GETTING THE TITLE ASSURANCES YOU WANT—

If you don't know what you want, you might not get it!

--Apologies to Yogi Berra

INTERNATIONAL RIGHT OF WAY ASSOCIATION, CHAPTER 67 (ORANGE COUNTY, CALIFORNIA)

July 16, 2019

Holiday Inn, John Wayne Airport

2726 South Grand Avenue

Santa Ana, California

"A ROSE BY ANY OTHER NAME, ETC." BUT IF YOU WANT A SCREW DRIVER, YOU'D BETTER NOT ASK FOR A HAMMER!

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Getting the Title Assurance You Want

1. Assurances of Title—Addressing Risk

The focus here is on assurances concerning title to real property. Such assurances are frequently—but not exclusively—sought from title companies or an opinion of counsel. The inference is that you would have an interest in obtaining such assurances when you are involved in a transaction or other project involving title to real property. The unfortunate question all too often asked—and more unfortunately too often the first question—is ***"Which is better title insurance or an opinion of counsel?"*** Transactions and other projects involving title to real property necessarily involve associated specific risks associated with title to reap property. So what that question really asks is ***"Which is a better way to address specific risks associated with title to real property—title insurance or an opinion of counsel?"*** The only thing more foolish than asking that question is trying to give it a serious answer. Neither we nor you are in any position to answer that question? You might as well ask, ***"Which is better—a screw driver or a hammer?"***

In this, as in many context, the tendency is to skip over the important and hard first questions, and leap right into what one suspects would be an easy question. In the present context, the important and harder first questions include:

"Why are you involved in this transaction or project?"

"What are you trying to achieve or avoid?"

"What are the risks that might jeopardize your ability to achieve or avoid those things?"

Consider the following summarized from the deposition of a title man, employed at the time by a "land services company," as illustrating what can happen if you are not clear about "**What am I looking for**"

> *I never know the ultimate objective of any client. I never know if they want to lease it, want to buy it. All I ever hear is, "Hey, I want you to do title for this piece." Nobody ever tells me like, "Hey, you need to go from Point A to Point B to Point C." -- it's always, "Here is a piece of property. Do title on it." All they ever say is, "I need a mineral search on this property," or, "I need a surface search," or, "I just want a leasehold searched," and that is as far as it goes.*

Numerous considerations may reasonably be expected to come into play in the evaluation of the merits in a given context of title insurance versus a title opinion. Before such considerations can be meaningfully evaluated, it is necessary to have some shared understanding about what we have in mind when we discuss "*title*" to real property. With that understanding, you should be in a position to understand what you want— ***"What are the specific risks associated with title that might prevent me from achieving what I want and/or avoiding what I do not want in this matter?***

Even then it is still too early in our conversation to analyze the relative merits of the two sources for obtaining assurance of title until we have a shared understanding of the services or products which may be obtained from a title insurer, on one hand, and those which may be obtained through an opinion of counsel, on the other. And then, magically—once you understand what you are looking for, and when you understand what you may be able to obtain through a title insurer, on one hand, and from an opinion of counsel, on the other—now you find yourself equipped to answer your own question—"***What is the best way for me to address the specific risks associated with title that might prevent me from achieving what I want and/or avoiding what I do not want in this matter?***"

2. What is "title"?

Take a moment to consider what "ownership" involves. Black's Law Dictionary (2nd Pocket Edition. 2001), p. 509, describes "ownership" as: "The collection of rights allowing one to use and enjoy property, including the right to convey it to others." We've been told that this "collection of rights" is best understood as a "bundle of sticks."[1] More to the present point, paraphrasing General Grant, *we have been told this so often that we have come to believe it.*[2]

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[1] "By mandating rents so low that its action denied plaintiff due process of law, the Board took from him a significant stick in the bundle of sticks that together constitute ownership of real property." (*Kavanaugh v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 793, Baxter, J., dissenting.) "Law students are taught that ownership of real property can be compared to possession of a 'bundle of sticks,' i.e., there are certain rights and privileges associated with such ownership and that each stick represents a distinct right or privilege....Here, appellants had an option to purchase real property. This does not give them a stick in the bundle." That dubious remark, however apt it may have been in the matter there before the court, appears in *Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 648. In a similar vein, "Property is comprised of a "bundle of rights" that may be exercised in reference to it." (Miller & Starr, California Real Estate (4th aped. 6/2016) p. 9-2, § 9:2.) To its credit, the text also recognizes that property involves not merely the rights, but also "the limitations on rights that a person has...." (*Id.*, p.9-2, § 9:1.)

