

## Washington Title Insurers' Duty To Search And Disclose

Formal land conveyancing methods have replaced those of simpler days when sellers handed clumps of dirt or twigs to their buyers while orally pronouncing the property transfer in their neighbors' presence.<sup>1</sup> Increasing complexities<sup>2</sup> of modern real estate transactions necessitated a system of title assurance to reduce the possibility of title loss. Title insurance emerged when modern society demanded not only a method to assure full ownership in real property, but also a solvent assurer to answer in damages if the assurance was incorrect.<sup>3</sup> Thus, state legislatures initially required title insurers to demonstrate their solvency by depositing substantial amounts of money in guaranty funds as a condition of doing business.<sup>4</sup> Some states have imposed duties on title insurers in addition to demonstrated sol-

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1. Neighbors, in case of a future dispute, would serve as jurors; therefore, buyers would want them present at the conveyance. This transfer of a possessory estate in land, called feoffment with livery of seisin, is the oldest English device for transferring property. 6A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 879 (rev. ed. P. Rohan 1979).

2. The ancient English conveyance system in which sellers transferred land by oral declaration (feoffment with livery) evolved into a system requiring written instruments to effectuate land transfers. English vendors transferring land also transferred the original deeds and instruments of title. The American system required not only written instruments, but also registration of the documents. Thus, English vendors proved title by reference to the transferred instruments of title; Americans, by reference to such instruments in the public registry. *Id.* ¶¶ 881, 912. One authority describes the public registry as a system of "extensive public records into which deeds, mortgages and an increasing variety of other instruments are supposed to be incorporated." *Id.* ¶ 912. See P. BASYE, *CLEARING LAND TITLES* § 3 (2d ed. 1970). Thus, real estate transactions are now much more intricate and formal.

3. See Beasley, *The Nature and Development of Title Insurance*, in *TITLE INSURANCE IN MAJOR REAL ESTATE TRANSACTIONS* 13, 15 (PLI Real Estate Law & Practice Course Handbook Series No. 144, 1978). See generally Johnstone, *Title Insurance*, 66 *YALE L.J.* 492 (1957). Title insurance originated in 1876, when Pennsylvania's governor granted conveyancers in that state a franchise to guarantee the accuracy of title examinations and indemnify insureds against loss. Brossman & Rosenberg, *Title Companies And The Unauthorized Practice Rules: The Exclusive Domain Reexamined*, 83 *DICK. L. REV.* 437, 444-46 (1979).

4. Washington, for instance, requires a \$200,000 deposit for a county population of 500,000. *WASH. REV. CODE* § 48.29.030 (1979). California requires title companies to maintain current assets of at least \$10,000 in excess of current liabilities. *CAL. INS. CODE* § 12389(a)(2) (West Supp. 1980). See Johnstone, *supra* note 3, at 510-13.

vency by requiring that insurers conduct reasonable searches<sup>5</sup> for title defects<sup>6</sup> and disclose the results to those relying on title insurance in purchasing property. The Washington Supreme Court, in contrast, has yet to impose this duty on Washington title insurers.<sup>7</sup> This comment proposes that Washington courts impose on title insurers a duty, enforceable in tort, to conduct reasonable searches and to disclose results to their insureds.

This comment, accordingly, explores possible non-statutory sources of a title insurer's duty to search and disclose. After reviewing the historical background of title insurance and comparing it with other title assurance methods, this comment examines Washington case law, where the supreme court has failed to impose the duty. It then considers the need to impose and examines the theoretical bases of such a duty to search and disclose: whether it should lie in tort or in contract. Finally, this comment concludes that Washington courts should allow home buyers to sue title insurers for negligence in failing to reasonably search and disclose.

Historically, five title assurance methods<sup>8</sup> exist in the United States.<sup>8</sup> The oldest system is the lawyer's search of the public records accompanied by an opinion or certificate indicating the lawyer's conclusions as to the title's condition. This "lawyer's opinion" method is now common only in New England and some parts of southeastern states.<sup>9</sup> A second system, the abstract method, evolved from the lawyer's opinion method.<sup>10</sup> When law-

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5. Both courts and legislatures have imposed this duty. See, e.g., *Banville v. Schmidt*, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974); *Northwestern Title Sec. Co. v. Flack*, 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970); *Williams v. Polgar*, 43 Mich. App. 95, 204 N.W.2d 57 (1972), *aff'd*, 391 Mich. 6, 215 N.W.2d 149 (1974); ARIZ. REV. STAT. ANN. § 20-1567 (West 1975); COLO. REV. STAT. § 10-11-106 (1973). See text accompanying note 123 *infra*.

6. A title defect occurs "when the aggregate of rights, privileges, powers and immunities known as ownership is subject to the claims of others." Comment, *Title Insurance: The Duty to Search*, 71 YALE L.J. 1161, 1161 (1962). Title defects may consist of party walls, easements for public highways, outstanding leases, liens and charges against land (mortgages, taxes, assessments, attachments, judgments, executions, mechanics' or vendors' liens), dower or curtesy rights, restrictive covenants, encroachments, and easements. See cases collected at 77 AM. JUR. 2D *Vendor and Purchaser* §§ 190-254 (1975).

7. See text accompanying notes 43-61 *infra*.

8. For a more thorough discussion of the history of title insurance and the five methods of title assurance, see Whitman, *Optimizing Land Title Assurance Systems*, 42 GEO. WASH. L. REV. 40, 47-49 (1973).

9. Even in areas where the lawyer's search and opinion method prevails, some lawyers use lay employees to conduct title searches. *Id.* at 47.

10. See Quiner, *Title Insurance and the Title Insurance Industry*, 22 DRAKE L.

yers realized their time and talents were not well utilized in conducting laborious title searches, they hired lay employees to perform title searches and issued opinions or certificates based on the information the employees obtained. The lay employees soon envisioned a more lucrative business if they worked for more than one lawyer, and with this realization came the formation of commercial abstract companies using the abstract method. In this method, currently used in several midwestern states, an abstract company makes the search and issues an abstract of title,<sup>11</sup> which the lawyer examines before rendering an opinion. A third method incorporates with title insurance either the abstract system or the lawyer's opinion method. While the "commercial abstract plus title insurance" variety predominates in midwestern states, the "lawyer's search plus title insurance" is common in the Atlantic seaboard and southeastern states.<sup>12</sup> This latter variety of title assurance is called the "approved attorney" system because the title insurer relies on independent lawyers rather than maintaining its own staff.<sup>13</sup> A fourth method, prevalent in Washington and other western states,<sup>14</sup> is the title plant system: the issuance of title insurance after the insurer conducts its own search and examination of records the insurer itself privately owns and maintains. Finally, the Torrens system assures proper title through a public official who, following a judicial hearing upon the purchaser's application, certifies

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REV. 711, 713 (1973).

11. An abstract is a book or file a layperson compiles after searching the records, summarizing relevant findings. *Id.*; Whitman, *supra* note 8, at 47 n.36 ("an abstract is a book or file containing summaries or full copies of all recorded instruments affecting title"). See Raushenbush, *Who Helps the Home Buyer?*, 1979 ARIZ. ST. L.J. 203, 208, where the author notes that under the abstract method, where abstracters rely on public records which may be in error, abstracters may sue recording officials. Because lawyers rely on the abstract, they may sue abstracters for error. Because buyers rely on lawyers, who may erroneously evaluate abstracts, buyers may sue their lawyers.

12. Whitman, *supra* note 8, at 48.

13. *Id.* at 48 n.37. In the "approved attorney" system, the title insurer predicates the policy on an independent lawyer's certificate: the policy therefore protects against errors the examining lawyer may have made. Although the insured may sue the title company if a nonexempt defect arises, the title company may in turn sue the lawyer if failure to find or report such defect constitutes professional error. See Taub, *Rights and Remedies Under a Title Policy*, in *TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW!* 69, 76-77 (ABA Section of Real Property, Probate & Trust Law ed. 1979). See generally Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 430 (1969).

14. Whitman, *supra* note 8, at 48. This self-search method predominates from the Rockies to the Pacific and in Texas, Illinois, Michigan, New York, and Washington, D.C.

the title and indemnifies losses resulting from errors.<sup>15</sup>

Of these five systems, those that more adequately<sup>16</sup> protect the public against lapses of the lawyer and abstractor are the methods that incorporate title insurance.<sup>17</sup> Thus, to understand the genesis of title insurance, it is necessary to examine the weaknesses of the abstract and lawyer's opinion methods which title insurance sought to remedy. Both the lawyer's opinion and abstract methods fail to provide adequate public protection. First, when lawyers and abstractors rely on inefficient public records<sup>18</sup> and grantor-grantee indices,<sup>19</sup> their search takes an inordinate amount of time compared to a title plant company search using superior recordkeeping and indexing systems.<sup>20</sup> Sec-

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15. *Id.* See Quiner, *supra* note 10, at 713-14 (noting the Torrens system's unpopularity since the first U.S. Torrens legislation was enacted in 1897).

16. Title insurance also has many shortcomings. See text accompanying notes 35-41 *infra*. It is interesting that one authority refers to title insurers as title abstractors when issuing a preliminary title report, 9 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5213, at 50 (Supp. 1980), commenting that "it is well known that the policy has replaced the title abstract." *Id.* § 5209, at 38 n.67.25.

17. Commentators describe the birth of title insurance in 1876 as a reaction to the judicial limitation of conveyancer's (abstractor's) liability in the Pennsylvania case of *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213 (1868). The *Watson* defendant was a lay conveyancer employed by the purchaser to determine whether certain property was free of title defects. The defendant submitted an abstract of title to a lawyer and, in reliance upon the lawyer's opinion, represented to the buyer that the land was free of encumbrances. The buyer sued when an outstanding judgment clouded the title. The Pennsylvania Supreme Court held for the defendant, concluding that a conveyancer does not guarantee titles he reviews. Thus, the first title insurance company was formed by "lawyers to protect the public against the non-liability of lay scribes following . . . *Watson*." Payne, *supra* note 13, at 431-32. See Brossman & Rosenberg, *supra* note 3, at 445-46 nn.30-32; Comment, *supra* note 6, at 1164 n.18.

18. Because public records are not centrally located, a title searcher must examine several record offices, e.g., secretary of state, county auditor, clerk of court, and tax collector. One company reported examining 76 sources of information in 16 public offices. Whitman, *supra* note 8, at 46 n.25. See generally Quiner, *supra* note 10, at 713.

