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TITLE SEARCHES AND TITLE INSURANCE

In Arizona, as with many other western states, the function of conducting a title search is not handled by attorneys, as it has traditionally been done in the states east of the Mississippi River. Instead, this function is performed by title insurers and their title agents.[1]

Title companies in Arizona do not typically provide "title abstracts" in connection with a real property purchase or loan transaction. Rather, they issue title "reports," or "commitments," as defined in A.R.S. § 20-1562(5). A title report or commitment is an offer to provide a title insurance policy to an insured along the terms and conditions of such coverage – a contractual offer to indemnify. It is not an opinion or statement (as with an abstract) as to the nature or condition of title.

In searching title and providing a report or commitment, a title company does not conduct the search as the agent for the proposed insured, and does not undertake any duty to act for the proposed insured's best interest. Under insurance licensing statutes, a title insurer is required to "cause[] to be conducted a reasonable examination of the title and . . . [make] a determination of insurability of title in accordance with sound underwriting practices for title insurers." A.R.S. § 20-1567(A). However, this is a regulatory requirement, not a duty to an insured or policyholder. Under Arizona law an insured has no right to rely upon the title report as being complete or correct. See, e.g., Centennial Dev. Group v. Lawyer's Title Ins. Corp., 233 Ariz. 147, 310 P.3d 23 (App. 2013); A.R.S. § 20-1562(5) (title report "is not a representation as to the condition of title to real property but does constitute a statement of the terms and conditions on which the issuer is willing to issue its title insurance policy if the offer is accepted"). This is consistent with the current practice of title companies.

In Arizona, including Maricopa County, real property recordings are not indexed by "street address," or for that matter, tax parcel numbers. They are indexed by the

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[1] Title insurers and title agents are distinct entities; the title insurer is the underwriter of the insurance, and the title agent is the entity that offers and issues title policies as the issuing agent of the insurer. The "title company" that one will typically encounter in a real estate transaction is an entity that is licensed as a title agent and which is authorized to issue policies for a certain title insurer. Such entities often also hold an escrow agent license. Where I refer to a "title company" or to "title companies," it is a general reference to both title insurers and their title agents.

county recorders only by grantor/grantee indices, along with descriptions of the document types. Title companies, however, keep or have access to separate "title insurance plants" as required under Arizona statute, containing all recorded documents pertaining to all real property in the county(ies) where the title insurer issues title insurance, going back not less than the preceding twenty years. These title plants, as required by statute, index real property records by grantor/grantee indices, *and* by property description. A.R.S. § 20-1562(10).

When conducting a title search, a title reviewer will search the records made available from the title insurer's title plant, which are accessed these days via online computer service. The title examiner does not "walk down to the courthouse" or to the county recorder to review property documents. Along with reviewing the recorded documents that come up through the title plant service, title reviewers (or oftentimes an escrow officer employed by the same "title company") obtain current property tax information concerning the property, in order to confirm that the property taxes are current and that no tax liens are outstanding. Property tax records are not recorded with the county recorder, but rather are obtained from the applicable county treasurer (available online in Maricopa County and many others). Tax records are typically searched by reference to the property tax parcel number. The address that comes up, if at all, is the address that happens to be associated with the property in the property tax records maintained by the county treasurer. The property address on file with the county treasurer may very well be different than the address on file with other governmental agencies (such as the county assessor, the city or town where the property is located, the US Postal Service, to name a few).

A title search is not a due diligence review of the property, its physical characteristics, the status of building permits or certificates of occupancy, zoning status, or whether the property has a correct physical or mailing address. In fact, in issuing standard title coverage, title insurers / agents do not as a matter of practice conduct a physical inspection of a property to be insured. Inspections (and other due diligence such as obtaining a survey, owner affidavits, verifying address, etc.) are done in cases where extended title coverage and/or particular endorsements are being issued, however extended coverage is ordinarily requested and issued only in land and/or commercial property transactions. A typical residential buyer is issued a standard coverage homeowner policy, which insures ownership in the subject property subject to various conditions, exclusions, exceptions, and the specified "Schedule B" matters explained below.

Title reports or commitments uniformly include a "Schedule A" and "Schedule B." The Schedule A identifies the person to be insured, the subject property, the insured amount, the effective date of the report, and often the existing "vested" owner. Schedule B typically includes two parts: (1) a list of requirements that must be met for the title policy to be issued (such as releases of existing liens and deeds of trust, or other

documents that are perceived to be a potential title claim); and (2) a list of all instruments found of record that may affect the subject property, along with a broader reference to any unrecorded matters (such as unrecorded leases, potential mechanic's lien claims, adverse possession, encroachments) that may or may not exist. This latter list is in most cases what is identified as "Schedule B - Exceptions" in the report, frequently referred to informally as the "Schedule B items."

The Schedule B items are matters over which the title policy to be issued will not provide any coverage for or against – such matters are exceptions to the coverage to be provided. If a matter is listed in the Schedule B, unless an additional endorsement is issued over such matter, it is of no risk to the title company and is a risk to be assumed solely by the proposed insured. The title company does not make any determination or provide any guidance to the proposed insured as to whether any of the Schedule B items are valid or enforceable, or the extent to which they affect (if at all) the property to be insured. This job falls to real estate attorneys such as myself. Title companies may, upon request, agree to issue certain endorsements for additional fees that provide some coverage over certain identified matters – where the title company determines based upon various considerations that the matter does not present a likely risk of a future title claim.

Oftentimes, in my experience, instruments will be identified in a Schedule B that do not, in fact, affect or have any relation to the subject property. The fact that a document is identified in a Schedule B is not itself a determination that it presently affects the subject property, but is rather an initial call by the title company that the document might have some potential effect as to the subject property, and as a result is excepted from coverage. Attorneys representing lenders and purchasers (such as myself) often communicate with title companies (either through the escrow agent or title officer) in further examining any Schedule B matters, and in addressing whether certain matters should be omitted from the Schedule B.

Title insurers, by nature, do not offer insurance against cognizable or anticipated risks (in contrast to most other forms of insurance, such as auto insurers or home insurers which statistically calculate risks based upon each insured and adjust rates in accordance with the perceived risks). Premiums for each title policy are based upon the policy amount (with some exceptions such as "builder discounts"); and with the assumption that any matters, recorded and unrecorded, that may have any potential effect on the subject property have been *excepted from coverage* by being listed in the Schedule B; and/or have been released and/or corrected pursuant to Schedule B Requirements. As such, title companies strive to issue a policy that correctly insures ownership of the subject property *but* excepts out any matters that might result in the title insurer having to pay or defend a title claim later on – regardless of the perceived validity or invalidity of the particular matter.

The normal practice of a title company is not to make a *per se* determination as to the validity or invalidity of an instrument, but rather to avoid and/or eliminate any risks of title claims or defects. As a matter of practice, and in my own personal experience, even in cases where a recorded document that asserts a claim against a property is patently invalid or not applicable to the subject property, a title company will require that the document either be released, or be deemed invalid by a court order, before it will insure title. Title insurers are not in the business of assuming any risk. Even a patently invalid document may indicate a potential fight or dispute over title, which, however invalid or frivolous, is a risk.