[2] "I was not studious in habit, and probably did not make progress enough to compensate for the outlay for board and tuition. At all events, both winters were spent in going over the same old arithmetic which I knew every word of before, and repeating: 'A noun is the name of a thing,' which I had also heard my Georgetown teachers repeat, until I had come to believe it....'" (Grant, Personal Memoirs of U.S. Grant, Selected Letters Vol. I, 1839-1865, p.21 (1990, Literary Classics of the United States, Inc.).

From a Title Attorney's Perspective:

Perhaps not surprisingly, both the technical and the colloquial notions concerning *ownership* have much in common with the related notion of *title*, being, as we have been coerced by repetition into believing: "The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself." (Black's Law Dictionary (2nd Pocket Edition. 2001), pp. 709-710.)

As useful as that definition might be in some contexts, it has the unfortunate effect of suggesting that *title* to specific property is a matter solely of a single relationship between a specific person (the "*owner*") and specific property (the "*owned*"). At least for some purposes, it is more useful to think of title to specific property as the aggregate accumulation of all the various relationships existing at a given moment in time among any number of persons with regard to the specific property in question. In this analytic framework we are not concerned merely with who owns which sticks in a hypothetical "bundle," but with such things as who else has a stick that may qualify or limit the time and manner or other aspects of the presumed "owner's" use of its stick.

Viewed in this way, *title* (with respect to specific property and between any two or more such persons) involves the rights and obligations that exist between or among them in regard to that property. We are concerned here solely with real property, and, further, we are concerned here not with customary, cultural or consensus rights and obligations, but with the rights and obligations that are legally enforceable.[3]

A complete statement of the *title* to specific real property would include a schematic diagram reflecting all the enforceable rights and obligations which exist among individual specific persons (private persons, governmental entities, and the general public) in regard to, for example, entry into, use, possession, use, improvement, acquisition, disposition, encumbrance and improvement of the real property in question. Accordingly, to be complete, the statement of *title* to specific real property must include also a schedule of the enforceable limitations on each of

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[3] One can be denied commercial service or seating for a variety of reasons. The denial is no less real and emphatic for being grounded in custom, culture or other consensus. That aside, we use *enforceable* here to mean *legally enforceable*, to the exclusion of matters that may be enforced by extralegal social sanction.

those enforceable rights and their exercise, and of the enforceable benefits or advantages others enjoy by reason of those enforceable obligations.

Similarly, the complete description of a specific person's *title* to specific real property includes a statement of: (a) all the enforceable rights of that person concerning that property and the identification or description of the persons who are obliged to respect such rights (i.e., against whom those rights may be enforced) and (b) all of the enforceable limitations on such person's exercise of such rights (and the persons who may enforce such limitations), as well as (c) all the enforceable obligations the person in question owes to other persons concerning that property (and the persons who may enforce such obligations).

In the present context, to be consistent with prevailing usage, I do not consider the rights and interests of the general public or of government/regulatory agencies to represent *ownership*. "*Owners*" here, rather, have specific rights and obligations not shared with the general public or regulatory authorities, but which are specific to their individual interest in specific property. "*Non-owners*" apart from regulatory authorities, have only such rights and obligations concerning specific property as are shared by the general public—they have no particular, specific personal interest and therefore no particular, specific, rights or obligations concerning the property.

Such *ownership* of real property is invariably not a single, uniform relationship between a single owner, on one hand, and all other persons as non-owners on the other. Rather, the rights of individual owners may vary among them, as well as between any of them and varying others who are non-owners—and the obligations owned by individual owners to particular other owners, and to non-owners generally (to say nothing of regulatory authorities), may also vary greatly. This sense of *title* is particularly relevant to a discussion of the available means of obtaining the assurances concerning title to specific property which may be from time to time desired.