19. The grantor-grantee index traces chain of title based on names of grantees and grantors; the tract index traces title based on tracts or parcels of land. Thus, the grantor-grantee index is alphabetical, the tract index, numerical. See A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* 553-55 (1971) [hereinafter cited as AXELROD]. Parcels of land are assigned separate pages in the tract indexing system. All transactions affecting each parcel are noted on that page in the index. Note, *The Tract and Grantor-Grantee Indices*, 47 *IOWA L. REV.* 481, 481-82 (1962).

20. Most title insurers operate as title plant companies. A title plant maintains its own records and tract indices. See Robinson, *The Organization and Operation of Title Plants*, in AXELROD, *supra* note 19, at 600-04. Tract indices are more efficient because (1) all recorded instruments affecting the parcels are compiled in one place and (2) the searcher need not look at grantor-grantee indices (and, conversely, grantee-grantor indices to double check) where it would be especially burdensome, as in the case of a subdivision. See Whitman, *supra* note 8, at 46 n.24; Comment, *supra* note 6, at 1164 & n.20.

ond, if lawyers and abstracters fail to discover title defects falling outside the scope of a reasonable search, the client recovers nothing.<sup>21</sup> Title insurance emerged to remedy these problems; if the defect was not excepted from coverage and not disclosed by the title search, the insured could recover.<sup>22</sup> Third, the lawyer's opinion method could prove too costly for clients, particularly when nonlawyers could be trained to conduct the searches.<sup>23</sup> Fourth, even if a client could prove negligence on the part of the lawyer or abstracter, the lawyer or abstracter might be insolvent.

The Torrens system also has many shortcomings. Because it involves title registration with a court and a judicial hearing, after which a public official issues a certificate of title, the cost is greater than with other forms of title assurance.<sup>24</sup> Additionally, in some instances, a land buyer using the Torrens system must defend suits against the property and, in other circumstances, must file a claim for indemnification in case a loss is suffered.<sup>25</sup> Inadequacy of guaranty funds is also a major problem with the Torrens system.<sup>26</sup> Because this title assurance method is based upon a public official's certificate of title, a corrupt or incompetent public official can deplete the indemnification fund and destroy the stability of titles the Torrens system is intended to foster.<sup>27</sup> Title insurance companies, abstracters, and title examining lawyers opposed the Torrens system during the 1920's and 1930's, fearing that its general acceptance would put them out of business.<sup>28</sup> As a result, although legislatures could remedy many of the Torrens system's shortcomings,<sup>29</sup> this method of title

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The expediency and accuracy of both types of indices, however, are predicated on the efficiency of the indexer.

21. See Brossman & Rosenberg, *supra* note 3, at 444-45. The standard of care for lawyers and abstracters is to exercise reasonable care and skill in providing title information. See text accompanying notes 145-47 *infra*.

22. Brossman & Rosenberg, *supra* note 3, at 444-45.

23. Whitman, *supra* note 8, at 46.

24. See Quiner, *supra* note 10, at 713-14; Whitman, *supra* note 8, at 62-64.

25. Quiner, *supra* note 10, at 714.

26. Whitman, *supra* note 8, at 62 n.94 (one claim wiped out California's fund in 1937); see AXELROD, *supra* note 19, at 712-13 (Alberta legislature limited amount of recovery resulting from register error).

27. Quiner, *supra* note 10, at 714 ("The thrust of this approach is that the certificate of title, compounded with the appropriate statutes of limitations, will become the background of good and safe title.").

28. See Johnstone, *supra* note 3, at 513; Whitman, *supra* note 8, at 62 n.96.

29. One authority recommends a system of federal reinsurance to resolve the guaranty fund insufficiency problem; the use of an administrative agency, rather than judicial registration, to lower costs of registering; and the use of existing title insurance policies

assurance is rarely used.

Title insurance developed to provide benefits lacking in the other title assurance systems. Insolvency may be a major defect of the lawyer's opinion, the abstract, and the Torrens methods of title assurance, and title insurance usually answers this problem by offering a solvent insurer to answer in damages for title losses.<sup>30</sup> Further, unlike other providers of title assurance, most title insurers provide legal defense for their insureds in suits based upon a title defect within policy coverage.<sup>31</sup> Additionally, title insurance coverage is unique because it extends to remote or latent risks<sup>32</sup> actuarially unlikely to result in losses.<sup>33</sup> Finally, the majority of title insurers, including Washington insurers, operate as title plant companies and accordingly do not rely on inefficient public records and indices in performing title searches.<sup>34</sup>

Title insurance has drawbacks as well as benefits. An examination of a title insurance policy reveals one salient feature: title insurers are not liable for most title defects disclosed by the search.<sup>35</sup> Although title defects disclosed by the search as a general rule are excepted specifically from policy coverage, title insurance policies also contain general exceptions that relieve the insurer of the necessity of searching for matters contained

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and lawyer's certificates of title as the basic evidence for title registration. He also suggests consolidation of title plants. Whitman, *supra* note 8, at 64-65. See generally P. Basye, *supra* note 2, § 1.

30. See Johnstone, *supra* note 3, at 499. See generally Quiner, *supra* note 10, at 719, 721. Guaranty fund requirements contribute to title insurers' solvency.

31. See Johnstone, *supra* note 3, at 499-500.

32. Examples of such remote risks include recorded documents which appear to be valid but are void because of forgery, improper execution, incapacity, impersonation, or a transfer by one whose name differs from the record owner's. See Curtis, *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants with Suggested Reforms*, 7 PAC. L.J. 1, 5-6 (1976); Johnstone, *supra* note 3, at 495-96.

33. See Brossman & Rosenberg, *supra* note 3, at 443; Johnstone, *supra* note 3, at 498; Quiner, *supra* note 10, at 719 ("lawyers [in contrast to insurers] have never been sufficiently able to provide assurance from hidden risk"); Comment, *supra* note 6, at 1164.

34. Quiner, *supra* note 10, at 720; Comment, *supra* note 6, at 1164 & n.20.

35. See O. BROWDER, R. CUNNINGHAM & J. JULIN, *BASIC PROPERTY LAW* 953 (2d ed. 1973) [hereinafter cited as BROWDER]; Johnstone, *supra* note 3, at 495-96 ("[Title insurance] critics assert that title [insurers] are not . . . insurers since they except any risks apparent after the title has been examined."); Payne, *supra* note 13, at 439 (title insurers exempt the very risks against which they are supposed to insure); Comment, *supra* note 6, at 1172 & n.61.

therein.<sup>36</sup> In the latter instance, the parties are not given notice that potential defects exist and, consequently, executory buyers prior to closing are unable to negotiate the risk of loss with their sellers or demand that sellers cure the defect.<sup>37</sup> In contrast, risks contained in the specific exceptions, although likewise not insured against, do provide the contracting parties with knowledge of specific title flaws. This knowledge, in turn, enables the executory purchaser to negotiate with the seller the risk of loss and demand cure or rescission if the seller fails to cure a major defect.

It is true, however, that title insurance policies cover hidden defects not discoverable by a reasonable search—those that previous assurance systems failed to address.<sup>38</sup> Yet, only certain risks are covered.<sup>39</sup> Title policies exclude many off-record risks such as labor liens and survey matters.<sup>40</sup> Because these exclu-

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36. See note 35 *supra* and text accompanying notes 73-75 *infra*.

37. See text accompanying notes 68-69 *infra*. See generally P. GOLDSTEIN, *REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE* 123-39, 165-68 (1980).

38. See text accompanying notes 32-33 *supra*.

39. Johnstone notes that the more risky defects are usually explicitly excepted. See Johnstone, *supra* note 3, at 494-97. See generally P. GOLDSTEIN, *supra* note 37, at 200.

40. *Id.* at 497. Other standard exceptions include liens or encumbrances not found in the public records, mechanic's liens, and matters of zoning. See Curtis, *supra* note 32, at 3 n.11; Whitman, *supra* note 8, at 58 n.79; Comment, *supra* note 6, at 1172 nn.60 & 61. The Washington Land Title Association (WLTA) standard form policy provides general exceptions for survey or encroachment matters, unrecorded easements, material or labor liens, patent reservations, possession matters, water rights matters, and government regulation of use, enjoyment, or occupancy. This list is not exclusive. See Hogan, *Selected Title Insurance Policies and Coverages*, in *REAL ESTATE AND THE GENERAL PRACTITIONER* 1, 7 (WSBA Section of Real Property, Probate & Trust Law ed. 1976). Assumedly, a title insurer's efforts in tracking down some of these excluded matters would prove uneconomical.

The new ALTA Residential Title Insurance Policy (1979) eliminates some of the above exceptions. However, it still excludes building and zoning ordinances, laws governing land use (unless the land cannot be used for a single-family residence), land improvements, land division, and environmental protection. It also excludes from coverage circumstances requiring removal of boundary walls and fences. See Bowling, *Recent Significant Developments*, *TITLE INSURANCE: SPECIAL PROBLEMS* 17 (Practicing Law Inst. ed. 1980). Washington title insurers, at the time this piece went to publication, have not yet used the ALTA Residential Title Insurance Policy, nor is there any indication whether the title industry in Washington will adopt it *in toto*.

Even if the title policy did not list within its general exceptions these non-record risks, facts indicating the *possibility* of such off-record risks resulting in loss would likely compel the insurer to exclude specifically the questionable off-record matter. Ring, *Title Insurance For The Owner - Or What You See Is Not Necessarily What You Get*, 52 L.A. B.J. 20, 21-24 (No. 1, July, 1976) ("if the title company's investigation discloses facts that would indicate the existence of any of these non-record defects, it will except

sions obviate the title company's need to search for such matters, they may leave both the buyer and seller unprotected. The weaknesses of title insurance led one commentator to describe it as a "snare and a delusion[,] for many policies written today exclude from coverage the very risks that a vendee desires insured."<sup>41</sup>

To understand how a duty upon title insurers to search and disclose title defects can alleviate these infirmities,<sup>42</sup> a brief

that specific item from the coverage of the policy.").

41. Roady, *Professional Liability of Abstractors*, 12 VAND. L. REV. 783, 794 (1959).

Another criticism leveled against the title industry attacks its tendency to act as a barrier to land conveyancing reform:

Title insurance was conceived of in an effort to meliorate some of the worst of [the weaknesses of the conveyancing process]. But it is designed to keep the patient alive, not to cure him, and has the inherent vice that it institutionalizes existing ills. It should not be treated as creating a vested interest in the inefficiencies of the land records. The public requires, to the contrary, that means be devised to make conveyancing more efficient and more certain. The very existence of title insurance stands in the way of such an objective.

Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 387 (1963). See also Brossman & Rosenberg, *supra* note 3, at 442. Others argue that all insurance companies operating title plants in the same area should consolidate to avoid high costs and needless duplication. Whitman, *supra* note 8, at 60-63. Another commentator sees three types of criticism of the title business: (1) lack of effective state regulation of title industry rates; (2) failure of the marketplace adequately to regulate title insurance because of the title industry's oligopolistic nature; and (3) the suspect nature of the relationship between title insurers and institutional lenders. Quiner, *supra* note 10, at 721-23.

42. Comprehension of the nature of title insurance and the desirability of imposing a duty upon title insurers to search and disclose title defects necessarily entails an understanding of four basic concepts: search, disclosure, insurability, and marketability. To illustrate the distinctions between these terms, assume that a buyer *B* wishes to purchase certain property from *S*. The property, however, is subject to a local assessment on the property to be paid in annual installments over a 40-year period. *S* has paid the first four installments. *S* conveys the property to *B*.

*Search* is the procedure where the title insurer, before issuing a policy, looks through the records to discover title defects, liens, and encumbrances. If it fails to discover the assessment, neither the title insurer nor *B* becomes aware of its existence. This omission may be a breach of the duty to search, but not of the duty to disclose.

*Disclosure* is a different situation. Assume the title insurer searches the records, discovers the assessment, but fails to inform *B* of its existence. Here the title insurer is aware of the defect, but *B* is not. The insurer may have breached the duty to disclose, but it has not breached the duty to search. The insurer might fail to disclose here because the assessment is the type of item that falls within the policy's general exceptions. For the same reason, an insurer might fail to search for such a risk. In either case, *B* cannot negotiate with *S* regarding the risk of loss and, therefore, the disclosure function of the title policy is not served. A different result follows if the insurer specifically had excepted the assessment from coverage. This disclosure via the specific exception enables *B* to avoid or negotiate the risk with *S* prior to closing (or require *S*'s cure, waive *S*'s cure, or allow *B*'s rescission of the contract, if the assessment renders title unmarketable).

*Insurability* is illustrated where the insurer searches the record, uncovers the assess-

examination of the case law in Washington is instructive. The Washington Supreme Court declined to impose such a duty on Washington title insurers in *Shotwell v. Transamerica Title Insurance Company*.<sup>43</sup> In *Shotwell*, plaintiffs discovered a forty-foot-wide right-of-way transecting their river front property. Prior to plaintiffs' purchase of the tract in 1974, Transamerica issued a preliminary commitment for title insurance,<sup>44</sup> agreeing to issue its policy to plaintiffs subject to certain exceptions. The

ment, weighs the actuarial possibilities of the risk becoming a loss, decides whether to assume or exclude the risk, and perhaps adjusts the premium accordingly. Here the insurer likely would declare the existence of the lienable assessment and exclude it from policy coverage. By so doing, however, it has informed *B* of the assessment's existence. *B* can then negotiate with *S* to deduct the unpaid assessment installments from the purchase price at closing. If, however, the assessment falls within an area of risk included in the policy's general exceptions and the insurer thereby decides not to except it specifically, *B*, lacking knowledge, is thereby denied an opportunity to reject title or negotiate a different price.

*Marketability* is the concept that the title, in contrast to being merely insurable, is "reasonably free of reasonable doubt." *Wilson v. Korte*, 91 Wash. 30, 32, 157 P. 47, 49 (1916); *accord, Colpe v. Lindblom*, 57 Wash. 106, 106 P. 634 (1910). Marketability, unlike insurability, connotes curative action and trouble-free ownership. Washington law presumes that *S* will convey marketable title. See text accompanying note 70 *infra*. Thus, assuming that the assessment renders the title unmarketable, *B* can demand that *S* cure the defect and, if *S* fails to do so, opt out of the contract with impunity. The Washington Supreme Court succinctly highlighted the insurability-marketability dichotomy in *Hebb v. Severson*, 32 Wash. 2d 159, 201 P. 2d 156 (1948):

[E]ven though a title be insurable, it does not follow, necessarily, that the title is also good or marketable. It cannot be gainsaid that any title, no matter how defective, is, from a practical standpoint, insurable, if the premium rate be set high enough, or the list excepting defects which are not insured against be long enough. Therefore, to say that a title is insurable merely means that it is capable of being insured, and not that it is also good or marketable.

This hypothetical is based on the case of *Mayers v. Van Schaick*, 268 N.Y. 320, 197 N.E. 294 (1935). In *Mayers*, the certificate of title insurance made no mention of the local assessment. The court held that the title company had not agreed to protect the purchaser against liability for the unpaid assessment because the assessment was not a lien at the time of the policy. A strong dissent stated:

Title insurance policies are intended to inform the purchaser of any defects in the title, claims against or burdens or requirements on the property. Unless defects or objections are noted, at least in the exceptions, the policy becomes valueless. An assessment levied against the property, although not a lien nor payable until the future, is clearly a burden on the property concerning which the purchaser seeks information. To hold that although objections to a title are not noted either by way of exception or otherwise, those insuring the title are not liable, is to render useless title insurance.

*Id.* (Finch, J., dissenting).

43. 91 Wash. 2d 161, 588 P.2d 208 (1978).

44. A preliminary commitment for title insurance is the same as a preliminary title report. See Pioneer National Title Insurance Co. (PNTI), *What is Title Insurance?*, MESSAGE, May 1973, at 2, 4. It has been held that a preliminary title report is equivalent to a title abstract. 9 J. APPLEMAN, *supra* note 16, § 5213 at 50.

policy insured against "loss or damage sustained by reason of . . . [a]ny defect in, or lien, or encumbrance on, said title"<sup>45</sup> except those listed, one of which was "right of way for existing roads."<sup>46</sup> Although the right-of-way was a matter of public record,<sup>47</sup> Transamerica failed to advise plaintiffs of its existence even though a reasonable search would have revealed it. The Shotwells sued Transamerica for damages,<sup>48</sup> asserting the policy covered this condition. The trial court, however, held for the defendant, and plaintiffs appealed.<sup>49</sup>

The court of appeals considered and resolved *sua sponte* the question of duty. Emphasizing the reasonable expectations of the land buyer and the interlocking of title insurance and title searches, the appellate court held that a title company has a duty to conduct reasonable searches for title defects and to

45. 91 Wash. 2d at 163, 588 P.2d at 208. A typical policy provides that "TITLE COMPANY does hereby insure against loss or damage sustained by reason of any defect in, or lien or encumbrances on said title existing at the date hereof, not shown in Schedule B," the list of exceptions. Thus, if a defect occurs that is not excluded in the policy, the purchaser can sue on the contract if the title company fails to pay upon demand. *E.g.*, *Kiniski v. Archway Motel, Inc.*, 21 Wash. App. 555, 586 P.2d 502 (1978); *Securities Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Wash. App. 664, 583 P.2d 1217 (1978).

46. In addition to this specific exception, the relevant general exception clauses read:

1. . . . public or private easements, streets, roads, alleys or highways, *unless disclosed of record by . . . decree of a court of record . . .*
2. . . . rights or claims based upon instruments or upon facts *not disclosed by the public records but of which rights, claims, instruments or facts the insured has knowledge.*

91 Wash. 2d at 163, 588 P.2d at 208.

47. A Clallam County court decree established the right-of-way in 1944.

48. It is unclear what measure of damages plaintiffs sought. Plaintiffs' brief states that "[p]laintiffs sued to recover under a title insurance policy for losses resulting from existence of an undisclosed county right-of-way across plaintiffs' property." Brief of Appellants at 2, *Shotwell v. Transamerica Title Ins. Co.*, 16 Wash. App. 627, 558 P.2d 1359 (1976). But plaintiffs-appellants' reply brief states that "the marketability of that portion of their [plaintiffs'] property is seriously impaired." Appellants' Reply Brief at 7. Thus, it appears that plaintiffs sought the difference between the fair market value of the land with and without the easement. Plaintiffs sought \$50,000 on an \$85,000 policy. Findings of Fact and Conclusions of Law at 2-3, *Shotwell v. Transamerica Title Ins. Co.*, No. 22385 (Super. Ct. Clallam County, June 13, 1975).

49. Plaintiffs argued that policy language excepting "right of way for existing roads" excluded from coverage only the ten-foot-wide visible road that was much narrower and shorter than the public right-of-way. The trial court held that the "policy of title insurance issued by the Defendant to the plaintiffs specifically excepted the right of way for the existing public road . . . as a 'defect, lien or encumbrance' which the Defendant did not insure." Findings of Fact and Conclusions of Law at 4, *Shotwell v. Transamerica Title Ins. Co.*, No. 22385 (Super. Ct. Clallam County, June 13, 1975).

advise applicants of any impediments the search uncovers.<sup>50</sup> The court also relied on the Washington statute requiring title insurers to maintain tract indices<sup>51</sup> and recognized that title insurance is designed to delineate and prevent, rather than assume, risk of loss.<sup>52</sup>

Unlike the court of appeals, the Washington Supreme Court left open the duty issue. The court instead reviewed the title policy as it would review any other insurance policy, construing ambiguities against the insurer and adopting the construction most favorable to the insured.<sup>53</sup> Inquiring as to the average person's<sup>54</sup> interpretation of the policy, the court found it "hard to believe that an *average* person purchasing this type of insurance would contemplate that a 40-foot right-of-way extending over his entire property would have been excluded from policy coverage."<sup>55</sup> The court held that the policy was ambiguous as a matter of law and that the exclusionary phrase "right of way for existing roads" embraced only visible roads, not a partially invisible right-of-way.<sup>56</sup> Accordingly, the court concluded that the policy covered the flaw on the title arising from the county right-of-way, thereby affirming the court of appeals' reversal and remand to determine damages.<sup>57</sup>

In choosing to resolve the Transamerica appeal by contract analysis, the supreme court avoided the issue of Transamerica's duty to search and disclose title defects.<sup>58</sup> Although conceding

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50. 16 Wash. App. at 631, 558 P.2d at 1361 (1976).

51. *Id.* See text accompanying notes 86-89 *infra*.

52. See text accompanying note 79 *infra*. It is unclear whether the court of appeals imposed a duty based on implied contract or tort. See text accompanying notes 137-55 *infra*.

53. 91 Wash. 2d at 168-69, 588 P.2d at 212. This rule of construction presupposes unequal bargaining power. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 3-11 (2d ed. 1977) ("This rule applies with particular force in a case of a standardized contract and in a case in which the drafting party had a stronger bargaining position."). *Id.* at 122 n.40.

