus, since the HPA covers buyers on the most serious of risks today, i.e. unrecorded construction liens, this is the reason I believe the disparity of coverage between lender and owner's policies is not as serious as it first might seem. Of course, this opinion assumes reasonable vigilance and due diligence by the buyer.

Additional Title Company Services.

Title insurance companies provide far more than title insurance, especially to the legal and real estate industries. With their extensive access to public records, they can act as an information clearinghouse about land. Since their rates are regulated like a utility, and there is substantial competition within the industry, title insurance companies have long realized that they compete most effectively by providing prompt, courteous, accurate service and an extensive range of free products.

- **The Trio.** One useful product that is available free of charge is the "trio," which is so named because it includes three separate pieces of information about a particular property. The trio includes: (a) The last deed of record [*showing the name in which the current owner is holding title*]; (b) The tax map [*showing the configuration of the property based upon the tax assessor's information*]; and (c) The current tax assessment [*showing the tax assessed value of the property and the amount of annual taxes*]. All of this information is available based solely upon the street address of the property.

⁷ And that seller may have a claim up the chain of title against their seller, assuming a warranty deed was used in that earlier conveyance.

TIP ~ A trio is not an insurance policy, and the title company bears no legal responsibility for the accuracy of the information provided. It is merely public record information.

- **Lot Book Reports.** This is a report on the status of the title to a particular property. The information is much the same as that contained in a preliminary title report. However it does not carry “insurance,” meaning that if the information is incorrect, the title company is not responsible. The cost of a lot book report is quite nominal, and in some instances, there may be a “discount” if the lot book report is converted to a full policy of title insurance.
- **Extended Coverage and Special Endorsements.** Title companies provide an array of products other than the basics discussed above. Extended coverage policies are, as the name implies, policies that provide, for an extra fee, added coverage beyond the standard owner’s policy. For example, one might order an extended owner’s policy to obtain coverage that includes the standard risks, *and* insurance against unrecorded construction liens, or other risks of concern. Special endorsements address specific concerns unique to the property or the transaction. One example is an endorsement assuring the policy holder that they will have street access to the property. There are many more. [[For a sample list of endorsements, see this link](#); [for a summary of coverage found in an extended policy go to this link.](#)]

TIP ~ Note, the OREF Residential Real Estate Sale Agreement provides that the seller will order and pay for a standard policy of title insurance to the buyer. If the buyer wants to secure additional coverage or a special endorsement, unless it is negotiated with the seller ahead of time, the extra cost will be borne by the buyer.

- **Escrow Services.** In Oregon, the vast bulk of real estate transactions are closed through escrow companies affiliated with title insurance companies. However, the services between the two entities are quite different. The escrow company acts as a neutral third party, following the joint instructions of the seller and buyer. Their general purpose is to receipt for the transactional documents and funds, prepare closing documents [*including the settlement statement or “[HUD-1](#),” disclosing to seller and buyer the disposition of all funds*] and record all appropriate documents, including the seller’s deed conveying title to the buyer.

Conclusion.

Title insurance companies are invaluable partners to lawyers, Realtors®, and their respective clients. Not only do they provide a host of free services to these industries, but they facilitate the safe and efficient closing of residential transactions. Although much of the risk of ever having to pay a claim has been eliminated by means of a thorough title examination, the expertise, information and assistance provided is essential, if buyers are to make informed decisions about the quality of their seller's title.