From an Underwriter's Perspective--[4]

Terminology and the concepts it represents are important in dealing with land titles. The common metaphors concerning title to real property invariably suffer due to the unique qualities of the subject matter. Those qualities are properly

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[4] 4 Intellectual Tyranny of The Status Quo; Symposium: Property: A Bundle of Rights? Econ Journal Watch, Volume 8, Issue 3, 193-291 (September 2011)

displayed on the American platform of liberty as a defining value in our society. Something private. Something that cannot be easily reduced.

For those who deal in real property for a living, a more compelling framework is the fundamental principle of exclusivity of the real property right. [5] The other principle is priority. The priority of a right is sometimes protected in a statute but more often established by agreement, date of delivery, notice or recording. Do yourself a favor and ignore the phrase "*bundle of sticks*" unless you're discussing cut lumber. It's just confusing. Remember "exclusivity" and "priority." The title searcher and title examiner apply each of those rules daily in performing their work.

3. What am I Trying to Achieve or Avoid?

You find yourself involved in a transaction or other project involving one or more real property assets. Let's just call it the "**Project**." Since the Project involves one or more real property assets it makes sense to believe that success in the Project may involve identifying and addressing risks associated with real property assets. NOT NECESSARILY! You could, of course, completely ignore that subject, and just assume that there are no relevant risks associated with the real property assets involved—or you could assume that whatever those risks may be they will all work out just fine. BUT YOU WILL NEVER DO THAT!![6]

So, about this Project—What real property assets are involved? Meaning to ask both "What are they?" and "What are they?" The first, "What are they?" is really, "Where are they?—What is the physical location of the real property in question?" The second, "What are they?" is literally that—and the possibilities are broad and deep--fee simple absolute, determinable fee, life estate, remainder, lease, fee oil and gas rights interest, easement, license, lien (interest securing

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5 "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property." (California Civil Code section 654.)

6 An experienced real estate development attorney was heard to proclaim, "I have never seen a problem involving the Rule Against Perpetuities!" He was right--HE HAD NEVER SEEN THE PROBLEM. He missed it every time, until finally it bit him in the hind quarters. If you believe the Rule Against Perpetuities has been abolished in California, see Probate Code section21200, et seq., "The Uniform Statutory Rule Against Perpetuities."

performance of an act), beneficiary interest in a deed of trust, burden of a deed restriction or CC&R, benefit of (right to enforce?) deed restriction or CC&R, etc.

For each such real property asset involved in your Project, there are either: (a) one or more "GOOD THINGS" you are hoping to achieve concerning it, (b) one or more "BAD THINGS" you would like to avoid concerning it, or (c) most often both. The Project risks associated with the specific asset include (a) anything that might prevent you from fully realizing the GOOD THINGS and (b) anything that might make occurrence of the "BAD THINGS" more likely.

Next, question: "Why do you care?" or perhaps, "Who cares?" Are you concerned for your own sake, or has someone asked you to obtain assurances of title? Who is asking?

Lender or Borrower
Seller or Buyer
Assignor or Assignee
Operator
Landowner seeking quitclaim or surrender
Lawyer representing adverse party
Government regulatory office

Who is asking may affect not merely the point of the concern, but also your flexibility in selecting the right tool. If a potential lender wants an attorney's opinion of title and enforceability of a deed of trust, you are not going to talk them into a title policy instead. You may well talk them into asking for that too—much to your client's annoyance. On the other hand, if the court in a quiet title action wants to see a title report, you are not going to talk it into taking an opinion of counsel—at least not very easily or often.

