Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title

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TITLE INSURANCE COMPANIES’ LIABILITY FOR FAILURE TO SEARCH TITLE AND DISCLOSE RECORD TITLE

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I. INTRODUCTION

In August of 1984, the Nebraska Supreme Court for the first time addressed the issue of whether a title insurance company is liable to its insured for losses caused by record defects in title which were not disclosed by the title insurance company.\(^1\) The court held that a title insurance company has a duty in tort to search the record diligently and to disclose even those defects which the title company has expressly declined to insure in its title insurance policy.\(^2\)

The Nebraska Supreme Court, of course, is not the first to have taken this position. Several jurisdictions previously have held title insurers liable in tort for loss to their insured caused by the title insurance company's failure to discover or disclose defects in title.\(^3\) But the state of the law on the issue is far from settled. Some jurisdictions have declined to impose a tort duty, but have found that an implied contract to search and disclose exists between a title insurer and the insured.\(^4\) Other courts have eschewed both the preceding approaches and have held that a title insurer's only obligation is to indemnify according to the express terms and limits of the policy.\(^5\) Legislatures in a few states have statutorily imposed a duty to conduct a reasonable search on title insurers.\(^6\) Conversely, the state whose judicial decision is most cited for the rule that title insurers have a duty to diligently search and to disclose all record defects has recently lifted that duty from title insurers by statute.\(^7\)

It is this Article's position that recognition of a duty in tort, based in the relationship of the title insurer to its insured, is the best of the alternatives open to courts facing the question. In fairness to title insurance companies, a state's legislature should act to clarify in its insurance code whether a title insurance company is required to find and disclose all record defects as a duty incident to insuring titles to land in the state.\(^8\) However, when a state's legislature has not

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2. Id. at 303-04, 354 N.W.2d 158-59.
3. See infra notes 100-18 and accompanying text. See also Appendix, infra, listing jurisdictions which have held title insurers to a duty, based either in tort or in contract, to search the record and disclose any defects or encumbrances found, whether or not those defects are covered in the title insurance policy.
4. See infra notes 77-99 and accompanying text. See also Appendix, infra (listing jurisdictions declining to hold a tort duty).
5. See infra notes 44-75 and accompanying text. See also Appendix, infra (listing jurisdictions holding that a title insurance company has no duty to search based merely on the act of entering into a contract to insure title).
8. Examples of such statutes are those adopted by the state of California stating
acted and a party who has relied on the title company's report suffers a loss, it falls to the courts to recognize and enforce the duty to search and disclose, which duty the title insurer implicitly assumed by offering to insure titles to land.

This Article analyzes the Nebraska Supreme Court’s decision in Heyd v. Chicago Title Insurance Co., examines the nature of the title insurer's duty to search and disclose as adopted in other jurisdictions, and analyzes the merits and weaknesses of the various approaches to the problem.

II. BACKGROUND

Title insurance has become the preferred mode of protecting purchasers and lenders in the United States against loss from unexpected encumbrances and undiscovered claims to land. To understand the different judicial and legislative responses to the question of the nature of a title insurance company's duty to its insured, it is helpful to consider briefly the predecessors of title insurance. The development and growth of the title insurance industry has been seen as a response to the inability of prior methods of title assurance to adequately protect land purchasers. Consumers' and the legal community's attitudes about a title insurer's duty to its insured have, thus, been to a great extent shaped by comparison with these earlier methods of title assurance.

The oldest method of assuring title is the attorney's search and title opinion. Either the buyer or seller retains an attorney who searches the public records, weights the facts shown, and provides a written opinion as to the condition of title. Attorneys sometimes hired professional abstractors to perform the search from which a title insurer will not be equated with an abstractor or be liable as an abstractor of title, and those adopted by the legislatures in Arizona and Colorado and other states imposing a reasonable search on all title insurers operating in those states. See infra notes 135-36 and accompanying text.


10. See infra notes 76-119 and accompanying text.

11. See infra notes 119-71 and accompanying text.

12. In many states, the purchase of title insurance has all but displaced the methods originally developed to ascertain that investments in land will not turn out to be losses. Whitman, Optimizing Land Title Assurance Systems, 42 GEO. WASH. L. REV. 40, 47-49 (1973); Comment, Washington Title Insurers' Duty to Search and Disclose, 4 U. PUGET SOUND L. REV. 212, 212 (1980).


15. Id. at 1163.

16. Id. Today this method only surpasses the use of title insurance in some southeastern states and parts of New England. Comment, supra note 12, at 213.
torneys prepared their opinions. From this practice grew commercial abstract companies which search the records and issue "abstracts" that contain either summaries or full copies of all recorded instruments affecting title to that property. A lawyer generally retains the abstract company and then examines the abstract before issuing an opinion to the client.\(^\text{17}\)

The attorney and the abstractor are each charged with a duty of using reasonable care in making the title search and preparing abstract or title opinion.\(^\text{18}\) Neither will be liable for failure to discover or disclose defects which would not normally be found or disclosed by a member of the relevant profession exercising reasonable care.\(^\text{19}\) The land purchaser who relies on a lawyer's opinion letter or an abstract thus has no recourse upon suffering loss due to one of the many types of title defects that are not discoverable from a reasonable search of public records.\(^\text{20}\) The weaknesses of the grantor/grantee recording system,\(^\text{21}\) and the sundry locations in which records affecting title to land may be kept,\(^\text{22}\) make such loses all too frequent. Additionally, some title defects will be disclosed only by a physical examination or a survey of the property. When the defect has been discovered but the attorney or abstractor has underestimated its significance, the injured client still will not recover the loss so long as reasonable care was exercised.\(^\text{23}\) And, even when negligence is clear, whether the client has any actual recourse will depend on the solvency of the individual lawyer or abstractor.

These inadequacies in the protection afforded a land purchaser by the attorney opinion and abstract methods of title assurance led to the development of title insurance.\(^\text{24}\) A title insurance policy indem-

\(^{17}\) Whitman, \textit{supra} note 12, at 47-48.

\(^{18}\) Comment, \textit{supra} note 14, at 1163-64.

\(^{19}\) \textit{Id.} at 1164.


\(^{21}\) The grantor/grantee index traces chain of title based on names of grantors and grantees. Misspelling of a name, a name change, or one party's use of various names all may result in a recorded deed, mortgage, or other interest which will not be discovered through a reasonable search of grantor/grantee indices.

\(^{22}\) Records of devises, judgment liens, tax liens, conveyances of title, mortgages, and other encumbrances may be found in the offices of the probate court, secretary of state, county auditor, court clerk, tax assessor, and tax collector. In one instance, a company reported examining seventy-six sources of information in sixteen public offices. Whitman, \textit{supra} note 12, at 26 n.25.

\(^{23}\) \textit{See} Comment, \textit{supra} note 14, at 1164 n.17 and accompanying text.

\(^{24}\) The first title insurance company is said to have been formed as a direct response to a state supreme court which held that an abstractor was not liable for loss to his client from a judgment lien which the customary search could not have uncovered. Comment, \textit{supra} note 14, at 1164 n.18. In \textit{Watson}, the land purchaser sued a lay abstractor when a judgment lien clouded the title to land the abstractor had certified to be free of title defects. The court held that an abstractor had certified to be free of
nifies the insured against loss from discovered and undiscovered defects in title which are not explicitly excepted in the policy. While a few title insurance companies do insure title on a casualty basis, historically title insurers have searched public records, or purchased such a search, prior to any agreement to insure title and have then tailored the policy to what they have found. The large majority of title insurance companies today maintain private records and tract indices from which they conduct their own searches. Employment of the tract index system adds to the protection title insurance gives a purchaser of the greater ease and efficiency with which claims to a particular piece of property can be uncovered in comparison with the grantor/grantee indices used in most states' public record systems. As well as indemnifying against loss, the title insurer agrees in the policy that, when appropriate, it will initiate actions necessary to quiet title or otherwise remove defects in title that are not excepted from policy coverage. The title insurer also contracts to provide legal defense when its insured is sued by reason of a title defect within the policy's coverage, even after the insured has sold the

25. See infra notes 40-41 and accompanying text. Statements in this Article about title insurance policies generally refer to the American Land Title Association ("ALTA") Owner's Policy, the most frequently used title insurance policy form in the United States. It was the policy form at issue in Heyd. See infra notes 52-70 and accompanying text. Differences exist between the standard Owner's Policy and a standard Lender's title insurance policy. A large institutional lender is also more able to persuade the title insurance company to waive general exceptions and to take on greater risk. This Article focuses on the Owner's Policy of title insurance and the title insurer's duty to the individual property buyer.

26. See Comment, supra note 14, at 1165. See infra notes 65-73 and accompanying text.

27. Searching the records for defects in title has become a part of the issuance of title insurance both because title insurance was an outgrowth of the previous searching methods and because of the insurer's desire to evaluate the risks involved before insuring. Comment, supra note 14, at 1164.

28. A few companies hire independent abstractors or lawyers to search the public record system and prepare abstracts or opinions upon which the title insurance company then bases its issuance of an insurance policy. A variation is the company which issues policies on the basis of applications from lawyers who have performed the search. See Taub, Rights and Remedies Under a Title Policy, 15 REAL PROP. PROB. & TR. J., 422, 422-23 (1980); Comment, supra note 14, at 1164.

29. The tract indices maintained by most title insurance companies trace title numerically based on tracts or parcels of land and attempt to record any encumbrance or lien involving each parcel on one set of records in the title insurance company's own offices. Comment, supra note 12, at 215 n.20. A party searching public records must examine records in several different locations, since all records affecting land title may not be available in one central office. See supra note 22-23 and accompanying text. Also, the grantor/grantee index system employed in most states requires a searcher to look at both grantor/grantee indices and grantee/grantor indices, tracing chain of title based on records of events and transactions involving grantors and grantees.
property.  