54. The term "average person" requires no definition because its meaning is commonly understood. See *State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964).

55. 91 Wash. 2d at 169, 588 P.2d at 212.

56. The court was referring to a road that was narrower and shorter than the court-decreed right-of-way. See note 49 *supra*.

57. 91 Wash. 2d at 170, 588 P.2d at 213. The court found another ambiguity in the exclusion "right of way for existing roads" by contrasting that exclusion with the general exception which excluded "public . . . easements, streets, roads . . . unless disclosed of [public] record." *Id.* at 167, 588 P.2d at 212. See note 46 *supra*. The court read the general exception to imply negatively that if such easements or roads were disclosed by public record, they fell within policy coverage. 91 Wash. 2d at 167, 588 P.2d at 212.

58. The parties had not raised the issue. However, judges faced with novel and nota-

that the combination of consumer expectations and the services title companies actually provide may warrant a duty to search and disclose,<sup>59</sup> the court declined to impose a duty because the parties did not brief the issue and because the court found an alternative basis for its decision.<sup>60</sup> The court's dictum leaves unclear whether the court will impose a duty when the occasion properly presents itself. The *Shotwell* dictum also fails to reveal whether the supreme court would adopt a tort or an implied contract theory if it imposed a duty.<sup>61</sup>

The duty issue, then, is an open question in Washington. An analysis of whether courts ought to impose such a duty should focus initially on the typical real estate transaction. The average home buyer usually completes an Earnest Money Receipt and Agreement (EMRA) form with the seller. In the EMRA form, the seller promises "title . . . to be free of encumbrances, or defects" except those specifically listed.<sup>62</sup> The EMRA form also lists general exceptions, including federal patents, state deeds, building or use restrictions general to the district, building or zoning regulations, and existing easements not inconsistent with the buyer's intended use.<sup>63</sup> The seller is obligated to provide title insurance prior to closing, and thus, delivery of the policy or preliminary title report is a condition precedent to the buyer's

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ble societal issues should not lightly decline review. Justice Cardozo believed that courts should engage in a balancing approach, weighing the social interest in precedent against the social interest "served by equity and fairness or other elements of social welfare. This may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey." B. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 112-13 (1922).

59. "We recognize such a duty might arise from the combined expectations of a title policy applicant and the service to be performed by title insurance companies." 91 Wash. 2d at 165, 588 P.2d at 211.

60. Thus, *Shotwell* does not stand for the proposition that failure to search and disclose is not actionable in tort or that there is no implicit duty to search and disclose. In fact, the supreme court cites more authorities supporting a duty than does the court of appeals. The court merely found it "unnecessary" to reach this issue. 91 Wash. 2d at 170, 588 P.2d at 213. The consumer public must now wait for another case to climb the time-consuming ladder of appellate review to discover what the supreme court will do.

61. It seems clear that title insurers will not insert express contract clauses imposing a duty to search. Thus, the two sources for judicial imposition remain (1) implied contractual duty and (2) tort duty arising from the parties' relationship and the disparity between the consumer's reasonable expectation and what the title industry actually provides. See Comment, *supra* note 6, at 1167.

62. See Falconer, *Earnest Money Receipt and Agreement*, in *REAL ESTATE AND THE GENERAL PRACTITIONER* *supra* note 40, at 221.

63. *Id.* at 222-24, 247-48.

duty to perform.<sup>64</sup> As a general practice, the realtor orders the title insurance as the seller's agent, and the seller, rather than the buyer, pays the premium.<sup>65</sup> If the buyer is also applying for a loan, a mortgagee title insurance policy to protect the lender is also required; however, the buyer, not the lender, pays for the mortgagee policy.<sup>66</sup> If the title is not insurable,<sup>67</sup> the seller must return the earnest money unless the buyer waives the defects<sup>68</sup> or the seller cures them.<sup>69</sup> Even if the contract is silent as to title quality, Washington law presumes the seller to convey "good or marketable" title.<sup>70</sup> Thus, the disclosure of defects to the purchaser is paramount in the executory contract phase prior to closing. Absent adequate disclosure, the executory purchaser cannot avoid or negotiate title risks or pursue other alternatives such as waiver, cure, and rescission.

The arguments for and against establishment of a duty also require familiarity with the typical title insurance policy. The face of Washington Land Title Association's (WLTA) standard form policy includes the insuring agreement, which provides basically that the insurer is liable for loss or damage due to defects, liens, or encumbrances except those specifically or gen-

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64. *Kolosoff v. Turri*, 27 Wash. 2d 81, 176 P.2d 439 (1947). See *Falconer, supra* note 62, at 228.

65. See *Falconer, supra* note 62, at 228. Sometimes, though, the buyer must apply for title insurance himself if he desires coverage. See *Johnstone, supra* note 3, at 494. Most real estate transactions involve realtors. See generally *Rauschenbush, supra* note 11, at 204.

66. The realtor customarily sends the paperwork to the lender or escrow agent and orders the loan and owner policies at the same time. Interview with Betty Olson, Realtor, in Bellevue, Washington, Feb. 13, 1980.

67. Paragraph 2 of the EMRA provides *inter alia*:

The title policy to be issued shall contain no exceptions other than those provided for in said standard form plus encumbrances or defects noted in Paragraph 1 above. Delivery of such policy or title report to closing agent . . . shall constitute delivery to purchaser. If title is not so insurable as above provided and cannot be made so insurable by [the] termination date . . . earnest money shall be refunded and all rights of purchase terminated. Provided that purchaser may waive defects and elect to purchase.

*Falconer, supra* note 62, at 248 (copy of EMRA). According to *Falconer*, this clause is misleading and should instead read: "If a report or policy of insurance cannot be issued with no encumbrances and defects except those set forth in paragraph 1 . . . ." *Id.* at 228.

68. See EMRA in *id.* at 247-48.

69. Negotiation is always possible to determine which party will bear certain risks. Interview, *supra* note 66. See *Falconer, supra* note 62, at 225.

70. See *Falconer, supra* note 62, at 225. This duty to convey marketable title can be altered contractually. See *id.* at 225, 248. The policy behind the marketable title presumption is that no one should have to buy a lawsuit. See note 42 *supra*.

erally excepted.<sup>71</sup> Schedule A of the WLTA policy contains the policy's subject matter.<sup>72</sup> Schedule B lists all the specific defects, encumbrances, and liens discovered of record that are excluded from coverage.<sup>73</sup> Schedule B also sets forth printed general exceptions<sup>74</sup> such as encroachments, boundary questions, federal patents, limitation by government regulation regarding subdivision, use, enjoyment, or occupancy, defects known to the insured, prohibition on the use or improvement of land, general taxes not yet payable, and noncompliance with consumer credit laws.<sup>75</sup> The WLTA title insurance policy significantly lacks any reference to insurer's negligence or even a title search.

Judicial imposition of a duty upon title insurers to conduct reasonable searches and to disclose results to land purchasers should help eliminate the weaknesses of title insurance. Several reasons support establishment of such a duty. First, because title insurance evolved from other title assurance methods predicated on title searches,<sup>76</sup> title insurers do in fact conduct title searches as a general practice.<sup>77</sup> When insurers issue preliminary commitments or title reports, they have impliedly undertaken a title search despite the absence of any express policy provision requiring a search.<sup>78</sup> Furthermore, title insurance differs from

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71. The period of coverage differs for the type of insured: if the insured is a lender, it continues as long as the mortgage or deed of trust is a lien on the property; if the insured is a purchaser-owner, it continues until sale or other disposal. See Hogan, *supra* note 40, at 5.

72. *E.g.*, policy limits, policy number, date, premium, insured's name, the interest insured, and a legal description. *Id.* at 5, 22.

73. *E.g.*, mortgages, recorded liens, easements, and other defects uncovered in the search. *Id.* at 23.

74. *Id.* at 5-7. See note 40 *supra* (listing examples of such general exceptions).

75. The EMRA general exceptions parallel many title policy exceptions. See Hogan, *supra* note 40, at 5-7, 16, 25, and text accompanying note 63 *supra*. The ALTA Residential Title Insurance Policy exceptions include violations of building and zoning regulations, title risks created or agreed to by insureds, and lack of rights in streets, alleys, or waterways that touch the insured's land. See Bowling, *supra* note 40, at 570.

76. See text accompanying notes 9-15 *supra*. As previously indicated, title insurance emerged to remedy the inefficiencies of the abstract system. The abstract system, in turn, evolved from the lawyer's opinion method. Because the abstract method relies on lawyers, the two are quite similar.

77. See, *e.g.*, Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 938, 122 Cal. Rptr. 470, 485 (1975); Shotwell v. Transamerica Title Ins. Co., 16 Wash. App. 627, 631, 558 P.2d 1359, 1361 (1976); P. BAYE, *supra* note 2, § 3; PNTI, *supra* note 44, at 2.

78. *Contra*, Hawkins v. Oakland Title & Guar. Co., 165 Cal. App. 2d 116, 127, 331 P.2d 742, 748 (1958) (no express or implied representation that defects listed are exclusive); see Banville v. Schmidt, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974) (relying on RESTATEMENT OF TORTS § 552 (1938) in holding insurer liable for negligent misrepresentation in issuing erroneous preliminary commitment it knew buyer would rely upon).

casualty insurance in that title insurance stresses loss prevention, not risk assumption.<sup>79</sup> This focus on loss prevention highlights the function of title policies or preliminary title reports in real estate transactions. By excluding specifically from coverage those defects disclosed by the company's search, the insurer thereby informs the executory purchaser of potential title defects; the now knowledgeable executory purchaser may negotiate the risk with the seller or, in appropriate circumstances, demand cure, waive cure, or rescind the contract.<sup>80</sup> Thus, it is clear that insurers can prevent loss only by conducting searches to find potential defects. The duty to search and disclose would require only that such searches be reasonably made<sup>81</sup> and the

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American Land Title Association (ALTA) owner policies, WLTA standard form policies, and ALTA Residential Policy (1979) are silent on the "searching" issue. ALTA owner policies may be found in TITLE INSURANCE IN MAJOR REAL ESTATE TRANSACTIONS, *supra* note 3, at 349, and B. STONE, MODERN LEGAL FORMS, §§ 24.1, 25.1 (Supp. 1980). ALTA adopted these forms in 1970. See text accompanying notes 71-75 *supra*.

