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Title Insurance Aspects of Tort Liability

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LAND IS UNIQUE. So is insurance on the title to land. Warren T. Gray, Acting Principal Insurance Examiner, Property Bureau, Title and Mortgage Section, has suggested the following *Analysis of Title Insurance:*[1]

> 1. In title insurance, a yet unknown claim (a hidden risk) existing on the effective date of the policy, is the risk insured. In other lines of insurance, a happening in the future which may develop into a claim is the risk insured. In other words, other types of insurance begin where title insurance ends.
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> 2. A title insurance policy has no fixed term of coverage, whereas in other lines, with trivial exceptions, there is normally a short term.
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> 3. In title insurance, the charge is earned on the effective date of the policy. In most other lines, an unearned portion of the charge or premium exists at all times until the expiration, cancellation, or maturity of the policy.
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> 4. In title insurance, a claim may be made at any time. In most other classes of insurance, there is usually a limitation governing the filing of claims and/or actions.
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> 5. A title policy cannot be cancelled by either the company or the insured. Other policies of insurance, with minor exceptions, can be cancelled by either party.
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> 6. Title insurance does not have an established expectancy of losses, whereas most other kinds of insurance generally do.
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> 7. In title insurance there is no statutory restriction limiting the amount of insurance on a single risk, unlike the usual rule in many other kinds of insurance.

A title insurance company might describe a policy of title insurance as being similar, in effect, to an abstract of title and an attorney's opinion, based on that abstract, with a guarantee in a stated sum that both are correct. This is probably true insofar as the record title only is concerned, but title insurance goes far beyond the record title and insures that hidden risks or defects which cannot be ascertained at the date of the policy will not defeat the interest of the insured, or, if the interest is defeated, that the insurer will pay the loss up to the face amount of the policy. (*Note*: The Title Guaranty, so-called, which is peculiar to Northern Ohio, is a guarantee of the *record title only* and for the purposes of this article is not considered to be a policy of title insurance. Any reference to a Title Guaranty will refer to title evidence limited solely to record title.)

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[1] Title Topics, Ohio Title Association (October, 1955).

We have two areas of risk in every policy:

1. Abstract or Examining—refers to those items which appear in the public record and which form the basis for the abstract or examination of title to the real estate which is necessary to the issuance of the policy. These items include deeds, mortgages, leases, mechanics' liens, court bonds, judicial proceedings in Probate, Common Pleas, and Federal Courts, recorded plats and other data.

2. Insurance—conditions of the items of record such as forged deeds in the chain of title, documents fraudulently obtained and recorded, and items not available in, or undisclosed of record such as afterborn children of a testator, undisclosed dower rights, and the like. Included in the insurance risk category might well be an error in judgment or knowledge of the law of the abstractor. The Conditions and Stipulations of the policy may also give rise to an insurance loss where a breach of the covenant to defend on the part of the company results in recovery to the insured.[2]

Contract Liability

There is no doubt, and much law, to the effect that an action will lie predicated upon the breach of the insurance contract as to title[3] and an action based upon the insurer's negligence or lack of skill in performing under the contract.[4]

It has been generally held in an action based on the breach of the insurance contract that the face amount of the policy is the limit to the insureds' recovery. That is, for a total loss or a complete failure of title, the measure of recovery is the value of the property insured up to the face amount of the policy.[5]

Where the interest of the plaintiff which was covered by the policy was that of owner in fee of the entire property, the court entered judgment for the value of the one-half interest to the property which failed, the court stating that any defect in title which reduced the interest of the insured below the fee was just that much loss, or damage, for which he was entitled to recover.[6]

In a more recent case, an Ohio court included, in addition to the value of the land to which title failed, other damages proximately result-

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[2] Baumann v. Puget Sound Title Insurance Co., 184 Wash. 9, 49 P. 2d 914 (1935); Overholtzer v. Northern Counties Title Insurance Co., 116 Cal. App. 2d 113, 253 P. 2d 116 (1953).

[3] Annot., 60 ALR 2d 972 (1958).

[4] *Ibid.* See, Auten v. Guaranty Abstract & Title Co., 220 N.E.2d 508 (Ill. App. 1966).