It is the promise of greater protection offered by these features that has resulted in title insurance becoming the premier method of title assurance in the country today. Yet, as shown by court dockets in many states, many purchasers discover too late that the protection they purchased was much less than they had thought. The culprit is a phrase which appears on the first page of a title insurance policy or preliminary commitment making the insurance “SUBJECT TO THE EXCLUSIONS FROM COVERAGE, [AND] THE EXCEPTIONS CONTAINED IN SCHEDULE B.” When a title insurance company’s preliminary title search reveals a defect in title that presents a greater risk of loss than the company is willing to assume, the company simply lists that encumbrance or defect as a “Specific Exception” from coverage. The most serious risks of loss are printed as “General Exceptions” to the policy or in one of the “Exclusions from

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31. Id. at 691. The ALTA Commitment (preliminary report) and Owner’s Policy both list on their first pages that against which the company offers to insure:
   1. Title to the estate or interest described in Schedule A being otherwise than as stated therein;
   2. Any defect in or lien or encumbrance on such title;
   3. Lack of a right of access to and from the land; or
   4. Unmarketability of such title.
Id.

This insurance is subject to the “EXCLUSIONS FROM COVERAGE” and the “EXCEPTIONS” contained in Schedule B. The “EXCLUSIONS” generally are losses caused by government regulations or zoning ordinances which restrict the use of the land; losses caused by exercise of governmental rights or eminent domain; losses caused by defects or encumbrances created or agreed to or known by the insured; and losses caused by encumbrances created subsequent to issuance of the policy. Id. at 692.

Schedule B of the ALTA standard from policy states: “General exceptions applicable to the region shall be printed as items in this Schedule.” Id. at 694. In most regions, Schedule B will except taxes or assessments not shown as a lien in the public records; easements not shown in the public records; liens for services or materials not disclosed by the public records; and encroachments, overlaps, boundary disputes, or other matters which would have been disclosed by an accurate survey or an inspection of the premises. See samples of title insurance policies of various companies reprinted in AM. BAR ASS’N, TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 139-58 (1979).

Some additional Schedule B exceptions that are standard in particular states or regions include: unpatented mining claims and water rights excepted from ALTA policies in Wyoming and from the Washington Land Title Association standard form policy, and riparian rights excepted in Florida ALTA policies. See McDaniel v. Lawyers Title Guar. Fund, 327 So. 2d 852, 856 (Fla. Dist. Ct. App. 1976); Nautilus, Inc. v. Transamerica Title Ins. Co., 13 Wash. App. 345, __, 534 P.2d 1388, 1391-92 (1975). See also Taub, supra note 28, at 431-33 (discussing the major exclusions in a title policy). Following the printed general exceptions in Schedule B, there are typed specific exceptions applicable to the particular estate or interest covered by the policy.

32. Most defects for which the insurance company assumes the risk are those actually unlikely to result in losses, for example recorded documents which appear to be valid but are void because of forgery, improper execution, incapacity, impersonation, or
The title insurer need not even search for these types of defects since it has already protected itself from liability via the exception or exclusion. Thus, the purchaser of title insurance not only will have no coverage for the types of encumbrances to title that are most likely to occur, but also will frequently be given no notice of the existence of those generally excepted or excluded defects, even when the title insurer has learned that a potential problem exists.

Purchasers of title insurance are most often sellers of property who have agreed to provide a title insurance company's report or insurance policy for the buyer, buyers of property who want to insure themselves against loss, and buyers who have been required to provide a title insurance policy insuring their lenders against loss. Because the institutional lender has significantly greater bargaining power as well as more informed expectations than the average home purchaser, the nature of the title insurer's duty to the two different groups of insureds may vary. This Article focuses on the duty of the title insurer to the average land buyer such as a purchaser of a home.

In a typical transaction, a seller promises the buyer marketable title free of encumbrances or defects. The seller generally agrees to supply the purchaser with a preliminary title report and often pays the premium for a title insurance policy for the purchaser. If the title insurance company finds that the title is not insurable, or is not marketable, the buyer is not obligated to perform its part of the transaction and may insist that the seller return the buyer's earnest money unless the seller cures the defects. When the process ends with the seller being able to provide a preliminary title report or

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See Johnstone, Title Insurance, 66 Yale L.J. 492, 494-98 (1975); Comment, supra note 12, at 217 n.32.


34. Title insurance companies offer “Owner’s” policies and “Lender’s” policies. The latter frequently varies as a result of bargaining with institutional lenders, while the Owner’s Policy adheres more strictly to the standard form. Compare ALTA Owner’s Policy—Form B, reprinted in Title Insurance and You: What Every Lawyer Should Know!, 138, 139-43 (1979) (exhibiting the standard form) with ALTA Loan Policy, reprinted in Title Insurance and You: What Every Lawyer Should Know!, 147, 147-52 (1979) (exhibiting a variation).

35. The 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.” The agreement obligates the seller to provide title insurance prior to closing, with delivery of the policy or preliminary title report being a condition precedent to the buyer's duty to perform. Comment, supra note 12, at 223-24.

36. Id. at 224.

37. In only a very rare instance would a title insurance company find property was uninsurable. The company would simply issue the title insurance policy excepting from coverage any defects likely to cause loss.

38. See Earnest Money Receipt and Agreement form in Falconer, Earnest Money
commitment which states that title is in the seller, the buyer completes the transaction. Title insurance companies maintain that the preliminary report or commitment presented to a potential buyer is not a report of the state of title but merely an offer to insure. The buyer, on the other hand, who receives such a report from the seller at this stage in the transaction may reasonably perceive it to be a representation that the seller, in fact, has good title to the property and may close the transaction in reliance upon it. What the purchaser is quite often not aware of is that the insurer did not disclose a serious defect in the title because it fell into one of the exclusions from policy protection or into one of the general exceptions listed in Schedule B.

The buyer is made aware of those specific defects in the title that the title insurer has typed into Schedule B of the preliminary report. That awareness lets the buyer choose whether to accept the risk that one of those encumbrances will interfere with the enjoyment and use of the property. The buyer may negotiate with the seller to have those defects removed or bargain for a lower price if the buyer is to complete the transaction in light of those potential risks. But when a defect falls into one of the standard exclusions or exceptions and the insurer chooses not to disclose it, the buyer not only will be uninsured as to that defect, but will have lost any opportunity to renegotiate or rescind the deal.

Once the land transaction is completed, the title insurance company and the buyer enter into a title insurance policy. The title insurance policy basically insures that the buyer will have fee simple title to land and that the title will be marketable. No exception or

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 Receipt and Agreement, in REAL ESTATE AND GENERAL PRACTITIONER 221, ___ (Wash. State Bar Ass'n Section of Real Prop. Prob. & Trust L. 1976).

39. The preliminary report, also called in some regions a "certificate of title" or a "commitment," describes the property as the title insurer is willing to insure it and contains the same exclusions and general and specific exceptions as later appear in the title insurance policy. Levinson, A Return to Policy Limits in PRAC. L. INST. TITLE INSURANCE IN CURRENT TRANSACTIONS 1983, 278, ___ (1983).

40. Although these exceptions are explicit in Schedule B, it is certainly questionable whether average homeowners, in fact, realize that the policy they believe is insuring them is simply excepting out of the policy any risk which became apparent. Ring, Title Insurance For the Owner—Or What you See Is Not Necessarily What You Get, 52 L.A.B.J. 20, 21-24 (July, 1976). See Comment, supra note 12, at 223 & n.61. See also Johnstone, supra note 32, at 494-97 (stating that "critics assert that title [insurers] are not . . . insurers since they except any risk apparent after the title has been examined"); Roady, Professional Liability of Abstracters, 12 VAND. L. REV. 783, 794 (1959) (stating that title insurance is "a snare and a delusion for many policies written today exclude from coverage the very risks that a vendee desires insured").

41. See Heyd, 218 Neb. at 300, 354 N.W.2d at 157. While the ALTA Owner's Policy states that the policy insures against "[a]ny defect in or lien or encumbrance on such title" and "[l]ack of a right of access to and from the land," these are often "excepted" or "excluded" away. See Lipinski v. Title Ins. Co., 655 P.2d 970, 974 (Mont. 1982) (ex-
exclusion is needed to prevent the insurer from having to indemnify for losses not directly involving ownership of fee simple title—for example, incorrect location of a structure on the insured property, or a flaw that lessens value to the insured but does not significantly impair marketability of title. While the information of the existence of such defects would certainly help a buyer determine the value of a potential purchase, the title insurer is not obligated by the policy to search for these types of defects, or to reveal them when they have been discovered in the company's preliminary examination.

As a result of these discrepancies between the insureds' expectations and insurers' own interpretations of their policies, insureds have raised the issue of whether the title insurer should be charged with a duty to fully search the record and disclose all record defects regardless of whether those defects will be excepted from the title insurance policy.

III. HEYD V. CHICAGO TITLE INSURANCE COMPANY: DUTY TO SEARCH AND DISCLOSE IN NEBRASKA

The Nebraska Supreme Court recently held that a title insurer issuing policies in Nebraska has a duty in tort to diligently search and disclose all record defects of title. The court reached its decision by analogizing between title insurers and abstractors.

In Heyd v. Chicago Title Insurance Company, the plaintiffs, the Heyds, had contracted to purchase a home and lot. In connection with the purchase, the plaintiffs applied for a policy of title insurance. The defendant, Chicago Title Insurance Company, prepared a preliminary title report and delivered it to the Heyds. The Heyds then entered into a land contract with the seller and shortly thereafter signed a contract of title insurance. Later the Heyds learned that the home was not wholly located on the lot described in the title insurance policy, but was situated in part on land owned by the city. Though that fact was discoverable from the public records, there was

including easements not of record from policy coverage); Horn v. Lawyers Title Ins. Corp., 89 N.M. 709, 57 P.2d 206, 208-09 (1976) (stating that an exception for rights of parties in possession prevented indemnification for loss due to an easement). See also Lincoln Sav. and Loan Ass'n v. Title Ins. and Trust Co., 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219, 220-21 (1975) (stating that a general exception for facts revealed by an accurate survey prevented coverage by a title insurance policy); MacBean v. St. Paul Title Ins. Corp., 169 N.J. Super. 502, 504 A.2d 405, 408-09 (1979) (stating that the "reasonable expectation" doctrine applies to "misleading terms and "ambiguities."). For examples of other exceptions having a similar effect, see supra note 31.