79. Title insurance generally is not written on a casualty basis, and, conversely, casualty insurance is not designed to prevent future loss. PNTI, *supra* note 44, at 2; Robinson, *Title Insurance and the Hairdresser*, TITLE NEWS, April 1979, at 18. In fact, the loss payouts and adjustments for title insurance constitute only about 4% of the amount collected in premiums. In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974), the court stated:

The investigation of the risk of loss prior to deciding whether to insure that risk is clearly part of the business of insurance. Anyone . . . knows that the cost of this investigation, which generally involves . . . the maintenance of a title plant, far exceeds the actuarial cost of the losses incurred. . . . [I]nvestigation . . . becomes more important than the actual insurance protection. . . . [I]t is a substitute for the risk.

*Id.* at 574.

80. See text accompanying notes 37 and 68-69 *supra*.

81. Although courts would determine the scope of a reasonable search, they should consider the information available to title insurers in their title plants. Thus, the starting point of inquiry would be WASH. AD. CODE § 284-16-030 (1977), defining what the legislature meant when it required title insurers to maintain a "complete set of tract indexes." WASH. REV. CODE §§ 48.29.020, .040 (1979). See note 83 *infra*.

The Washington Administrative Code defines tract indices as "a set of indexes from which the record ownership and condition of title to all land within the . . . county can be traced and ascertained, such set of indexes to be complete from the inception of title from the United States of America." WASH. AD. CODE § 284-16-030(1) (1977). The title company must maintain not only tract indices for judicial proceedings and recorded documents affecting title to particular property and imparting constructive notice, but also name indices for matters affecting title to all real property of the person or entity named in the instruments. *Id.*

In conformity with the administrative agency requirements, a court could define a reasonable search to encompass any defects that would render the title unmarketable, including all matters of record such as tax liens, easements, judgments, mortgages, mechanic's liens, material liens, unexpired leases, and other matters such as building code violations and restrictive covenants if the insurer has or should have knowledge of

results thereof reasonably revealed.<sup>82</sup>

Judicial establishment of a duty to search and disclose would also further the goals of Washington's statutory scheme pertaining to title insurers. Three sets of such statutes exist, designed primarily to protect the public in dealing with title insurers. The statutes that protect the public from unfair practices of insurance companies, including title companies, are the most obvious.<sup>83</sup> Second, legislation passed in 1979 requires companies such as banks, credit unions, and title insurers to give written notice to parties involved in property sales and loans that the documents may affect their legal rights and that they should consult a lawyer if they have questions.<sup>84</sup> Although the act does not cover title insurance *policies*,<sup>85</sup> its intent with respect to the notice requirement is public protection.

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them. The court also might have to invalidate policy exceptions in the process of defining a reasonable search.

82. Both lawyers and abstracters are held to a standard of reasonable care. As discussed in text accompanying notes 137-48 *infra*, the similarity between title insurance and the abstract and lawyer's opinion methods of title assurance justifies imposition of a similar standard of care.

Although courts holding title insurers liable for negligent searches generally limit the scope of reasonableness to documents discoverable within the official chain of title rather than tract indices, see Curtis, *supra* note 32, at 4, one court found negligence in failing to disclose a document in the insurer's file. *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973).

Title insurers can reasonably reveal the results of title searches simply by informing the insured of any defect that may materially affect property value. This requirement, therefore, goes to both form and substance. See notes 116 & 128.

83. The state code prohibits persons engaged in the insurance business from using unfair methods of competition or engaging in deceptive acts or practices and authorizes the insurance commissioner to promulgate regulations in accordance therewith. WASH. REV. CODE § 48.30.010 (1979). See WASH. AD. CODE §§ 284-30-300 to -410 (Supp. 1978) (commissioner's regulations). California's chief deputy insurance commissioner specifically warned the title industry in California to read the state's Unfair Trade Practices Act because it applied to them, particularly in regard to handling claims. McNitt, *A Regulator's View of the Title Industry*, TITLE NEWS, Dec. 1977, at 7, 12. One could argue that title insurers are engaging in an unfair trade practice because the actual practice of the industry does not comport with the expectations of the average purchaser who relies on the preliminary commitment (ordered by the seller) in purchasing property.

84. 1979 Wash. Laws 1st Ex. Sess. ch. 107 § 1 (codified as WASH. REV. CODE § 19.62.010 (West Supp. 1980)). The impetus for this legislation came from the realty and lending industries who think non-lawyers should be allowed to prepare routine documents. *Question looms over who legally can prepare routine documents*, The Seattle Times, October 5, 1980, F at 2, col. 1.

85. The documents covered by the act are "limited to deeds, promissory notes, deeds of trust, mortgages, security agreements, assignments, releases, satisfactions, reconveyances, contracts for sale . . . , and bills of sale . . ." 1979 Wash. Laws 1st Ex. Sess. ch. 107 § 1(2).

Imposition of a duty to search and disclose would also comport with the third type of public protection legislation: the requirement that title insurers maintain complete sets of tract indices.<sup>86</sup> Compliance with this statute means that Washington title insurers operate as title plants containing, at the minimum, duplicates of all the recorded encumbrances affecting title to property within the county.<sup>87</sup> Furthermore, by defining title insurance as "insurance of owners of property . . . against loss by . . . defective titles . . . and services connected therewith,"<sup>88</sup> the legislature impliedly sanctioned recognition of a duty reasonably to search and disclose. The fact that tract indexing tends to offer greater protection because of its superiority to traditional indexing systems<sup>89</sup> also bolsters the inference that such a duty is congruent with the legislative scheme to protect the public.<sup>90</sup>

A legal obligation to search and disclose would not only conform to statutory regulation of title insurers and the prevailing practice of the industry to conduct title searches, but also is in keeping with the very definition and purpose of title insurance as expressed by courts,<sup>91</sup> commentators,<sup>92</sup> and the title industry

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86. WASH. REV. CODE § 48.29.020 (1979).

87. A title company normally carries out its own independent searches. See Payne, *The Why, What, and How of Uniform Title Standards*, 7 ALA. L. REV. 25, 27 (1954); Comment, *supra* note 6, at 1164; notes 20 & 81 *supra*.

88. WASH. REV. CODE § 48.11.100 (1979) (*emphasis added*).

89. The grantor-grantee index in the public recording system is inferior to the tract index in organization and expediency in searching. The tract index is not inherently superior but works better in practice. See notes 19-20 *supra*.

90. The remainder of chapter 48.29 protects the public by requiring title insurers to make a guaranty fund deposit, maintain a special reserve fund, and not charge excessive rates. WASH. REV. CODE §§ 48.29.010-.140 (1979).

91. See text accompanying notes 94-95 *infra*. See generally *Transamerica Title Ins. v. Ramsey*, 507 P.2d 492 (Alaska 1973); *First Am. Title Ins. Co. v. Casper*, 96 Cal. App. 3d 282, 157 Cal. Rptr. 798 (1979); *Banville v. Schmidt*, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974); *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal. App. 2d 116, 331 P.2d 742 (1958); *Pierson v. Bill*, 138 Fla. 104, 189 So. 679 (1939); *Pruett v. Mississippi Valley Title Ins. Co.*, 271 So. 2d 920 (Miss. 1973).

92. *E.g.*, P. BAYE, *supra* note 2, at 14 ("Most title insurance is . . . based upon . . . a careful search of the record."); *Brossman & Rosenberg, supra* note 3, at 443 ("The principal function of the commercial title insurer is twofold: to delineate . . . defects . . . by the performance of a title examination and, based upon the results of this examination, to issue a policy . . ."); *Johnstone, supra* note 3, at 494 ("Title [insurance combines] a thorough title examination with the insurance of losses from some potential defects."); *Quiner, supra* note 10, at 715 ("Prior to the issuance of [the] binder [or preliminary commitment], the title company will make a very thorough investigation of the records and documents affecting the title in question."). See generally *BROWDER, supra* note 35, at 941-43, 953.

itself.<sup>93</sup> For instance, one Washington court defined title insurance as "a guaranty of the accuracy of a company search and record title on a specific property."<sup>94</sup> It is said to be "more than a mere contract of indemnity": "[T]he very purpose . . . of the title insurance transaction is to obtain a professional title search, opinion and guarantee."<sup>95</sup> The industry defines its primary function as loss prevention, not pure risk assumption, thus distinguishing title insurance from other types of insurance.<sup>96</sup>

A duty to search and disclose would provide additional consumer protection now lacking in title insurance. The average home buyer incurs a substantial debt and invests the majority of his life savings in buying a home.<sup>97</sup> Yet, in the usual real estate transaction, the vendor, not the vendee, applies and pays for the title policy, leaving the vendee at most a third-party beneficiary.<sup>98</sup> Recognizing the precariousness of the vendee's position, some courts have invoked the doctrine of negligent misrepresentation to hold title insurers liable for negligent search and disclosure.<sup>99</sup> The Restatement (Second) of Torts, section 552,

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93. According to ALTA, the primary purpose of title insurance is to eliminate risks: therefore, "title insurance companies undertake a thorough search of all public records affecting a title before issuing title insurance policies." ALTA, *The Nature of and Need for Title Insurance Services*, I THE TITLE INDUSTRY: WHITE PAPERS (1976), reprinted in TITLE INSURANCE IN MAJOR REAL ESTATE TRANSACTIONS, *supra* note 3, at 577, 581-83.

94. *Kiniski v. Archway Motel, Inc.*, 21 Wash. App. 555, 560, 586 P.2d 502, 506 (1978).

95. *Lawyer's Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764, 767 (8th Cir. 1966); *accord*, *Pierson v. Bill*, 138 Fla. 104, 189 So. 679 (1939). See Note, *Title Guaranty Companies Are Subject to Suit by the Insured on the Title Insurance Contract Although No Suit Has Been Filed Against the Insured and No Adverse Claimant Has Taken Possession of the Property*, 8 HOUSTON L. REV. 580, 581 (1971) ("The nature and purpose of today's title insurance is to insure and guarantee a title free of defects and to relieve the insured of the burden of examining the public records to determine the condition of the title to the land.").

96. See text accompanying note 79 *supra*.

97. See Gaudio, *Title Covenants for the Iowa Homeowner—Some Good News and Much Bad News*, 23 DRAKE L. REV. 1 (1973).

98. See Comment, *Title Searches: Tort Liability in California*, 7 SANTA CLARA LAW. 257, 257 (1967). However, the buyer is the "named insured." Some courts do not even address or recognize this privity problem, i.e., the fact that the seller pays for the title insurance. Also, even if the purchaser, rather than the seller, applied for title insurance, the WLTA policy limits actions to those based on the policy provisions. See note 105 *infra*. Thus, if a court upholds this exculpation clause, the buyer can never recover for negligence in searching. See Hogan, *supra* note 40, at 25 (specimen WLTA policy).