[5] Jones v. Southern Surety Co., 210 Iowa 61, 230 N. W. 381 (1930); Gauler v. Solicitor's Loan & Trust Co., 9 Pa. Co. 634, 20 Phila. 334, 48 Phila. Leg. Int. 252, 28 WNC 208 (1891).

[6] Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561, 12 LRA (NS) 465, 118 Am. St. Rep. 916 (1907).

ing from failure of the title. The court held that the breach of contract, resulting from the defect in title, not only deprived the grantee of part of the land he had bought, but also required him to change the location of his driveway, which with other consequential damages suffered, exceeded the amount of insurer's guaranty. The court concluded that the parties had contracted with all of those damages in contemplation and that such damages arose naturally from the insurer's breach of contract.[7] This action was based on a Title Guaranty, not a Title Insurance Policy, and raised many eyebrows relative to legal descriptions in addition to measure of damages occasioned by breach of an insurance contract. It was further held that a title guaranty is a contract of indemnity.

At least one court has stated that "A policy of title insurance is more than a contract of indemnity; it is in the nature of a warranty or a covenant of encumbrances." [8]

In an action based upon the insurer's negligence in performing under the contract, it was held that the limitation of the policy upon the insurer's liability did not apply where the loss was caused by the insurer's own negligence.[9]

It appears that damages for breach of the covenant to defend are separate and distinct from damages for a defect in title, and that damages for breach of the insurer's covenant to defend are not affected by the face amount of the policy.[10]

Damages—Action on Contract

Breach of the policy as to title:

1. An insured is entitled to recover the actual loss or damage sustained from a defect, lien or encumbrance affecting his title which was not excepted from the policy's coverage.

2. For complete failure of title an insured owner may recover the value of the property up to the face amount of the policy.

3. For a deficiency in urban land, the insured may recover not only the value of the land lost, but also indemnity for loss of its use and consequential damages.

4. A mortgagee's recovery for a partial loss occasioned by an undisclosed prior lien is the amount of the lien.

5. A mortgagee's recovery for loss or damage predicated upon a defect in title cannot exceed the face amount of the policy.

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[7] Burks v. Louisville Title Insurance Co., 95 Ohio App. 509, 54 Ohio Op. 128, 121 N. E. 2d 94 (1953).

[8] Glickman v. Home Title Guarantee Co., 167 N. Y. S. 2d 793 (1957).

[9] Quigley v. St. Paul Title Insurance & Trust Co., 60 Minn. 275, 62 N. W. 287 (1895).

[10] Baumann v. Puget Sound Title Insurance Co., *supra*, n. 2; Overholtzer v. Northern Counties Title Insurance Co., *supra*, n. 2.

Loss predicated upon insurer's negligence:

1. Damages for breach of the insurer's covenant to defend are not affected by the face amount of the policy.

2. Limitation of the policy does not apply where the loss is caused by the insurer's own negligence.

Tort Liability

A policy of title insurance obligates the title insurance company to pay any loss, up to a fixed amount and as provided in the policy, which is suffered by the insured because of defects in title or encumbrances thereon existing at the date of the policy and not excepted therein. The company agrees to defend against alleged defects and encumbrances, and to pay the expenses of litigation, although the adverse claims are invalid. The insured is protected after he has conveyed the property with a warranty. The protection extends to the heirs and devisees of the insured but is generally not assignable.

The policy protects against omissions of the abstractor and errors of the title examiner, and also against the many claims which may be enforceable over the rights of a bona fide purchaser although the claims are not of record.

Although insuring against valid claims, some policies do not insure against loss from the title being unmarketable. Such a loss can occur, even though the adverse claim is unenforceable, as when the purchaser refuses to perform the contract on the ground of unmarketability.[11]

Thus it appears that the protection under the policy covers the "Abstract or Examining" area and the "Insurance" area. From a purely mechanical standpoint, the Abstract or Examining area is the most difficult for the company issuing the insurance. By reason of the possibility of error or omission of recorded documents in the title examination, the company is exposed to actions based on negligence in the performance under the contract, and it is in this phase of preparation of the title insurance policy that the exposure to an action in tort based on the failure to exercise a reasonable degree of knowledge, skill, and due care may lie.