42. Heyd, 218 Neb. at 300, 354 N.W.2d at 157. See infra notes 77-99 and accompanying text.
44. Id. at 297, 354 N.W.2d at 155.
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no mention of it in the preliminary report's list of specific defects to be excepted from coverage.45

The Heyds claimed, first, that the insurance company was liable on the contract because the fact that the house was not located completely on the insured land made title to the land unmarketable. The Heyds' second cause of action claimed that the title insurance company was liable in tort for negligently preparing a title report which failed to disclose the defect.46

The policy issued to the Heyds was a standard ALTA Owner's Policy Form B—1970 used with little adaptation by the Chicago Title Insurance Company.47 The policy insured against any loss or damage by reason of the following: title to the real estate being vested in one other than the seller, any defect in or lien or encumbrance on such title, lack of a right of access to and from the land, or unmarketability of such title, subject to listed exclusions and general and specific exceptions. The policy represented that title to the "land" was vested in fee simple in the seller. The legal description of the property insured included only the lot, with no mention of any buildings or improvements. One of the "CONDITIONS AND STIPULATIONS" in the policy defined the "land" insured to mean:

[T]he land described . . . and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways.48

The policy also contained the standard Schedule B exception from coverage for "loss or damage by reason of (1) Rights or claims of parties in possession not shown by the public records. (2) Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises."49

Chicago Title Insurance Company argued that the policy did not insure that any improvement was located on the land, only that fee simple title to the described lot was vested in the seller. The insurer also argued that the stipulation and the "survey exception" quoted

46. Brief of Appellant at 1, Heyd.
47. Brief of Appellee at app., Heyd.
48. Id.
49. Id.
above precluded its having any obligation to indemnify the plaintiffs for loss caused by the house being partially located on land owned by the city.\textsuperscript{50} Unlike all four of the other Schedule B general exceptions, the "survey exception" was not qualified to except only those defects not of record, so the fact that the potential loss was clear from the record made no difference. The defendant contended that it would only be liable if title to the lot described in the policy were not vested in fee simple in the seller, or if the lot itself were not marketable.\textsuperscript{51}

The defendant also denied any liability to the Heyds in negligence due to the policy's merger and limitation of liability clauses.\textsuperscript{52} According to the policy, the plaintiffs could not assert any cause of action on the preliminary report nor any cause of action in negligence that would not be limited by the exceptions and conditions of the policy. Paragraph twelve of the "CONDITIONS AND STIPULATIONS" provided:

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the state or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.\textsuperscript{53}

The trial court sustained the Chicago Title Insurance Company's demurrer to both the plaintiffs' contract and tort claims.\textsuperscript{54} The court accepted the insurance company's reasoning and ruled that there was no defect in title to the described property, nor was the title to that land unmarketable. Thus, the trial court determined that the Heyds' petition failed to state a cause of action and could not be amended to state a cause.\textsuperscript{55}

The Nebraska Supreme Court upheld the lower court's dismissal of the Heyds' contract action.\textsuperscript{56} The court agreed that the mislocation of the house did not make title to the land unmarketable, nor did it make a deficiency in the seller's fee simple ownership in the property insured. The loss alleged by the Heyds had resulted from

\begin{itemize}
\item \textsuperscript{50} Brief of Appellee at 14-15, Heyd.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Heyd, 218 Neb. at 298, 354 N.W.2d at 156.
\item \textsuperscript{54} Id. at 297, 354 N.W.2d at 155.
\item \textsuperscript{55} Id. at 297, 354 N.W.2d at 156.
\item \textsuperscript{56} Id. at 301, 354 N.W.2d at 157.
\end{itemize}
the house not being located within the boundary lines of the land described in the policy. Citing the rule that contract terms should be applied according to their plain and ordinary meaning, the court held that the survey exception effectively removed the Heyds' loss from coverage under the policy. The court concluded that the Heyds had no cause of action in contract and that "because there can be no question about the policy provisions or terminology concerning the stated survey exception, no amendment to the pleadings can improve Heyds' position in any contract action against Chicago."57

The court then addressed the question of whether the trial court had correctly dismissed plaintiffs' petition for failure to state a cause of action in tort.58 The court followed the lead of the Kansas Supreme Court in adopting the rule formulated by the California Court of Appeals in Jarchow v. Transamerica Title Insurance Co.,59 stating that where a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, the insurer has assumed two separate responsibilities.60 As well as its function as insurer, the court reasoned that in rendering the title report the title insurance company serves as an abstractor of title and, therefore, has the abstractor's duty to list all matters of public record adversely affecting title to the real estate. The Nebraska Supreme Court also adopted the California court's definition of the scope of that duty: the title insurer must report all matters which could affect a client's interests and which are discoverable from those public records ordinarily examined when a reasonably diligent title search is made.61 Breach of this obligation results in liability of the title insurance company for all damages proximately caused.

The Heyd court held that, because the insurer's duty in tort is distinct from the insurance company's responsibility on its policy, exceptions and conditions in the policy do not prevent a cause of action in tort for failure to abstract accurately. Particularly addressing the clause in the policy entitled "Liability Limited to this Policy," the court ruled: "This duty [to search and disclose] may not be abro-

57. Id. at 301, 354 N.W.2d at 156.
58. Id. at 301, 302, 354 N.W.2d at 157-58.
60. Heyd, 218 Neb. at 301-02, 354 N.W.2d at 157-58. Ford also involved a suit against the Chicago Title Insurance Company. In that case the preliminary title report failed to mention a break in the chain of title, such as a missing or unrecorded deed. The Kansas Supreme Court cited Jarchow for the holding that a title insurer assumes two duties, and that in fulfilling its duties as abstractor, the title insurer must list all matters of public record regarding the subject report. The court held the Chicago Title Insurance Company liable in tort for all damages proximately caused by the omission, and assessed punitive damages against the title insurer as well.
61. Id. at 301-03, 354 N.W.2d at 158.
gated through standard policy clause which would, if given the effect urged by defendant, place the onus of the title company's failure adequately to search the records on the party who secured the insurance protection for that very purpose.'

The court remanded the case to the district court with orders to allow the plaintiffs to amend their petition to state a claim in negligence. The case has not yet been heard or disposed of. The trial court will need to determine whether the mislocation of the house was, in fact, discoverable from the record. The Nebraska Supreme Court was careful to point out that a title insurer is liable only when it fails to find and disclose defects that are of record.

The Nebraska Supreme Court made no reference in *Heyd* to Nebraska statutes that regulate title insurers' operation in the state. Section 44-1901(1) of the Nebraska Revised Statutes defines title insurance as follows:

(a) Insuring, guaranteeing, or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, defects in or the unmarketability of title to such real property, or adverse claim to title in real property, which reasonable examination to title guaranteeing, warranting or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property; (b) Insuring, guaranteeing, or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of defects in the authorization, execution, or delivery of an encumbrance upon such real property, or any share, participation, or other interest in such encumbrance, guaranteeing, warranting, or otherwise insuring by a title insurance company the validity and enforceability of evidences of indebtedness secured by an encumbrance upon or interest in such real property; or (c) Doing any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of sections 44-1901 to 44-1917.

Subsection (b) applies to the efficacy of insuring an encumbrance on property such as the interest of a mortgage or holder of a lien on the property. It is subsection (a) which applies to defects in title to property and which might have been implicated in the *Heyd* case. According to subsection (a), by definition title insurance in Nebraska

62. Id. at 304, 354 N.W.2d at 159 (quoting L. Smirlock Realty Corp. v. Title Guar. Co., 52 N.Y.2d 179, 190, 418 N.E.2d 650, 655, 437 N.Y.S.2d 47, 62 (1981)).
63. Id.
64. See id. at 303, 354 N.W.2d at 158.
66. Id. § 44-1901(a)-(c).
must be accompanied by a reasonable search of the records. Further, section 44-1905 of the Nebraska Revised Statutes mandates:

No policy or contract of title insurance shall be written unless and until the title insurance company has caused to be conducted a reasonable examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies. 67

The question arises whether these statutes were intended to establish a duty of title insurance companies operating in the state to search title and to disclose defects to their insureds. And, if so, why did the Nebraska Supreme Court fail to find a duty of Chicago Title Insurance Company imposed by statute rather than in tort?

Several other states have enacted similar statutes mandating reasonable title searches prior to issuance of title insurance policies. 68 Yet, no court that has recognized a title insurer's duty to search and disclose has premised that duty on those state statutes. 69 It has been suggested that these statutes do not explicitly create a duty to search for the benefit of home purchasers. 70 Neither the Nebraska statutes nor similar statutes in other states mention disclosure to the insured. As discussed in Section II of this Article, it is the disclosure of all defects—whether insured or excepted from the title insurance policy—that is necessary to protect potential buyers from unexpected loss. Statutes which require title insurance companies to perform a reasonable search of the records but which do not require disclosure of defects to the insured actually protect only title insurance companies, and not home buyers. Such statutes have the effect of preventing title insurance written on a casualty basis from being sold in the state. 71 Companies that issue casualty insurance do not attempt to prevent the homeowner's loss by searching title first and thus, can of-
fer title insurance at a much lower rate than traditional companies which must maintain title plants and pay searchers' salaries. Statutes such as Nebraska's help. Traditional title insurance companies would like to avoid competition from those who would offer to write title insurance on a casualty basis.