99. See, e.g., *De Zemplén v. Home Fed. Sav. & Loan Ass'n*, 221 Cal. App. 2d 197, 34 Cal. Rptr. 334 (1963); *Chun v. Park*, 51 Hawaii 462, 462 P.2d 905 (1969); *Williams v. Polgar*, 391 Mich. 6, 215 N.W.2d 149 (1974) (holding Michigan abstractor liable to third-party vendee). See generally Comment, *supra* note 98, at 257-64.

imposes liability on a company that fails to exercise reasonable care in obtaining or relating information for others' guidance in business transactions if the recipient is reasonably foreseeable, justifiably relies on the information, and suffers pecuniary loss.<sup>100</sup> Because title companies know that land purchasers justifiably rely on the title insurer's expertise in ascertaining the condition and desirability of title, despite the fact that sellers customarily order the policies,<sup>101</sup> courts could invoke the Restatement to impose liability for negligent search and disclosure.

A duty to search and disclose would be consonant with the average person's reasonable expectations. When the prospective insured deals with title insurer, he expects to receive a professional title search, an opinion as to the title's status, and a guarantee that title is "good"<sup>102</sup> subject to the exceptions stated. In fact, the purchaser may be interested more in what the title examination reveals than in the insurance itself.<sup>103</sup> Significantly, some jurisdictions require consideration of the insured's expectations. A California court has stated:

In determining what benefits or duties an insurer owes his insured pursuant to a contract of title insurance, the court may not look to the words of the policy alone, but *must* also consider the reasonable expectations of the public and the insured as to the type of service which the insurance entity holds itself out as ready to offer.<sup>104</sup>

Thus, the aggregate of consumer expectations—purchaser reliance, the definition and purpose of title insurance, and the goal of Washington's statutory scheme to protect the public in dealing with the title industry—together with the historical founda-

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100. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

101. See Comment, *supra* note 98, at 261.

102. *McLaughlin v. Attorneys' Title Guar. Fund*, 61 Ill. App. 3d 911, 916, 378 N.E.2d 355, 359 (1978). "Good" title generally means marketable title. See *Shotwell v. Transamerica Title Ins. Co.*, 16 Wash. App. 627, 631, 558 P.2d 1359, 1361 (1976) ("[A] policyholder has a reasonable expectation that he will be advised of the specific impediments upon his land as revealed by a reasonable search. . . ."). Marketability and insurability are two distinct concepts. See note 42 *supra*.

103. *Johnstone*, *supra* note 3, at 494. This is so because the purchaser, prior to closing, has the opportunity to negotiate risks disclosed by the title search and thereby waive or demand seller's cure of any major defects. The executory purchaser also can rescind the contract if the seller fails to timely cure. See note 37 *supra*; text accompanying notes 68-69 *supra*.

104. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 941, 122 Cal. Rptr. 470, 487 (1975) (emphasis added).

tions from which the title insurance method emerged, militates the establishment of a duty reasonably to search and disclose.

Such a duty will be effective only if courts disallow insurer exculpation. Courts faced with an exculpatory clause<sup>105</sup> should consider whether enforcement of the clause will widen the gap between the home buyer's expectations and the actual title protection provided.<sup>106</sup> The standardness of the insurance policy and particularly the uniform attempt at exculpation should convince a court to thwart such efforts to relieve insurer liability. In support of this view, some commentators have concluded that the owner's policy, in contrast to the lender's policy, is essentially an adhesion contract.<sup>107</sup> An adhesion contract is defined as a:

[s]tandardized contract form offered to consumers of goods and services on essentially a "take it or leave it" basis without affording the consumer realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract. A distinctive feature . . . is that the weaker party has no realistic choice as to its terms.<sup>108</sup>

In Washington, title insurance predominates over other methods of title assurance<sup>109</sup> and price competition is essentially nonexistent.<sup>110</sup> Accordingly, the average home buyer is effectively precluded from going elsewhere to obtain the kind of title assur-

105. WLTA's standard form policy provides: "All actions or proceedings against the Company must be based on the provisions of this policy. Any other action or actions . . . that the insured may have . . . against the Company with respect to services rendered in connection with the issuance of this policy, are merged herein and shall be enforceable only under the terms, conditions and limitations of this policy." See Hogan, *supra* note 40, at 25.

106. For an example of this gap, see *Condo caper: Title insurance offers owner no protection*, Seattle Times, Sept. 3, 1980, § F at 2, col. 1, where the "policy did not guarantee good title or even that the building was a legal condominium."

107. Curtis, *supra* note 32, at 1; Johnstone, *supra* note 3, at 504; Quiner, *supra* note 10, at 721. The mortgage policy, in contrast, is not an adhesion contract because the lender is a commercial entity able to deal with the insurer on an equal basis. See note 114 *infra*.

108. BLACK'S LAW DICTIONARY 38 (5th ed. 1979).

109. In Seattle, Spokane, and Tacoma, title insurance is used almost exclusively; in smaller metropolitan areas, title insurance comprises 90% of the title market. *Report of the Committee on Acceptable Titles to Real Property*, PROC. A.B.A. SECTION REAL PROP. PROB. & TRUST LAW 43, 52 (1953). See note 111 *infra*.

110. Quiner believes competition would lower prices. See Quiner, *supra* note 10, at 725, 730.

ances he needs or from even knowing what he needs.<sup>111</sup> Although one Washington insurer offers, at additional cost, an Owner's Inflation Protection Endorsement up to a maximum of 150% of the original policy coverage,<sup>112</sup> title insurance still remains quantitatively and qualitatively inadequate.<sup>113</sup>

In addition to a judicial resolution, the adoption of administrative regulations could aid the average home buyer in dealings with the billion-dollar title industry.<sup>114</sup> The state insurance commissioner could promulgate regulations requiring title insurers to offer certain additional coverage for reasonable prices.<sup>115</sup> This

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111. Before buyers go elsewhere, they must realize the necessity of finding more protection. Yet most consumers lack knowledge as to title insurance, rates, real estate transactions, and price competition. See *id.* at 725; cf. 9 J. APPLEMAN, *supra* note 16, § 5201, at 20 (“[b]lanket exclusions . . . are wholly inconsistent with the protection which the face of the policy purports to offer.”); Curtis, *supra* note 32, at 1 (“The buyer almost never obtains an independent examination of the title to the land he is purchasing since he has been induced by long-standing custom to place his faith in a title insurance policy containing numerous exceptions which he infrequently reads and seldom understands.”); Quiner, *supra* note 10, at 719 (“Attorneys have been forced to admit that it can be inconvenient and even costly for a prospective real estate buyer to retain the services of both an attorney to perform the abstracting and to give title opinions, and the title company to insure hidden risk.”).

The argument that consumers could realistically turn to title abstracts in addition to title insurance for added protection fails for several reasons. First, if the consumer resides in Washington and seeks an abstracter by turning to the telephone directory's yellow pages, they refer him or her to title insurers. Second, assuming the average consumer recognizes the need for additional title assurance in buying real property, he will essentially be paying for two title searches because the cost of title insurance encompasses searching expenses and overhead costs for title plant maintenance. Third, with the same assumption, it would be both costly and inconvenient to order an abstract of title. Fourth, once the consumer receives the title abstract, he quite possibly will have to hire a lawyer to interpret it for him. See Quiner, *supra* note 10, at 721 (“Since a real estate transaction is a large and infrequent undertaking for many people, they probably have little knowledge of alternative forms of title protection.”).

112. See Hogan, *supra* note 40, at 13, 33.

113. The new ALTA Residential Title Insurance Policy offers greater protection and more readable language to consumers. Unfortunately, at the time this piece went to publication, it was not yet in use in Washington. See Bowling, *supra* note 40, at 17.

114. Unlike individual purchasers, institutional lenders bargain at arm's length with title insurers. See, e.g., Howlett, *Standard Forms and What's New*, TITLE NEWS, Jan. 1974, at 23. This can be seen by a comparison of the ALTA loan policy (1970), which covers material liens, with the standard ALTA owner's policy, which does not. Mortgagee policies extend to insure assignees of the mortgagee, whereas owner policies usually do not cover grantees of the insured. See R. POWELL, *supra* note 1, and ¶¶ 1032-33 and Johnstone, *supra* note 3, at 495-96, for further comparisons of owner and mortgagee policies. See also C. FLICK, 1 ABSTRACT AND TITLE PRACTICE §§ 191-212 (2d ed. 1958); R. PATTON, 1 PATTON ON LAND TITLES § 41 (2d ed. 1957).

115. This writer suggests additional endorsements for: inflation equivalent to the actual rate, not 150%; government liens; material and labor liens; survey findings; unmarketability; and defects disclosed by inspection; and assignees of insured owners.

would serve two purposes. First, it would inform the land buyer of the existence of possible deficiencies in the policy as it stands. Second, it would provide access to additional protection. The commissioner could also mandate that the insurer notify the insured of the availability of additional coverage without the insured's request.<sup>116</sup> The commissioner could, as well, require title insurers reasonably to conduct title searches and reasonably to disclose the results to home buyers, leaving it to the courts to determine the scope of reasonableness. Either administrative or judicial imposition of a duty would result in more diligent searches and would encourage courts to prevent insurer exculpation.

While compelling reasons exist to support judicial imposition of a duty to search and disclose, opponents of the duty may advance several arguments against it. Adversaries might argue that imposition of such a duty is a legislative, rather than judicial, function. In Washington, title insurers could contend that because the legislature has already enacted other laws regulating the title industry,<sup>117</sup> none of which explicitly establishes a duty, the courts cannot act in this realm. To bolster this argument, the title industry could point out that some state legislatures have recently enacted statutes explicitly mandating reasonable title searches prior to issuance of insurance policies. Alaska, for example, enacted a statute in 1974 requiring that "[n]o policy or contract of title insurance may be written until the title insurance company conducts . . . a reasonable search and examination of the title and has made a determination of insurability in accordance with its established underwriting practices."<sup>118</sup> The statute, however, makes no mention of a disclosure requirement. Nine state legislatures essentially have said that title insurers

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116. One problem with this solution is its assumption that home buyers will understand the significance of certain defects or potential defects. Most home buyers do not seek professional advice, instead relying on realtors and title insurers. Interview, *supra* note 66. Yet, this problem also inheres in the reasonable search and disclosure solution: it could possibly be alleviated by compelling disclosure, in plain English, of defects that could materially affect property value. See McNitt, *supra* note 83, at 12. One writer impliedly recognized the Washington home buyer's predicament in suggesting that a buyer may wish to have the "seller provide more than the title insurer will insure" and that lawyers representing purchasers should encourage them to make "informal inquiries regarding the property at the local governmental departments." Falconer, *supra* note 62, at 222, 246. For a discussion of who (buyer or seller) should pay for additional coverage, see note 125 *infra*.