Ordinarily, a breach of contract is not a tort. However, a common law duty to perform with care, skill, reasonable expedience, and faithfulness is incidental to every title search or abstract contract, and the negligent failure to observe these conditions may constitute a tort.[12]

A few cases have allowed an action in tort to lie against the abstractor for negligence. One of these cases was most interesting in that

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[11] 2 McDermott, Ohio Real Property Law and Practice 9 (Third Ed. 1966).

[12] 52 Ohio Jur. 2d 226. And see, Auten case, *supra,* n. 4. For forms of pleadings in a N. Y. case based on an attorney's negligence in a title search, see, Oleck, Negligence Forms of Pleading, 756-766 (1957 rev. ed.).

the court appeared to be determined to allow recovery against the abstractor and the reasoning expressed is worth repeating here.

> A false certificate was attached to an abstract which had omitted a deed of the remainder interest of the vendor so that all he had to convey was a life estate. The error was not discovered until a much later date at which time an action on contract was barred by the statute of limitation. The court held that the delivery of the abstract and certificate amounted to a breach of contract, but asserted that the making of the contract gave rise to a common-law duty to perform the agreed work with skill, reasonable expedience, and faithfulness, and that the negligent failure to include the omitted deed in the abstract was a tort as well as a breach of contract, and that the falsity of the representations made by the abstract and the certificate, although not intended to be false in any respect, was none the less a legal fraud.[13]

With only occasional dissent, the cases agree that the liability of the abstractor is purely contractual.[14]

By the great, if not universal, current of authority, the liability of an abstractor for damages resulting from his mistakes is based on contract "and does not rest upon principles of negligence." [15]

The abstract or examining area is that which makes the company most susceptible to the possibility of an action in slander of title.

Slander of title has been defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him special damage.[16]

A false and malicious statement as to the title or interest falls within that branch of the law of libel and slander designated as slander of title, or slander of property. An action may be brought against anyone who falsely and maliciously defames the property of another, and, thereby causes him some special pecuniary damage or loss.[17]

It is a well established principle that malice, expressed or implied, in making slanderous statements with respect to the title of another in property, is an essential element of an action for damages for slander of title, and that in the absence of proof of such malice no action can be maintained.[18]

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[13] Chicago R. I. & G. R. Co. v. Duncan, 273 S. W. 908 (Tex. Civ. App. 1925).

[14] Annot., 28 ALR 2d 891 (1953). And see, Auten case, *supra,* n. 4.

[15] Peterson v. Gales, 191 Wis. 137, 210 N. W. 407, Annot., 47 ALR 956 (1926). And see Thomas v. The Guarantee Title & Trust Co., 81 Ohio St. 432, 91 N. E. 183, 7 Ohio L. R. 615, 55 W. L. B. 71 (1910), where the judge in the first sentence of his decision states, "So far as we have been able to discover, there has been no exception to the general rule that an action against an abstractor to recover damages for negligence in making or certifying an abstract of title must sound in contract. . . ." This appears to be the law of Ohio.

[16] Annot., 129 ALR 179 (1940).

[17] 2 McDermott, *op. cit. supra,* n. 11 at 28.

[18] See *supra,* n. 16.

The general principles stated above that malice is an essential element to maintain such an action are comforting words to the title insurer who is always obligated to report liens, encumbrances, insanity cases, etc. where the identity of the debtor or ward is in doubt and must be determined. Such reporting is certainly not malicious, at least insofar as the intent of the examiner of titles is concerned. A warning not to deal frivolously with the affairs of an owner of real property is, however, disclosed by the fact that there is considerable authority that malice is not necessary if the untrue publication could be reasonably expected to prevent a sale of the property.[19] So, also, is the fact that execution, acceptance, or filing a false instrument purporting to affect the title may be slander of title.[20]

A bar to those who might seek special damages common to some actions in tort is the fact that mental distress, no matter how immediately resulting from the slander, is not within the range of the special damage naturally, reasonably, and proximately flowing from slander of title to property which will support an action therefor.[21]

The principles of the general law of agency apply to insurance companies and their agents.[22] In the absence of special circumstances, an agent of the insurer who solicits or effects insurance, clearly, is not the agent of the insured.[23]

Thus, where a title insurance policy by its Terms and Conditions is not bound by the fraudulent acts of the insured, or knowledge of facts which would defeat the policy, neither can the insurer escape the effects of fraud, deceit, and misconduct on behalf of its agent in the performance of his agency.