It is, thus, possible that the Nebraska Supreme court ignored sections 44-1910(1)(a) and -1905 of the Nebraska Revised Statutes as a basis for finding a title insurer's duty to search and disclose because the statutes do not expressly mention disclosure to insureds, and because property buyers were not the class which those statutes were intended to protect. However, legislative history clearly shows that sections 44-1910(1)(a) and -1905 were promoted as protection for home buyers, and that legislators would have adopted the statutes to that end. The more likely explanation for the Nebraska Supreme Court's failure to mention these statutes as possible bases for imposing a duty to search and disclose on title insurers is that the court based its opinion so heavily on opinions by the Kansas Supreme Court. 72

72. Id.

73. The Nebraska statutes including a reasonable search as part of the definition and role of title insurance companies operating in Nebraska were sponsored and promoted by the Nebraska Land Title Association, the Fidelity Title Insurance Company, and the Minnesota Title Insurance Company, not by groups of home buyers. The representative of the Nebraska Land Title Association stressed, following the bill's introduction, that Nebraska law at that time allowed the issuance of title insurance with or without examination of title, and that the legislation was proposed in part to prohibit the practice of writing title insurance on a casualty basis. Title Insurance Bill: Hearing on L.B. 611 Before the Comm. on Banking, Commerce & Ins., Neb. Unicameral, 77th Sess. 11 (Apr. 5, 1967) (statement by Mr. Sam Jensen, Attorney for the Nebraska Land Title Ass'n) [hereinafter Hearing]. Thus, the class truly intended to be protected by the supporters of such legislation, probably traditional title insurance companies. Yet, the promoters also set forth the reasonable search requirement as "establishing a standard of care providing for reasonable examination of the claim of title and retention of records." Introducer's Statement of Purpose: L.B. 611 by Sen. Payne 2 (Apr. 5, 1967). The representative of the Nebraska Land Title Association at the hearing on the bill described title insurance under the bill as intended to protect home buyers:

[O]ur legislation requires that there be reasonable examination of title. We set up a standard of care, whereby a title must be searched, our records must be kept for fifteen years, and this all must be done . . . with the recognized standards of underwriting in the national title insurance industry. . . . [W]e are not going to have a situation where you will write this on a casualty basis. We want to get away from this, because we think . . . that if you have a home and you lose your home, certainly that insurance company is there to make good the financial loss, but most people always, I know I personally, think this is my home where I've lived for a period of time I've worked on, this home is worth much more to me than the replacement value in dollars, so what you get when you get title insurance, you get the thing that you buy from an attorney and from an abstractor . . . .

Hearing, supra, at 11. Thus, while it is possible the statutes were ignored by the parties and the court in the Heyd case because they were never intended to protect property buyers, it is more likely that they were just overlooked, for it clearly could have been argued that property buyers were within the class of persons the statutes were intended to protect.
Court\textsuperscript{74} and the California Court of Appeals.\textsuperscript{75} Neither Kansas nor California statutorily requires that title insurers conduct searches before issuing title insurance. The Nebraska Supreme Court seems to have simply relied on the opinions of these courts and overlooked the possibility that a statutory basis could exist for finding a duty of title insurers to search and disclose record defects in Nebraska.

IV. THE NATURE OF THE TITLE INSURER'S DUTY TO SEARCH AND DISCLOSE DEFECTS IN TITLE TO ITS INSURED

The existence and nature of a duty to search and disclose depends to some extent upon whether its source is found in the title insurance contract or in tort, created by the relationship between the parties. The Nebraska case of \textit{Heyd v. Chicago Title Insurance Company},\textsuperscript{76} takes the latter approach. This Article will look next at the nature of the duty to search that courts have found in the contract between the title insurer and the insured. The Article will then explore the line of cases that find a duty to search based in tort.

A. CONTRACT LIABILITY

Some courts have found that a title insurer has an obligation to search and disclose implied in the contract to insure title. In a few instances, courts have actually been able to find an express undertaking to search title from language in the preliminary title report or commitment to \textit{insure},\textsuperscript{77} or in the title insurance policy itself.

A title insurance company's initial response to an application for title insurance is to send the potential insured a "commitment" to insu-
sure—termed a "preliminary report," or "certificate of title" in some regions of the country—in which it makes its offer to insure the title subject to the list of specific and general exceptions. Neither the preliminary title report nor the title insurance policy mentions an agreement to search. The preliminary "title certificate" used in some regions comes the closest, by certifying that the insurer has examined the title and discovered the listed defects. However, there is no express agreement to search and there is no promise regarding the extent of the company's examination. To the contrary, all the above types of preliminary papers expressly limit the insurer's obligation to issuance of a title insurance policy. Still, one court was able to find an express contract to search and disclose from an insurer's oral explanation of the function of the preliminary report. Another court found an express agreement to search and disclose in a clause requiring the purchaser to pay three-quarters of the company's "time and expense in the investigation of the title." A third court found

78. Experience of title insurance companies as shown, see infra notes 81-83, has led companies to be careful with their preliminary communications to potential insureds in order to lessen the likelihood that those communications will be deemed reports contracted for or paid for separately from the policy of title insurance. Neither the ALTA "Commitment" nor the ALTA Owner's Policy mentions a search. The face of the ALTA Committee describes itself as "a legal contract between you and the Company. It is issued to show the basis on which we will issue a Title Insurance Policy to you." "Schedule A" describes the land being purchased, and "Schedule B" contains the list of general and specific exceptions, described supra at note 31. ALTA Commitment—1982, reprinted in PRAC. L. INST., TITLE INSURANCE IN CURRENT TRANSACTIONS 1983 725, ___ (1983). See Pioneer Nat'l Title Ins. Co. Commitment for Title Insurance, reprinted in ABA SECTION OF REAL PROP., PROB. & TR. L., TITLE INSURANCE AND YOU 119, 207 (1979).

79. Similarly, no language suggesting that a search will be performed appears in the standard owner's title insurance policies. ALTA Owner's Policy—Form B—1979, reprinted in PRAC. L. INST., TITLE INSURANCE IN CURRENT TRANSACTIONS 1983 691, ___ (1983); TICOR Residential Title Insurance Policy, reprinted in PRAC. L. INST., TITLE INSURANCE IN CURRENT TRANSACTIONS 1983 705, ___ (1983); Title Insurance Policy of the Title Guarantee Company and Pioneer National Title Insurance Company, reprinted in TAUB, TITLE INSURANCE AND YOU 194, ___ (1979) [hereinafter Title and Pioneer]. See supra note 77; infra note 80.

80. A "Certificate of Title" is the type of preliminary communication commonly issued in the New England states. The certificate of title furnished by the Title Guarantee Company and Pioneer National Title Insurance Company does state that the company "[c]ertifies to [insured] that an examination of title to the premises described in Schedule A has been made in accordance with its usual procedure and agrees to issue its standard form of insurance policy ...." Title and Pioneer, reprinted in TAUB, TITLE INSURANCE AND YOU 123, ___ (1979). See Metropolitan Title Guar. Co. v. Gildenhorn, 249 F.2d 933, 935-37 (D.C. Cir. 1957); M.R.M. Realty Co. v. Title Guar. & Trust Co., 270 N.Y. 120, 200 N.E. 666, 666-69 (1936).


82. Kentucky Title Co. v. Hail, 219 Ky. 257, 292 S.W. 817, 818-19 (1927). The ALTA Commitment does not expressly state the consequence if the purchaser declines the insurance policy after the commitment or preliminary report has been issued, and does not apportion the price charged between preparation of the report and the policy
an express contract when language in the policy and in the company’s advertisements represented that a purchaser would pay a single premium as the “Total Fee for Title Search, Examination & Title Insurance.”

In the more usual cases the court finds an implied contract to search and disclose defects. The agreement is found to be implied either from the company’s issuance of a preliminary report or title certificate, from its listing of some specific defects in the policy, or from circumstances surrounding the parties’ entering into the contract. An example of the first approach appears in an early New York case. The title insurance company sent a preliminary letter to an applicant stating that the insurer had examined the title and was willing to issue a policy of insurance. The court held that the letter implied that the company had undertaken to search title for the insured. The court reasoned:

[The company] undertook to act for plaintiff in two capacities—as a conveyancer who examined the title and undertook to advise her whether it was good and marketable, and as an insurer who undertook to insure that she had a good and marketable title. In the former capacity the [company] assumed the same responsibilities and owed to the plaintiff the same duty as if it had been an individual attorney or conveyancer.

Several courts have seen the insurer’s listing of some specific defects in the title as implying to the insured that a search was made to uncover those defects. They have then held the title insurer liable for failing to find or disclose other defects, on the basis that the insurer is required to provide the protection that the insured had a reasonable right to expect.

83. Banville v. Schmidt, 37 Cal. App. 3d 92, 105, 112 Cal. Rptr. 126, 135 (1974). The court ruled: “It is . . . clear that a portion of the total fee of $113.60 is attributable to a title search and examination.” Id. The theory on which liability was ultimately based was negligent misrepresentation, but the court indicated that the facts may have been sufficient to hold the insurer liable in contract had that cause of action been pleaded. Id. at 102, 112 Cal. Rptr. at 132 n.2.


Finally, some courts have implied a contract to search title from the circumstances of the various functions assumed by title insurance companies. They have cited the facts that title insurers maintain a title plant, search title, write contracts, and transfer and record deeds in the manner of attorneys and abstractors. The reasoning applied is that the client intends not only to contract for those types of similar services, but also for the same title-searching duties as the client would receive from an attorney or abstractor. Some courts would limit this rule to specific cases where special facts make the insured’s expectations as to the scope of the contract and the intent of the company particularly compelling. Other courts have imposed the rule based on general public expectations and held that the title insurer in all cases must meet the same duty to search as an abstractor or attorney.

Courts finding either an express or an implied undertaking in the preliminary report or title insurance policy have had to find a void created by ambiguity in the contract language which the court would then need to fill. They have applied the rule of strict con-


The court in the oft-cited case of Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975) decided that the title insurance company’s duty to its insured to search and disclose was in tort. However, some of its language has since been cited by courts finding that the expectations of the insured support requiring title insurance companies to search and disclose defects in the title:

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. . . . [T]he provisions of the policy "'must be construed to as to give the insured the protection which he reasonably had a right to expect.'"