117. See text accompanying notes 83-86 *supra*.

118. ALASKA STAT. § 21.66.170 (1979 Supp.).

cannot operate until they conduct reasonable searches.<sup>119</sup> Because these states found it necessary to be explicit about such a duty, an adversary could argue that Washington's omission amounts to denial of the duty.

Although this legislative function argument has superficial appeal, closer examination reveals its weaknesses. First, assuming that these statutes explicitly create a duty, the negative pregnant argument relative to Washington's legislative scheme fails to acknowledge that judicial imposition of a duty promotes the purpose behind tract indexing and other statutory requirements to protect the public.<sup>120</sup> Second, the mere fact that other legislatures found time to deal with this problem does not mean that Washington legislators are not operating under time constraints<sup>121</sup> or that the insurance lobby has not been effective.<sup>122</sup> Third, other state courts' willingness to act in imposing a duty to reasonably search and disclose evidences further the weakness of the argument that courts must await legislative action.<sup>123</sup> Finally, these statutes have not *explicitly* created a duty to

119. *Id.*; ARIZ. REV. STAT. ANN. § 20-1567 (1956); COLO. REV. STAT. § 10-11-106 (1973); NEB. REV. STAT. § 44-1905 (1943); NEV. REV. STAT. § 692A.220 (1977); N.H. REV. STAT. ANN. § 416-A:6 (1979 Supp.); N.C. GEN. STAT. § 58-132 (1975) (also requires an attorney's opinion); OHIO REV. CODE ANN. § 3953.07 (Page 1971); PA. STAT. ANN. tit. 40, § 910-7 (Purdon 1971); *cf.* TEX. INS. CODE ANN. art. 9.34 (Vernon 1979 Supp.) (requires only "search of title . . . from an abstract plant," omitting any requirement of a reasonable search).

120. See text accompanying notes 83-86 *supra*.

121. See *Wyman v. Wallace*, 91 Wash. 2d 317, 322, 588 P.2d 1133, 1135 (1979) (Utter, J., dissenting) (recognizing that present time constraints on modern legislatures are such that they may act only upon the most compelling needs).

122. See generally Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 281, 285, 291 (1963).

123. *E.g.*, *Banville v. Schmidt*, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974) (tort recovery allowed); *Northwestern Title Sec. Co. v. Flack*, 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970) (recovery allowed in either contract or tort, but under California's statutory scheme the monetary recovery is the same); *Viotti v. Giomi*, 230 Cal. App. 2d 730, 41 Cal. Rptr. 345 (1964) (recognizing recovery for negligent search grounded in contract or tort); *Chun v. Park*, 51 Hawaii 462, 462 P.2d 905 (1969) (recovery in tort for negligence); *Quigby v. St. Paul Title Ins. & Trust Co.*, 60 Minn. 275, 62 N.W. 287 (1895) (recovery in tort allowed). *But see* *Horn v. Lawyers Title Ins. Corp.*, 89 N.M. 709, 557 P.2d 206 (1976) (no duty, hence no recovery in tort); *Stone v. Lawyers Title Ins. Corp.*, 537 S.W.2d 55 (Tex. Civ. App. 1976) (title company had no duty regarding title examination). See 9 J. APPLEMAN, *supra* note 16, § 5213, at 50 nn.4.65-4.90 (cases listed where duty was imposed on title insurers), *Curtis, supra* note 32, at 1-29; Comment, *supra* note 6, at 1161-84 (policy considerations in finding a duty to search). See also Comment, *supra* note 98, at 257, discussing expansion of title insurer's liability for breach of duty to third-party purchasers in searching records.

search that benefits home purchasers.<sup>124</sup> Accordingly, the legislative function argument cannot stand.

Title insurers also might contend that judicial imposition of the duty will raise insurance premiums. Higher premiums could follow from the greater duty and risk imposed on insurers and from increased labor costs.<sup>125</sup> This contention is unfounded, though, because consumers already absorb the overhead cost of recording land encumbrances<sup>126</sup> and computer systems are available to expedite the searcher's job.<sup>127</sup> The assertion that premiums will rise because of a greater duty, and hence potentially unlimited exposure to liability if a tort measure of damages is applied, would have some merit if such a duty required insurers to find, disclose, and explain *all* defects or potential defects. The duty, however, does not encompass absolute disclosure; it merely

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124. A close reading of these statutes can lead to the conclusion that these laws do not benefit home buyers, but rather, insurers by preventing title insurance written on a casualty basis. If the insurer fails to search, it is absorbing loss on a casualty basis. Thus, companies issuing casualty insurance make no attempt to prevent loss by searching title first. See Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 *Geo. L.J.* 1311, 1348 (1974); Whitman, *Transferring North Carolina Real Estate, Part II: Roles, Ethics and Reform*, 49 *N. CAROLINA L. REV.* 593, 623-24 (1971). See also Ruemele, *Title Evidencing in North Dakota*, 43 *N. DAK. L. REV.* 467, 483 (1967). Presumably, title insurers issuing policies without a prior search would threaten title insurers who maintain title plants and pay searchers' salaries. Title insurers in Washington must maintain title plants and, thus, the problem of title casualty insurance is academic.

Home buyers within states statutorily prohibiting issuance of title policies unless the insurer conducts a reasonable search and makes a "determination of insurability" could try to use these statutes to state a cause of action against the insurer for negligence in searching title. They could argue that they are within the statute's protected class, see *W. PROSSER, HANDBOOK OF THE LAW OF TORTS*, § 36 (4th ed. 1971), because legislators know that buyers rely on insurers' preliminary title reports. Moreover, both society at large and the insured are harmed by negligent searches or failure to search. See Payne, *supra* note 13, at 439. Buyers benefit by ability to purchase real estate with some degree of assurance; society, by stability in the land title market.

125. These are three possible remedies to this potential problem: regulation, competition, or state subsidization.

Assuming *arguendo* that premiums would rise, sellers forced to pay the premiums might also object. In many real estate transactions, however, the seller plans to buy another home and has tax inducements to do so. Thus any debate over the seller's objections is academic.

Further, sellers might object to paying for additional coverage through endorsements. Sellers could argue that they might end up with a buyer who wants as much protection as possible. Yet, when the seller too becomes a buyer, he also may want the maximum protection. The problem is best resolved by local real estate practice.

126. The title search and examination account for the overwhelming majority of costs incurred and revenues realized by title insurers. *ALTA, supra* note 93, at 584.

127. Ogasawara, *Potential Benefits of Plant Automation Assessed*, *TITLE NEWS*, Aug. 1978, at 9: "Direct savings can be expected in the searching area."

requires insurers to advise potential purchasers in advance of all matters discovered in a reasonable search that might materially affect the value of the property.<sup>128</sup>

The title industry might assert further that an actionable duty to search would interfere with its right to contract.<sup>129</sup> Invoking the freedom of contract doctrine, insurers may contend that the policies not only do not obligate them to search and disclose<sup>130</sup> but also may relieve them contractually of any judicially imposed liability.<sup>131</sup> On close examination, however, the freedom of contract doctrine in this context fails in its basic premise that the parties bargained from relatively equal positions.<sup>132</sup> In fact, the insurer usually has access to far more information than the insured, who generally must accept the insurance policy on a take-it-or-leave-it basis.<sup>133</sup> Thus, where the parties are not bargaining at arm's length, the basis for the doctrine's application does not exist.

Countering this reasoning, title insurers also might argue that the analysis of title policies as adhesion contracts is inappropriate because consumers would not want to bear the cost of their insurer's increased liability through higher premiums.<sup>134</sup> This argument, however, ignores the fact that pecuniary inter-

128. Most importantly, the courts are suggesting that a title insurer has an affirmative duty to disclose all defects or potential defects in title or be liable for negligent abstracting . . . . If the title insurers are to be burdened with the duty of disclosing and explaining all defects or potential defects, costs of title insurance may substantially increase. . . .

The solution to this problem is simple . . . . Title insurers should merely advise the prospective purchaser in advance of all matters—in the chain of title or not—of which they are aware and which might materially affect the value of the property.

McNitt, *supra* note 83, at 12.

129. Title insurers may fail if they argue constitutional impairment of a contract right. See generally Comment, *United States Trust Co. v. New Jersey—State Promises and the Contract Clause: An Untimely Resolution*, 1 U. PUGET SD. L. REV. 299 (1978).

130. WLTA and ALTA owner and residential policies are silent as to a duty to search. See text accompanying note 78 *supra*.

131. *But see* Viotti v. Giomi, 230 Cal. App. 2d 730, 41 Cal. Rptr. 345 (1964) (court invalidating exculpatory clause of title insurer).

132. See, e.g., J. CALAMARI & J. PERILLO, *supra* note 53, § 1-3: "Most of Contract Law is premised upon a model consisting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining."

133. See notes 107-14 *supra*. Generally, only sophisticated buyers or those who seek legal representation in purchasing property know enough to negotiate for more expansive coverage.

134. See text accompanying notes 125-28 *supra*, discussing "higher premium" argument.

ests are not the only interests at stake. For instance, society has a centuries-old interest in efficient use of land and in assuring clear, marketable title.<sup>135</sup> Moreover, a prospective buyer who knows the condition of title prior to purchase can better plan the best use of the land. An insurer's duty to search and disclose facilitates intelligent purchasing decisions by enabling buyers to acquire as much title information as possible. This in turn fosters the social policy of increased productivity and economic growth.<sup>136</sup>

Once a court concludes that a duty to search and disclose is warranted, its next task is to determine whether the obligation is based in tort or contract law. The contract theory of liability is founded on an analogy between title insurers and abstracters;<sup>137</sup> the tort theory, on an analogy between title insurers and lawyers.<sup>138</sup> These alternative bases for imposing liability follow from the fact that lawyers' liability for professional negligence in searching and examining the state of title is based generally on tort law,<sup>139</sup> while abstracters' liability for negligence in issuing

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135. See Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1 (1953). See also Comment, *Adverse Possession in Alabama*, 28 ALA. L. REV. 447, 451 (1977) (describes the importance of maximizing land usage as evidenced by adverse possession statutes).