In the event an action in tort is maintained the measure of liability is found by determining the consequences of the defendant's breach of duty. Only such damages are recoverable as can be shown with reasonable certainty and as are the direct, natural, and proximate consequences of the defendant's wrongful act.[24]

Discussion

The scope of this article has been limited primarily to the tort aspects of title insurance. The reason for this is that such insurance has become an important factor in the protection of titles to real estate on a national basis. Some areas still rely solely on the abstract and/or

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[19] *Ibid.*

[20] Annot., 150 ALR 716 (1944).

[21] Ebersole v. Fields, 181 Ala. 421, 62 So. 73 (1913); Briggs v. Coykendall, 57 N. D. 785, 224 N. W. 202 (1929); Ward v. Gee, 61 S. W. 2d 555 (Tex. Civ. App. 1933).

[22] 30 Ohio Jur. 2d 129.

[23] 29 Am. Jur. 538.

[24] 15 Am. Jur. 469.

attorney's opinion in real estate transactions, but it is now the custom in most urban areas to require a policy of title insurance in their stead.

Since the issuance of a policy of title insurance is comprised of an abstract, an attorney's opinion, and a guarantee in a stated sum that both are correct, it would appear that the existing rules of law relative to abstractors and to insurance companies are applicable to this rapidly growing industry.

The absence of inroads of actions in tort arising from the issuance of title insurance policies seems to lie in the fact that the rules of contract law adequately protect the insured where he suffers a loss based on breach of the contract or in the negligent performance of the contract. No cases have been found where personal injury has been the result of any negligent act or omission on the part of the insurer. In each case studied it appears that the damages allowed for breach of contract or negligence were adequate on the facts submitted.

A further reason for the lack of actions in tort might be the result of stringent statutory regulation of title insurance companies in many states. Some laws govern and require the maintenance of title plants, rate schedules, types of title evidence, licensing of agents, and close supervision in the reporting of premiums earned.

Another reason is the fact that the industry is primarily controlled or staffed by members of the legal profession. The very fact that the majority of the title insurance companies are operated by trained lawyers and attorneys who ply their professional skill in the preparation of abstracts and title insurance policies, and whose reputation for knowledge and ability is at stake in every policy has a tremendous effect on that industry and the quality of service it offers.

There is little doubt that a relaxation of the professional ethics of the members of the industry might well tend to introduce practices and procedures in the issuance of policies of title insurance which would open the door to action in tort. If the licensing procedures of agents were relaxed it is quite possible that scurrilous conduct on the part of such agents might well result in tortious acts of their grossest degree.

Competition probably accounts in part for the dearth of tort actions since, where such actions might lie, the title company tends to settle the action out of court rather than be subjected to unfavorable publicity. Further, competition among companies has demanded that knowledge, skill, and careful attention to detail is required of all employees to reduce losses and inconvenience of its customers.

The maintenance of sophisticated land records and court records, in what are commonly referred to as "title plants" has played an important part in the reduction of error in title examination. More accurate land measurement also has been extremely helpful in title examination.

It must also be remembered that the experience factor in preparing

title evidence such as the Terms and Conditions of the title policy itself has favored the companies. The industry is at least seventy years old, and underwriting practices are continually being improved.

Finally, the American Land Title Association, to which most major companies belong, has devoted many years to the establishment of ethical conduct and procedures. It has standardized policies of title insurance and studied and made recommendations on risks and practices in the industry. It has maintained close liaison with the leading users of title insurance, and, through the practice of committee study, has attempted to avoid the pitfalls of loss through the dissemination of information to its members.

Conclusion

By reason of the adequate damages recoverable in contract by the insured, and because of safeguards of ethics and efficient methods of title examinations, underwriting practices, and sophisticated systems of document storage and retrieval, it would appear that tort liability will not become prevalent in the title industry. Since law is disposed to follow the needs of society, rather than to anticipate them, it seems logical that actions in tort liability will not be needed.