89. See Taub, supra note 87 at 425; Comment, supra note 14, at 1169-70.

90. Dinges v. Lawyers’ Title Ins. Corp., 106 Ill. App. 3d 188, __, 435 N.E.2d 944, 946 (1982) (holding a clause excepting rights of others in portion of the property within the bounds of any streets to be ambiguous, construing the clause to except only rights of others not of record); Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super. 110, __, 110 A.2d 878, 880 (1955) (construing a clause in a title commitment excepting tax liens from the insurance policy to except only from the later insurance coverage and not from the duty to search); Marandino v. Lawyers’ Title Ins. Corp., 156 Va. 696, __, 159 S.E. 181, 183-84 (1931) (holding that, by describing the property in the insurance policy and noting the city ordinance which took some of the insured’s property, the insurer
struction of insurance contracts against their makers.\textsuperscript{91} Courts finding a duty to search and disclose in the contract have also had to ignore, construe, or void other express language in the policy and preliminary papers which would belie such an obligation. As well as the general exceptions and exclusions discussed above, all types of preliminary papers and title policies contain clauses limiting the title insurer’s liability to the terms of the policy and merger clauses stating that any obligation under the preliminary report ends when the policy is issued, or that the contract for the preliminary report merges into the issued policy.

Finding of an implied agreement to search title seems to break down in the fact of such express assertions to the contrary. For example, though it is true that insureds suffer many unexpected losses due to defects omitted from policy coverage by general exception clauses, is it analytically sound to say that the insurer impliedly agreed to search for general types of defects for which it expressly denies any liability under the policy?\textsuperscript{92} Can it be fairly said that the title insurer has agreed by implication to conduct a search of the same scope conducted by an attorney or abstractor if the face of the

\footnotesize{\textsuperscript{91} See supra note 90. See also Miller v. Lawyers Title Ins. Corp., 112 F. Supp. 221, 225 (E.D. Va. 1953) (upholding a contract’s designation of a “plat of survey”); National Holding Co. v. Title Ins. & Tr. Co., 45 Cal. App. 2d 215, __, 113 P.2d 906, 908-09 (1941) (stating that if the respondent wished to avoid liability in the event of a reassessment, the respondent should have stated so clearly in the policy).

\textsuperscript{92} There are many cases in which courts have answered this question with an emphatic “No.” Nishiyama v. Safeco Title Ins. Co., 85 Cal. App. 3d Supp. 1, 7, 149 Cal. Rptr. 355, 358 (1978) (holding that a title insurer was not liable for unmarketability of property due to an undisclosed subdivision map act by reason of a general exception from policy coverage for losses arising from any law, ordinance, or governmental regulation); Lincoln Sav. and Loan Ass’n v. Title Ins. and Trust Co., 46 Cal. App. 3d 493, 497, 120 Cal. Rptr. 219, 221 (1975) (stating that an insured whose land was not accessible by any road was not covered by a title insurance policy by reason of a general exception); Contini v. Western Title Ins. Co., 40 Cal. App. 3d 536, 543-44, 115 Cal. Rptr. 257, 261 (1974) (holding a title insurer not liable on the contract for failure to note a judgment affecting the boundary of the property because of a policy exception for matters dependent on a survey or a critical inspection of the property, unless the policy provides for extended coverage or the insured requests special endorsements); Anderson v. Title Ins. Co., 103 Idaho 875, __, 655 P.2d 82, 85 (1982) (stating that as other contracts, policies of title insurance are to be construed in their ordinary meaning); Kuhlman v. Title Ins. Co., 177 F. Supp. 925, 926 (W.D. Mo. 1959) (stating that “[t]here can be no other reason for the exclusionary clause in its contract, and such exclusionary clause is binding upon the plaintiffs, and they are not entitled to recover.”); Heyd, 218 Neb. at 301, 354 N.W.2d at 157 (stating that “[t]hat survey exception is expressed in language having plain and ordinary meaning. Therefore, correct location of any structure on the described premises is not a risk or loss covered by Chicago’s policy of title insurance”); Offenhartz v. Heinsohn, 30 Misc. 693, __, 150 N.Y.S.2d 78, 83 (1956) (stating that “[t]he title policy is a contract, and the obligation of the title company is limited and defined by the terms thereof.”).}
policy clearly disclaims liability by means of blanket exclusions for many items that are clearly within the scope of an abstractor or attorney's reasonable search? Still, several courts have found particular exceptions to be ambiguous, applied the rule of construction against the maker of the contract, and held that the exception did not prevent the inference that the insurer had assumed an obligation based in contract to search for and disclose defects otherwise falling within the exception.

The preliminary report and insurance policy also both contain clauses that limit the insurers' liability to the terms and conditions of the policy and also clauses that merge all obligations and claims under the commitment contract into the subsequently issued policy. Some courts have termed these clauses exculpatory and held them unenforceable, reasoning that the insurer should not be able to exculpate itself from liability for its errors and force the burden onto those who paid to be protected from such liability. Some commen-

93. See Comment, supra note 14, at 1169 n.44.
94. One example of how far courts have gone under the guise of interpreting the title insurance contract is the Illinois Supreme Court's decision in Dinges v. Lawyers Title Ins. Corp., 106 Ill. App. 2d 188, ___ 435 N.E.2d 944, 946 (1982). Both the preliminary title report and the policy contained a general exception from coverage for "'rights of others in that portion of the property within the bounds of any streets, roads or highways.'" Id. (quoting Schedule B, § 2, title insurance commitment). The preliminary report did not specially except, or otherwise disclose, a recorded easement over the property. The court held that the general exception was ambiguous, then construed it against the insurer to except from coverage only rights of others not of record. Blanket exceptions in title insurance policies are often expressly qualified to except only those defects which are not of record, and the absence of the usual qualifying phrase should have been interpreted as a decision of the insurer not to qualify that particular exception. See also Henkels, 177 Pa. Super. at __, 110 A.2d at 880 (construing a clause in a title commitment excepting tax liens from the insurance policy to except only from the later insurance coverage and not from the duty to search); Marandino, 156 Va. at __, 159 S.E. at 184 (holding that, by describing the property in the insurance policy and noting a city ordinance which took some of the insured's property, the insurer assumed the risk of a faulty description despite a clause expressly excepting losses caused by city laws from coverage under the policy).
95. See supra notes 79-80.
96. See Heyd, 218 Neb. at 304, 354 N.W.2d at 159. The court stated: "This duty may not be abrogated through a standard policy clause which would, if given the effect urged by defendant, place the onus of the title company's failure adequately to search the records on the party who secured the insurance protection for that very purpose." Id. (quoting Smirlock Realty v. Title Guarantee, 52 N.Y.2d 179, 190, 418 N.E.2d 650, 655, 437 N.Y.S. 57, 62 (1981)). Accord Viotti v. Giomi, 230 Cal. App. 730, 739, 41 Cal. Rptr. 345, 350 (1964); O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 438, 155 N.E.2d 545, 546 (1958); Papakalos v. Shaka, 91 N.H. 265, __, 18 A.2d 377, 378-79 (1941). See also 9 J. Appleman, INSURANCE LAW AND PRACTICE § 5201, at 8 (1981) (stating that "blanket exclusions ... are wholly inconsistent with the protection which the face of the policy purports to offer."). But see Union Realty Co. v. Ahern, 93 A.2d 84, 86 (D.C. 1952) (holding an insurer not liable due to a clause disclaiming responsibility for correctness of information relating to taxes and assessments); Chu v. Chicago Title Ins. Co., 89 A.D.2d 574, __, 452 N.Y.S. 229, 229 (1982) (stating that a cause of ac-

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tators have suggested courts could reach the same result by finding the title insurance contract to be a contract of adhesion, and then refusing to enforce the standardized merger and limitation of liability clauses on the bases of public policy and inequality of bargaining power.

Just as there are analytical difficulties in implying an agreement to search for and disclose defects that are expressly excepted from both the preliminary papers and the title policy, there are similar problems in holding that the title insurer agreed to perform a search, based on the preliminary report or the list of defects provided before closing, when clauses state clearly that the title insurer only agrees to be liable on the policy and according to its conditions and terms. Many courts that apply the rule that insurance contracts, like other contracts, must be given effect according to the plain and ordinary meaning of their terms have held that the above merger and limitation clauses prevent any claim based on the contract for a failure to search and disclose. These courts rule that the standard policy of title insurance is a contract of indemnity which cannot be judicially rewritten into an agreement to make a full search and disclosure of defects. While many end the analysis at that point, other courts unable to find an obligation to search and disclose in the contract look to the law of torts.

B. TORT LIABILITY

When a duty to search title and disclose all defects is found in tort, it is premised on the relationship between the title insurer and

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97. Black's Law Dictionary defines an adhesion contract 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." BLACK'S LAW DICTIONARY 38 (5th ed. 1979). A seller often has no alternative but to approach a title company in order to provide a report on the state of title for a potential buyer. In many states, title insurance has so predominated over other title assurance methods that competition in price essentially does not exist. And, the seller has little opportunity to demand terms other than those on the printed forms, with the exception of additional coverage the seller may purchase as per other printed forms. Quiner, Title Insurance and the Title Insurance Industry, 22 Drake L. Rev. 711, 725-27 (1973).

Again, the same rule would not be fairly applied when one party to the title insurance contract is an institutional lender rather than a private homeowner. The mortgage policy of title insurance is much more likely to be the product of true bargaining. Comment, supra note 14, at 1172. If a court is to rewrite the insurance policy, it must respond to the actual relationship between the insured and the insurer.

98. Comment, supra note 14, at 1172.

99. See Heyd, 218 Neb. at 300-01, 354 N.W.2d at 157. See supra note 92.
the insured property buyer and not on any agreement between them. Liability is, thus, not limited by the coverage of the title insurance contract or any exceptions, merger clauses or other exculpatory clauses therein.\textsuperscript{100} The theory, whether based on pure negligence\textsuperscript{101} or negligent misrepresentation,\textsuperscript{102} is that once the title insurer takes on the responsibility of performing some sort of title search and disclosing some defects, the company has a duty to one it knows may rely on those services to search and disclose fully and accurately.