136. Comment, *supra* note 135, at 451.

137. See Roady, *supra* note 41, at 783; Annot., 34 A.L.R.3d 1122 (1970).

138. See Comment, *Title Searches: The Potential for Liability*, 49 MISS. L.J. 689 (1978); Annot., 59 A.L.R.3d 1176 (1974).

Some courts holding that insurers have no duty to search and disclose focus on a distinction between title insurers and abstract companies. The Texas Court of Civil Appeals, in *Tamburine v. Center Sav. Ass'n*, stated that there was a "vast difference" between the two; that, because a title insurer is technically not an abstracter, it "owes no duty with regard to the examination of title, thus precluding any recovery for negligence." 583 S.W.2d 942, 947 (Tex. Civ. App. 1979). In *Southern Title Guar. Co. v. Prendergast*, 494 S.W.2d 154 (Tex. 1973), the Texas Supreme Court held that title insurance is only a contract of indemnity and therefore no cause of action for negligence will lie for failure to discover title defects prior to issuance of the policy. See also Note, *supra* note 95, at 580-86.

Accordingly, one difference between advocates and opponents of a duty to search hinges on their views of title insurance's purpose and function. The industry maintains that an insurer is not an abstracter, while proponents of the duty contend that insurers have functions of both title abstracting and insuring. Indeed, one remarks that, under such a restrictive view of title insurance, lawyers relying on title policies rather than title abstracts would be committing malpractice. 9 J. APPLEMAN, *supra* note 16, § 5213, at 54 n.12.25. Appleman believes courts have a duty to enforce the parties' expectations, particularly when the industry leads parties, via advertising and practices, to rely on the title policy as a guarantee of "good" title. He is highly critical of the Texas court's approach. *Id.* § 5209, at 38 n.67.25, § 5213, at 55.

139. See note 138 *supra*.

title abstracts traditionally has been grounded in contract law.<sup>140</sup> Because the purpose of a preliminary commitment for title insurance is to advise the intended insured of the proposed contract terms,<sup>141</sup> and hence, list defects and encumbrances, title insurance resembles both the abstract and the lawyer's opinion methods. All three title assurance methods base their findings on a search of the records under supervision of trained personnel.<sup>142</sup> Thus, some courts liken title insurers to abstracters,<sup>143</sup> others to lawyers.<sup>144</sup>

Regardless of whether an abstracter's or a lawyer's liability rests in tort or in contract, the standard of care is essentially the same. In 1879, the United States Supreme Court, in *Savings Bank v. Ward*,<sup>145</sup> held that abstracters have a duty to exercise reasonable care and skill in providing information regarding title to real estate.<sup>146</sup> Similarly, in a typical case, the Montana Supreme Court in *Clinton v. Miller*<sup>147</sup> held that an attorney

140. See note 137 *supra*.

141. See Haines, *Claims Against a Title Insurer*, in TITLE INSURANCE IN MAJOR REAL ESTATE TRANSACTIONS, *supra* note 3, at 301, 324-27 (citing obligatory clause of ALTA commitment).

142. See text accompanying notes 8-15 *supra*.

143. *E.g.*, *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 938-39, 122 Cal. Rptr. 470, 485 (1975) (a title insurer acts as an abstracter when issuing a preliminary title report). Both the abstracter and insurer have a duty to "report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent search is made." *Id.* (quoting *Contini v. Western Title Ins. Co.*, 40 Cal. App. 3d 536, 545-46, 115 Cal. Rptr. 257, 263 (1974)). See generally Comment, *supra* note 98, at 257.

144. See cases cited in 9 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 5566, at 443-44 & n.73 (1943). One difference between the two methods, though, is that title insurers examine title only back to the date of the last policy issued, whereas lawyers under the lawyer's opinion system reexamine the full abstract. *Johnstone*, *supra* note 3, at 508. Also where title insurers operate as title plant companies, as in Washington, they use their own storehouse of information rather than relying on the public records and indices that lawyers use under the lawyer's opinion method. These differences, though, seem insufficient to establish that title insurers are unlike lawyers who search and issue certificates, particularly in light of the persistent controversy between the organized bar and title insurers regarding alleged unauthorized practice of law. See, *e.g.*, *Payne*, *supra* note 13, who notes:

When the central issue is other than unauthorized practice of law, the courts show a much greater readiness to admit that title insurance companies are, in fact, practicing law. . . . When liability has been imposed it has been said that the company must be held to the same standard as an attorney.

*Id.* at 443-44. See generally *Brossman & Rosenberg*, *supra* note 3.

145. 100 U.S. 195 (1879).

146. *Id.* at 205.

147. 124 Mont. 463, 226 P.2d 487 (1951). *Accord*, *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934); *Watson v. Calvert Bldg. & Loan Ass'n*, 91 Md. 25, 45 A. 879, 881 (1900)

owes a reasonable degree of care or skill and "to a reasonable extent the knowledge requisite to a proper performance of his duties . . . ." <sup>148</sup> Thus, a court obligating title insurers reasonably to search and disclose should, consistent with the historical roots of the title insurance method, adopt a standard requiring that the insurer use a reasonable degree of skill and care.

In determining which theory of liability affords greater protection to the average purchaser, a court should consider such factors as measure of damages, capacity to prove negligence or breach of contract, and statute of limitations. Under a contract theory of liability, plaintiffs could recover only those damages not exceeding policy limits, <sup>149</sup> as opposed to tort damages proximately caused by insurer error. <sup>150</sup> On the other hand, a tort theory may require a greater burden of proof because the plaintiff must prove negligence rather than the contract theory's minimal showing of the existence of a defect. <sup>151</sup> Furthermore, the statute of limitations may be longer in contract than in tort. <sup>152</sup> Although these factors may favor a contract theory, insureds in Washing-

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("reasonable degree of skill [and] diligence"); *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (1978); *Bayerl v. Smyth*, 117 N.J.L. 412, 189 A. 93, 95 (1937) ("An attorney employed to examine a title to real property must exercise reasonable care and skill. . . ."); *Jacobsen v. Peterson*, 91 N.J.L. 404, 103 A. 983, 984 (1918) ("ordinary care and skill"). See *AXELROD*, *supra* note 19, at 816-17 (attorney's negligence).

148. 124 Mont. at 483, 226 P.2d at 498. See Comment, *supra* note 137, at 699-701 (attorney's liability for negligence in searching title).

149. The title insurance contract fixes the total amount of damages. See O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, *BASIC PROPERTY LAW* 955 (3d ed. 1979) ("policy . . . obligates the insurer to pay all losses, up to a stated maximum"). It is unclear whether a "reasonable contemplation of the parties" standard—the typical contract measure of damages—would also limit the amount recoverable. See generally *J. CALAMARI & J. PERILLO*, *supra* note 53, § 14-4.

150. See *W. PROSSER*, *supra* note 124, § 92. Proximate cause usually encompasses more than what is "reasonably contemplated": "the damages recoverable for breach of the contract duty are limited to those reasonably within the contemplation of the defendant when the contract was made, while in a tort action, a much broader measure of damages is applied." *Id.*

One court, holding a title insurer liable for negligence in failing to report an easement and in failing to defend, awarded damages of \$200,000 although the policy limits were only \$75,000. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).

151. See Comment, *supra* note 6, at 1182-83 n.114 (discussing in detail the pros and cons of tort versus contract regarding title insurance). See generally *W. PROSSER*, *supra* note 124, § 92 (delineating relative advantages and shortcomings of tort and contract).

152. Compare WASH. REV. CODE § 4.16.040(2) (1979) (six-year statute of limitations for actions based on written contract) with WASH. REV. CODE § 4.16.080(3) (1979) (three-year statute of limitations for tort actions). See generally *W. PROSSER*, *supra* note 124, § 92 ("[In contrast to a contract action, a] shorter statute of limitations may bar the tort action.").

ton actually have a greater advantage in tort because of greater flexibility in the accrual date of a cause of action. Traditionally, the statute of limitations begins to run, both in tort and in contract, when the lawyer or abstracter delivers the abstract or certificate of title.<sup>153</sup> The Washington Supreme Court, however, in *Peters v. Simmons*,<sup>154</sup> adopted the date-of-discovery rule for lawyer negligence, holding that a malpractice cause of action accrues when the defect is, or with reasonable care should have been, discovered.<sup>155</sup> Thus, a tort theory of liability for title insurance actions better protects the buyer relying on the policy because of the tort date-of-discovery rule and the possibility of greater damages where the prospect of full proximate cause liability will motivate the insurer to diligently search title to keep down the loss-payout ratio.

Judicial imposition of a tort duty, with an accompanying negligence standard of care and tort measure of damages, can best accomplish the goals of protecting the public in its dealings with title insurers, promoting efficient use of land, and fostering marketable titles and fluidity in real estate transactions.<sup>156</sup> In deciding whether to impose the duty on title insurers, courts should look at the factors examined herein, including the relationship between the parties, the reasonable expectations of the property buyer, the existence of legislation regulating the title industry, the purpose and function of title insurance, and the industry's historical origins. Consideration of these factors dictates imposing an obligation of reasonable search and disclosure on Washington title insurers.

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153. *E.g.*, *St. Paul Fire & Marine Ins. Co. v. Crittenden Abstract & Title Co.*, 255 Ark. 706, 502 S.W.2d 100 (1973) (statute begins to run when abstract of title delivered). *See Rody*, *supra* note 41, at 793. *See also Douglas v. Title Trust Co.*, 80 Wash. 71, 141 P. 177 (1914) (abstract liability based on contract).

154. 87 Wash. 2d 400, 552 P.2d 1053 (1976).

155. *Id.*; *cf. Hall v. San Jose Abstract & Title Co.*, 172 Cal. App. 2d 421, 342 P.2d 362 (1959); in *Hall*, a California court adopted the date of discovery rule for a cause of action based on a title insurance policy even though the court based liability on breach of contract rather than insurer negligence. Having found liability for breach of contract, the court found it unnecessary to reach the negligence issue.

156. Hundreds of thousands of real estate transactions occur every year in Washington. *See REAL ESTATE RESEARCH REPORT*, spring 1979, at 23-27 app. (Seattle Real Estate Research Comm. ed.); *Realty Surge*, Seattle Post-Intelligencer, Aug. 13, 1978, § D, at 3, col.4.