Courts basing their findings of a duty to search in tort have found liability on a pure negligence theory by analogizing the title insurer's duty to that of any attorney or abstractor, or on a negligent misrepresentation theory by holding the title insurance company to the standard of one who has set himself out as supplying information for the guidance of others. The latter approach is exemplified by the California case of Hawkins v. Oakland Title Insurance and Guaranty Co.,\textsuperscript{103} the former by Heyd v. Chicago Title Insurance Co.\textsuperscript{104} and the oft-cited case of Jarchow v. Transamerica Title Insurance Co.\textsuperscript{105}

In Hawkins, the title insurance company made no mention in its preliminary report of a recorded grant of access rights to the state.\textsuperscript{106} Relying on what appeared from the preliminary report to be clear title, the purchaser completed the transaction and built a service station on the property. When the state chose to act on its right, the insured was unable to continue operating his business. The lower court had dismissed the case for failure to state a cause of action in negligence.\textsuperscript{107} On appeal, the California appellate court found a duty of the title insurer in section 552 of the Restatement of Torts:

One who, in the course of his business or profession supplies information for the guidance of others in their business

\textsuperscript{100} Contini, 40 Cal. App. 3d at ___, 115 Cal. Rptr. at 263; Heyd, 218 Neb. at 304, 354 N.W.2d at 159. See infra notes 164-67 and accompanying text.

\textsuperscript{101} Jarchow, 48 Cal. App. 3d at 938-40, 122 Cal. Rptr. at 486; Contini, 40 Cal. App. 3d at 545-46, 115 Cal. Rptr. at 262-63 (holding a title company liable for negligent search even though the insurer was relieved of liability under the policy); Ford v. Guar. Abstract and Title Co., 220 Kan. 244, __, 553 P.2d 254, 266 (1976); Dorr, 238 Mass. at 494, 131 N.E. at 192-93; Heyd, 218 Neb. at 303-04, 354 N.W.2d at 158-59; Udell v. City Title Ins. Co., 12 A.D.2d 78, __, 208 N.Y.S.2d 504, 506-07 (1960).


\textsuperscript{103} 165 Cal. App. 2d 116, 331 P.2d 742 (1958).

\textsuperscript{104} 218 Neb. 296, 354 N.W.2d 154 (1984).

\textsuperscript{105} 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).

\textsuperscript{106} Hawkins, 165 Cal. App. 2d at 126, 331 P.2d at 743.

\textsuperscript{107} Id.
transactions is subject to liability for harm caused to them by their reliance upon the information if
(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
(b) the harm is suffered
   (i) by the person or one of the class of persons for whose guidance the information was supplied, and
   (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.\textsuperscript{108}

The \textit{Hawkins} court held that a title insurance company furnishes preliminary reports for the guidance of those it insures, rejecting the insurer's assertion that the preliminary report only functions to identify defects that the company is not offering to insure. The standard of care was defined in comment "e" of section 552: "If the matter is one which requires investigation, the supplier of the information must exercise reasonable care and competence to ascertain the facts on which his statement is based."\textsuperscript{109} Other courts have similarly held title insurers liable on the theory of negligent misrepresentation without citing to section 552.\textsuperscript{110}

The California court in \textit{Jarchow} premised liability in negligence on a comparison of the title insurer to an abstractor.\textsuperscript{111} The court held that when a title insurance company presents a buyer with both a preliminary title report and a policy of title insurance, it assumes two distinct responsibilities. In rendering the first service, "the insurer serves as an abstractor of title—and must list all matters of public record regarding the subject property in its preliminary report. . . . When a title insurer breaches its duty to abstract title accurately, it is liable, in tort for all the damages proximately caused by said breach."\textsuperscript{112} The analogy of a title insurer to an abstractor has since been adopted as a basis for imposing a duty to search and disclose by many courts, including the Nebraska Supreme Court in \textit{Heyd}.\textsuperscript{113} A few courts have imposed the same duty by analogizing the title insurer's examination to the attorney's.\textsuperscript{114}

The standard of care required under the two negligence theories should be the same, though the language the courts have employed has been slightly different. Courts following the Hawkins analysis impose a duty of "reasonable care and competence"; the courts following Jarchow hold the title insurer to a "rigorous" duty and require a "reasonably diligent title search":

The duty imposed upon an abstractor of title is a rigorous one: "An abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that professional skill . . . the abstractor must 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 title search is made." Similarly, a title insurer is liable for his negligent failure to list recorded encumbrances in preliminary title reports.

Basing a tort duty to search and disclose on the general section 552 definition of one who supplies information to guide others in their business transactions seems analytically more sound than imposing on the title insurer the status of an abstractor or attorney performing a title search. The title insurance company does attempt to state that its preliminary report is merely an offer to contract, not an abstract, and its partial list of defects are entitled "exceptions" from coverage. Yet, the majority of courts finding a duty to search and disclose in tort base the duty on that analogy rather than section 552.

V. ANALYSIS

The Nebraska Supreme Court's decision in Heyd might have been more soundly premised on the relationship between the parties as described in section 552 of the Restatement of Torts. But the

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115. See supra note 110 and accompanying text.
117. See supra notes 79-80 and accompanying text. See also Tamburine v. Center Sav. Ass'n, 583 S.W.2d 942, 947 (Tex. Civ. App. 1979) (stating that a vast difference between title insurers and abstract companies exists, and that because a title insurer is not an abstractor it "owes no duty with regard to the examination of title, thus precluding any recovery for negligence").
118. Compare supra note 110 and accompanying text (citing decisions which held title insurers liable for negligent misrepresentation) with supra note 113 and accompanying text (citing cases holding title insurers liable for the failure to search).
119. See supra notes 110-18 and accompanying text.
court's decision to recognize a duty to search in tort has much to recommend it. Though there are some analytical inconsistencies, as shown in the preceding sections of this Article, the policies supporting a duty of the title insurer to diligently search the record and to disclose all defects found outweigh the disadvantages of judicial imposition.

A. PROBLEMS WITH RECOGNIZING A DUTY TO SEARCH IN TORT

One of the major policy arguments against finding a duty to search title has been that courts that impose such a duty are interfering with the rights of the parties to contract. Critics complain in this respect that a title insurer does not agree to be an abstractor of title and should not be required by the courts to provide services other than those that the title insurer has bargained to provide. These critics also complain that finding a duty to search increases the liability of the title company beyond the extent of its bargain. But even in their criticism, the roots of the insureds' reasonable reliance are revealed. One commentator claims that title insurers do not promise to abstract title, but merely offer to insure title subject to a list of exceptions. Yet, that same commentator in another paragraph describes a preliminary report as being prepared to provide the customer with initial information regarding a particular piece of real property, and states that it is usually ordered "so that all the parties can be apprised of the steps necessary to clear title and consummate the transaction." Despite disclaimers, preliminary title reports are normally relied upon by insureds, escrow agents, and lenders with full knowledge, and sometimes with the encouragement, of the insurance company. If the insurer actually intended the list of title defects in the preliminary report to be used just to inform the potential insured of the proposed contract terms, the list could be presented in

121. Id. at 277. See also Tamburine, 583 S.W.2d at 947 (holding that a vast difference exists between title insurers and abstract companies, and that because a title insurer is not an abstractor it "owes no duty with regard to the examination of title, thus precluding any recovery for negligence").
122. See Comment, supra note 14, at 1162 n.9.
124. Id. at 278. A second commentator also claims that a title report functions solely as a title insurer's commitment to insure the title described, yet laments that this is not the perception of the average seller or purchaser who perceives a title report as a representation of the true state of title. Note, Does a Title Insurer Qua Title Insurer Owe a Duty to Any but its Insured? 7 OKLA. CITY U.L. REV. 293, 307 (1982).
125. See supra note 93 and accompanying text.
the policy at the time it is offered to the insured, as is the case with most other types of insurance policies. Instead, the title insurance company’s preliminary report is issued prior to closing of the land contract—at the same stage in the transaction as is the abstract or attorney’s opinion—and the company should know that it will likely be used in the same manner.126

A second concern advanced by those opposed to judicial imposition of a duty to search and disclose is that full disclosure of title defects will alarm purchasers unnecessarily and chill alienation of land. They presage that placing a duty to search and disclose on title insurers will result in the disclosure of even de minimus risks currently assumed by the insurer without mention.127 The prediction is that, though the title insurer would have judged them to be of no concern, the average home buyer may view the risk of losing title from those defects more seriously. As a result, the buyer may seek to clear title with an expensive quiet title suit or even to forego what would have been an advantageous investment. However, the argument does not take into account the fact that, along with the disclosure, the title insurer will make known its willingness to insure those defects. This willingness should keep a potential buyer from overreacting to the list of defects.128

A third negative prediction is that requiring a full search will raise the cost of title insurance. The reasoning is that many of the types of defects title insurers except from their policies are those most time consuming to search for and difficult to find. The extra cost to the company to search for those defects is predicted to lessen the number and size of the risks the company can afford to insure, and will prevent insurability of some of the largest threats of loss to the landowner.129 Mechanics’ liens are said to be an example.130 Title insurers will be less easily persuaded to insure such major risks if they are required to expend increasing amounts of the premium dollar to search for them. If the cost is passed on to the buyer, title insurance will become too expensive for the very buyers who need it the most. This prediction also is not difficult to refute. The duty

126. For an opposing view, see H. Miller & M. Starr, supra note 123, at § 12.80. The authors state that though a purchaser may enter into a purchase agreement in reliance on the preliminary report, at the time the purchase is concluded the purchaser simply relies on having a title insurance policy and is no longer relying on the report stating that there are no defects.
127. See Comment, supra note 14, at 1175.
128. Id.
129. Id. at 1175-76.
130. Id. Mechanics’ liens are frequently impossible to discover since they may attach to property prior to filing or may relate back to a time earlier than the date of filing.
courts have imposed has merely been a reasonable search of record defects. Liability would not be imposed for failure to uncover defects which are not discoverable from the public records customarily searched. Most title insurance companies do search either their own tract indices or the public records to some extent. Others hire an abstractor or attorney, who is already held to a reasonableness standard, to perform searches from which the insurers prepare their title reports and policies. The expense would not be drastically different in most cases.

A final major argument against judicial imposition of a duty to search is that a state's legislature, rather than its courts, should decide whether this duty should be imposed on title insurance companies issuing policies in the state. Most states have statutes regulating the operation of title insurance companies within their borders. As seen previously, some states statutorily require title insurance companies to maintain title plants and to conduct a reasonable search thereof before the issuance of any policy. On the other hand, at least one state has recently adopted statutes proscribing the imposition of abstractors' liability on title insurers. Thus, when a legislature has enacted other laws regulating the title insurance industry and included none which establish a duty of the title insurer

131. See infra notes 156-67 and accompanying text.
132. See supra note 27 and accompanying text.
133. Levinson, supra note 120, at 280; Comment, supra note 12, at 235.
135. In 1981, California adopted statutory language which prevents title insurers from being held to the same duty to search as an abstractor. Cal. Ins. Code §§ 12340.10 to -. 11 (West Cum. Supp. 1987). Section 12340.10 codifies the legislature's decision that a title insurance policy may not be treated as an abstract of title:

A written representation, provided pursuant to a contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein. An abstract of title is not a title policy as defined in Section 12340.2.

Id. § 12340.10 (emphasis added). Section 12340.11 similarly states that preliminary title reports are not to be equated with abstracts:

"Preliminary report", "commitment", or "binder" are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.

Id. § 12340.11 (emphasis added). Thus, in the state that led the way to finding a duty to search and disclose in tort, section 12340.10 and -.11 seem to make a tort action for negligence of the insurer in preparing the title policy no longer viable.
to search and disclose, it may be cogently argued that a choice has been made to not require title insurers to perform such a function in that state. Legislative adoption of a title insurers' duty to search probably is the best answer. But when legislation is not forthcoming, the position of the parties and the policies described in the following paragraphs make it incumbent upon the courts to recognize a title insurance company's duty to fully search title and accurately disclose defects to its insured.

B. ADVANTAGES OF RECOGNIZING A DUTY TO SEARCH IN TORT

Three policies outweigh the above disadvantages of imposing a duty to search and to disclose to a potential purchaser and user of property: (1) societal interests in title assurance, alienation of land, and efficient resource allocation; (2) the equity of enforcing the expectations of the parties; and (3) the fairness that pronouncing a definite standard affords to both the insurer and the insured.

Imposing a duty to search title facilitates societal interests in title assurance, alienation of land, and efficient risk and resource allocation. As one commentator has explained:

Determining the nature and extent of the rights existent in land will allow freer transfer of these rights. Disclosure of rights held by others or disclosure of restrictions on the use of land will facilitate efficient resource allocation. Reduction of the risks from undiscovered title defects fosters more certain analysis and planning which in turn will lead to greater economic efficiency in use of land.

136. Statutes in Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, and Texas, on the other hand, only require that "[n]o policy or contract of title insurance shall be written unless and until the title insurance company has caused to be conducted a reasonable examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies." NEB. REV. STAT. § 44-1905 (Reissue 1984). See NEV. REV. STAT. § 692A.220 (1985); N.H. REV. STAT. ANN. § 416-A:6 (1983); N.C. GEN. STAT. § 48-132 (1982) (also requiring an attorney's opinion); OHIO REV. CODE ANN. § 3953.07 (Baldwin 1980); PA. STAT. ANN. tit. 40, § 910-7 (Purdon 1971); TEX. INS. CODE ANN. art. 9.34 (Vernon 1981) (requiring only a "search of title . . . from an abstract plant" without mentioning any standard of reasonableness). These statutes do not require disclosure to the insured and, in fact, are purported to protect title insurers operating in the state from those who would offer to insure title on a casualty basis, not to protect the insured.

137. See generally Comment, supra note 12, at 234-35 (discounting the argument that the legislatures rather than the courts should determine whether title insurers should be required to search and disclose for the benefit of the insureds).

138. See infra notes 141-44 and accompanying text.

139. See infra notes 148-51 and accompanying text.

140. See infra notes 152-55 and accompanying text.

141. See Comment, supra note 14, at 1177.

142. Id.
Without a duty to search and disclose, most title insurance companies will not fully search for types of defects excluded from insurance coverage under their policies. A full search of record title is necessary to determine the nature and extent of the rights of others existent in land. Having a degree of certainty as to what those rights are and are not will enable investors, owners, developers, and promoters to purchase only property that can be used for their intended purposes. That certainty will, thus, aid in the efficient allocation of resources and prevent waste by keeping purchasers from investing in land they will never be able to use. As one commentator has written, "[t]o effectuate these social interests and individual needs, insurance coverage alone is inadequate; a duty to search title and disclose defects must also be imposed."

Requiring the title insurer to complete a reasonable search also prevents waste of the insured's resources for a second title search by an abstractor or attorney, most of which would only duplicate work for which the insured has paid the title insurance company. Title insurers generally make some search in order to estimate the risks involved in insuring each piece of land. The insured pays for this search in the premium for the title insurance policy. To require payment from the insured for this service and not allow the insured to reap full benefit "seems economically wasteful; to force him to pay again, this time to a third party, in order to rely upon the finding of a search seems clearly unfair." As one commentator has written:

When the insured is forced to turn to another agency for title searching, this agency must either duplicate the high cost recording system of a title plant or else use the notoriously inefficient public records. In either case resources are misallocated: duplication frustrates efficiency by preventing intensive use of high fixed cost facilities; utilization of the public records forces the insured and society to pay for an inefficient method of search. Finally, . . . in those states and cities where title insurance is most used, the insured may in effect have no alternative agency to which to turn for a title search.

The average purchaser of an owner's policy of title insurance

143. See supra notes 31-34 and accompanying text.
144. Comment, supra note 14, at 1177.
145. Id.
146. Johnstone, supra note 32, at 506-07; Comment, supra note 14, at 1171.
147. Comment, supra note 14, at 1171. See J.H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal. App. 2d 831, 839, 304 P.2d 832, 837 (1956) (stating that "it would be strange, indeed, if prospective purchasers of real property could not rely upon title reports for which they are required to pay, but must search the records themselves.").
148. Comment, supra note 14, at 1171.
Title insurance companies' liability does not expect to have to pay another searcher in order to get a complete report after having purchased title insurance and a preliminary title report. Both commentators and courts have asserted that the title insurance industry leads parties, via its advertising and other practices, to rely on the preliminary title report as a guarantee of good title, and that the courts, therefore, have a duty to enforce the insureds' expectations and recognize a duty of the insurer to complete a full search and disclosure.\textsuperscript{149} Insurance coverage alone is not an adequate substitute for the ability to depend on a title report before closing a deal when the result can be an easement running through the yard of a private home, or an undisclosed lien which curtails operation of a business at a prime location.\textsuperscript{150} Only disclosure of the true state of the title in time to prevent an unfortunate investment will meet the goals of owners who intend to use, develop, or promote their property; owners need assurance that they can do so, not money damages if they cannot.\textsuperscript{151}

Judicial pronouncement of a duty to search in tort is the fairest approach not just from the insured's standpoint. It is also fairer to title insurance companies than to refuse to adopt an express duty yet to construe provisions of the title insurance contract in order to reach that result. A recent example is the case of \textit{Hedgecock v. Stewart Title Guaranty Co.}\textsuperscript{152} The Colorado Court of Appeals in \textit{Hedgecock} did not speak in terms of a duty to search. The court instead just attempted to construe the contract. The plaintiffs had sued to compel their title insurer to indemnify them for a lost sale and to remove the defect in title which had caused the loss. The defect was that the legal description which had been used in the public records since 1904 did not fit the location of the property. The policy and preliminary report both contained a general exception from coverage for "any discrepancies, conflicts or shortages in the area or boundary lines, or

\textsuperscript{149} Comment, supra note 12, at 233; Comment, supra note 14, at 1171. See supra notes 81, 83, 86, 87, 100, & 101.

\textsuperscript{150} See Lawyer's Title Ins. Corp. v. Frieder, 147 Colo. 44, 362 P.3d 555, 557 (1961) (stating that a building had to be relocated due to an undisclosed easement); Dinges v. Lawyers Title Ins. Corp., 106 Ill. App. 188, 435 N.E.2d 944, 947 (1982) (stating that property could not be used for the business purpose for which it was purchased due to an easement running through its center); James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 789-90, 284 N.W. 273, 275, aff'd, 136 Neb. 456, 286 N.W. 337 (1939) (stating that a business was upset by an undisclosed zoning restriction); Korn v. Campbell, 192 N.Y. 490, 85 N.E. 687, 689-90 (1908) (stating that intended land use was limited by a restrictive covenant to residential uses); Finley v. Glenn, 303 Pa. 131, 301 A. 299, 301 (1931) (stating that a purchaser lost an investment in land when undisclosed restrictive covenants prevented building of a factory); Comment, supra note 14, at 1173.

\textsuperscript{151} Comment, supra note 14, at 1173.

\textsuperscript{152} 676 P.2d 1208 (Colo. Ct. App. 1983).
any encroachments, or any overlapping of improvements or other boundary or location disputes.’”\textsuperscript{153} The title insurance company claimed it was not liable because of this exception.\textsuperscript{154} The court, however, held that the description was so faulty as to make the property unmarketable; since the title insurance company had insured plaintiff against title being unmarketable, the company was liable. The court dismissed the fact that the title insurance company’s promise to insure against “unmarketability of title” was subject to the listed exceptions from coverage.\textsuperscript{155} The result was that the court chose not to recognize a duty to search and disclose, but then construed away a clause which arguably should have prevented coverage under the policy in order to find liability in contract.

Such a result is less fair to title insurance companies than imposing upon them a duty to search and disclose. The title insurance company is placed in a position of uncertainty as to how to avoid liability. It is not expressly required to search or to disclose, and yet it finds itself being held liable in contract despite pains it has taken to clearly disclaim or except itself from liability in particular areas. Expressly recognizing a duty to search would protect the insurer from unexpected loss just as it would the insured.

In sum, the social interests achieved through disclosure of title defects, the need to effect the expectations of the insured, and fairness to both parties combine to recommend that courts faced with the issue find that the title insurer owes a duty in tort to search and disclose title defects to the potential insured.

\textsuperscript{153} Id. at 1209. The defectiveness of the description that had been used in the records since 1904 was revealed when the plaintiff arranged to sell the property to purchasers who were required to provide a survey to their lender. The surveyor was unable to reconcile the actual location of the property with the legal description. That the contract intended to exclude such defects might have been clearer if the exception had been stated in the more typical language excepting “encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.” Heyd, 218 Neb. at 297-98, 354 N.W.2d at 155. See supra note 75.

\textsuperscript{154} Imposing a duty to search here would have been less burdensome to the title insurance company than construing the contract to cover a title which was unmarketable because of a defective description. The company might not have been able to discover the defect in description through a reasonable search of the records. Thus, by tort standards the title insurer might not have been liable—though it is certainly arguable that a reasonable search would have disclosed that the description placed the land in a nonexistent subdivision.

\textsuperscript{155} Hedgecock, 676 P.2d at 1210.
C. Issues Regarding a Title Insurers' Duty to Search Which Remain Unresolved

1. What is the scope of a reasonable search?

The Nebraska and Kansas Supreme Courts have described the scope of the reasonable search required of a title insurance company as follows: "[T]he title insurance company . . . must list all matters of public record adversely affecting title to the real estate which is the subject of the title report."\footnote{156} The California court in Jarchow stated that "the abstractor must 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 title search is made."\footnote{157} Most courts have not further explained which public records a reasonably diligent search must include.

Relevant records may include not only deeds, mortgages, and other outright transfers of land, but also records of judgments, foreclosures, tax assessments or liens, marriages or divorces, and probate hearings. Thus, questions could arise in future cases as to whether certain public records should have been consulted.

The term "public records" is generally defined in title insurance policies to include "those records which by law impart constructive notice of matters relating to said land."\footnote{158} Some courts interpret the definition broadly. One court held a title insurance company liable for failing to discover a public easement filed only in a federal land office and not discoverable in any county records;\footnote{159} another court found a title insurer to be negligent when the insurer failed to disclose a document that was not in the public records but which was in the insurer's tract indices.\footnote{160} A third court has interpreted the definition quite narrowly and held that the insurer was only required to


157. Jarchow, 48 Cal. App. 3d at 939, 122 Cal. Rptr. at 485 (quoting Contini v. Western Title Ins. Co., 40 Cal. App. 3d 538, 545-46, 115 Cal. Rptr. 257, 263 (1974)). Thus, in the Heyd case, should it be determined on remand that Chicago Title Insurance Company could not have discovered the mislocation of the house via a search of the public records, the company would not have breached its duty and would not be liable to the Heyds.


search the records of the county probate court since state law named that office as the place where all documents purporting to convey an interest to real estate were to be recorded; the insurer was, thus, not held liable for the plaintiff's loss caused by a title defect on record in the office of the district court. Generally, courts limit the scope of reasonableness to documents discoverable within the official chain of title. No court has extended the scope of the search to the point where the insurer is expected to survey the land or disclose defects not discoverable from a record search.

Since the Nebraska Supreme Court, like most courts, has hinged tort liability of the title insurer on analogy to an abstractor, an answer to the question of duty should begin with what sources the typical abstractor in good standing would customarily consult. Items that fall clearly outside those sources should not be read into the title insurers' duty. When practices in the state vary, liability in tort must be limited to the standard of a reasonable search. Undiscoverable defects must be left to the insurance function.

2. What defenses may the insurer raise?

The Nebraska court left unresolved the question of whether the existence in the title insurance policy of a merger clause might be raised as a defense by the insurer. Presumably, all other defenses to a negligence claim would apply as well. The Supreme Court of Montana has stated in dicta that comparative negligence may be a full defense in a case where a plaintiff has conveyed title when a reasonably prudent person might not do so. The defense of contributory negligence was raised in another case but was not reached since the court premised the duty to search in contract and not in tort. It may also be possible for an insurer to argue that a purchaser as-

162. 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, 3-4 (1976).
163. Comment, supra note 14, at 1182-83. Among the relevant guides to defining the scope of the search considered reasonable in a particular area would be standards set forth by the local bar association. Basye, Improvement of Conveyancing Procedure, 36 Neb. L. Rev. 81, 90-92 (1956). Types of defects generally excepted from standard title insurance policies will not be a guide to what is a reasonable search. One commentator has stated that "the question of whether a subsequently discovered defect causing loss to the insured will give rise to liability will turn on whether a reasonable search would have discovered the defect, and not on whether that defect fell outside of the broad classes of hard-to-discover defects usually excepted from the policy." Comment, supra note 14, at 1163 n.11.
164. Heyd, 218 Neb. at 304, 354 N.W.2d at 159.
sumed the risk by choosing to invest in land without hiring a surveyor in the face of knowledge that the policy excepted from coverage those defects that an accurate survey or inspection of the property would reveal. Very few courts have addressed such defenses. Presumably they have not often been raised by defendant title insurance companies which rely on clauses in the policy of title insurance to refute plaintiffs' claims.

3. What is the proper measure of damages?

As did the Nebraska Supreme Court in Heyd, most courts have premised tort liability for failure to adequately search and disclose on the idea that the title insurance company's responsibility in tort is distinct from its responsibility on its policy of title insurance. Thus, the title insurer's liability in tort should also be distinct from its liability under the title insurance contract, and need not be limited by the policy amount, though at least one court has mistakenly held otherwise. Liability in tort would include "all damages proximately caused by such breach of duty." The result is that the scope of proximately caused damages in tort will often be broader than an insured could claim under the policy for breach of the contractual undertaking. This of course will be true when the court determines that the scope of the title insurer's reasonable search encompassed a defect of a type excepted from the insurance policy.

167. The defense would be more persuasive in areas of the county where surveys are commonly purchased before a land transaction is finalized than in a state such as Nebraska where surveys prior to closing of a land transaction are the exception rather than the rule.

168. Heyd, 218 Neb. at 303, 354 N.W.2d at 158.

169. Lipinski v. Title Ins. Co., 655 P.2d 970, 974 (Mont. 1982). The court seemed to impose a duty in tort on the title insurer who "owes its clients the duty of conducting a title search with reasonable care," yet, the court held that damages were limited by the amount for which the policy was written.

170. Heyd, 218 Neb. at 303, 354 N.W.2d at 158. For a more detailed discussion of methods of calculating the measure of damages than is within the scope of this Article, see Taub, supra note 28, at 437-39.

171. Comment, supra note 14, at 1183. See Chun v. Park, 51 Haw. 462, 466, 462 P.2d 905, 907 (1969), where the court allowed the plaintiff all "out-of-pocket expenses," including his downpayment, payments on a mortgage, financing charges, taxes, and insurance. The plaintiff was not able to recover the loss of anticipated profits, however, since he was unable to show proximate cause.

This does not mean that a title insurer may not set a maximum on liability under the insurance coverage. Recovery will be limited to that amount when the cause of action under which the insurer is found liable is in contract. The policy limit is set forth in Schedule A of an ALTA owners' policy. Several paragraphs of the "Conditions and Stipulations" section of the policy also operate to lower awards to insureds under the contract by allowing the company to set off any amounts previously paid under the policy, to require notice within 90 days after any loss, and to otherwise protect itself. ALTA Owners' Policy—Form B—1970, reprinted in PRAC. L. INST., TITLE INSURANCE IN CURRENT TRANSACTIONS 1983 691. __ (1983).
When a court has found liability in tort to exist it must, on the question of damages, be careful to separate liability for an inadequate search from limits on contract liability under the policy.

VI. CONCLUSION

Nebraska has joined the growing number of states which find that, by presenting their insureds with a preliminary title report, title insurance companies assume the responsibility to search the public records and to disclose all matters which could affect their insureds' interests. This duty to search requires title insurance companies to examine all relevant public records and to search for all types of title defects, liens, and encumbrances, even though they will be exempted from policy coverage. The duty includes disclosure to the potential insured of those exempted defects, so that the insured may decide whether to terminate the transaction, require the seller to cure the defects, or negotiate a new price. Failure to discover a recorded encumbrance that a reasonable search would have disclosed will be a breach of the title insurer's duty to search; failure to reveal in the preliminary report any defect the insurer could have reasonably discovered—whether or not excepted from insurance coverage—will be a breach of the insurer's duty to disclose.

Recognition of a duty to search and disclose is compelled by the need to enforce the reasonable expectations of large numbers of insureds. Imposition of a duty to search and disclose is also necessitated by the need to effect important societal interests in title assurance, alienation of land, and efficient resource allocation. Since title insurance companies' advertising and practices have contributed over the years to consumer expectations, as well as to a near-preemption of the field of title assurance, it is not inequitable to impose upon them a standard of reasonable care in search and preparing preliminary reports to be relied upon by their insureds.
APPENDIX

A. BELOW ARE JURISDICTIONS RECOGNIZING A DUTY IN TORT OF TITLE INSURERS TO MAKE A REASONABLE SEARCH AND DISCLOSURE.


CONNECTICUT. Bridgeport Airport Inc. v. Title Guaranty & Trust Co., 111 Conn. 537, 150 A. 509, 510 (1930).


IDAHO. Hillock v. Idaho & Trust Co., 22 Idaho 440, 126 P. 612, 613 (1912).


MINNESOTA. Quigby v. St. Paul Title Insurance & Trust Co., 60 Minn. 275, 62 N.W. 287, 290 (1895).


B. BELOW ARE JURISDICTIONS HOLDING THAT A TITLE INSURER OWES NO DUTY BEYOND THAT ASSUMED IN ITS POLICY.


DISTRICT OF COLUMBIA. Union Realty Co. v. Ahern, 93 A.2d 84, 86 (D.C. 1952).


TEXAS. Southern Title Guaranty Co. v. Prendergast, 494 S.W.2d 154, 158 (Tex. 1973).