Now you have identified the risks you want to address. You have thought through the extent of your flexibility in making a judgment on the best way to address those risks. Next question—same question—"***What do you want?***" Title insurance and an attorney's title opinion are each sought and delivered to provide *assurances* (i.e., a level of comfort or security) concerning title to real property. But what does that entail, and what are the differences between the assurances you might get from a title company and those you might get from a title opinion? For example:

Do you want a commitment of funds to cover some specific risk? Do you want a commitment to defend your title against an adverse claim? Would you like to limit your exposure by having someone else take on some minimal risk? Are you willing to pay for that?

Do you want a formal written analysis of the implications of specific matters—on and off record—upon your intended entry into, use and improvement of the property in question?

4. *What is Available to Me from a Title Company?*

Once you know what it is you are looking for—but before you leap to deciding whether you should seek that from a title company or an opinion of counsel (or some from each?)—you need to pause and familiarize yourself with (or remind yourself of) the broad range of services and materials available from a title company.

- **The Title Insurance Process**

Title insurance is really a process involving services that facilitate closing of a transaction, especially a purchase and sale transaction or mortgage loan. The process involves: (1) a quick look at tax records and title plant records to confirm names and legal description (often referred to by Escrow Officers as "legal & vesting or "L&V"); (2) Title Search; (3) Title Examination; (4) Issuance of Preliminary Tile Report; (5) Curative work by the Title Officer; (6) Review of documents submitted for recording; (7) Recording; and (8) Policy issuance.

The title search and examination work which the title insurance companies perform is based on the information contained in their own title plant resources. Three collections, sorted by County, are maintained in each title plant: (1) document references analyzed and organized by legal description and property address; (2) judgment and tax liens and other documents that do not describe property analyzed and organized by names and recognized name variations; (3) images of document copies.

- **State-Filed Rates**

The title insurer is closely regulated and must charge a premium and fee for its services or products that are governed by filed rates that vary among the competing title insurance companies.

- **Title Insurance Company Guarantees and Non-Insurance Products from Other Providers**

In addition to policies of title insurance, title insurance companies issue many types of guarantees to suit the needs of various customers. The trustee's sale guarantee is issued in the course of a non-judicial foreclosure. The litigation guarantee is issued in eminent domain cases and in other cases. Note one pertinent statutory provision:

> "The court upon its own motion may, and upon motion of any party shall, make such orders as appear appropriate: (a) For joinder of such additional parties as are necessary or proper; (b) Requiring the plaintiff to procure a title report and designate a place where it shall be kept for inspection, use, and copying by the parties." (*Section 762.040, California Code of Civil Procedure.*)

The term "title report" is not recognized in the Insurance Code and is not defined anywhere else in the statutes. There is no product known as a "title report" and the title insurer would usually issue a litigation guarantee to satisfy this procedural requirement.

Parcel Map and Subdivision Guarantees are used when maps are filed. Other guarantee forms are designed to provide some bit of specific information.

There are companies in the business of issuing flat-price "reports" of various types that are not insurance products.

So title insurers offer a variety of services and products containing varying degrees of coverage and designed to suit a particular need.

- **Insurance Regulation, Preliminary reports and Property Profiles**

Insurance Code Sections 12340.11 defines "Preliminary report", "commitment", or "binder" as reports which are 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.

Insurance Code Sections 12404-12413.5 define and prohibit illegal rebates. Section 12404.1 states that furnishing of a preliminary report by any title insurer, controlled escrow company or underwritten title company, without charge to any person, shall constitute a violation of Section 12404.

Although preliminary reports are narrowly defined in the statute, the furnishing of the names of owners of record, descriptions of real property, and property characteristics, as defined in Section 408.3 of the Revenue and Taxation Code, shall not be deemed to be a violation of Section 12404, whether provided on individual or multiple properties and whether provided in printed form or by electronic media. This information is customarily referred to as a "Property Profile."

5. What is Available to Me from an Opinion of Counsel?

The usefulness of an opinion of counsel depends upon its ability to identify and assess the legal risks associated with a specific set of facts and contemplated actions. To the extent the opinion concerns an interest in real property, the legal risks are best identified by consideration of the specific interest involved and what it is you are trying to achieve or avoid in regard to the interest. The more specifically you are able to identify the interest in question, and to describe what you wish to achieve or avoid (or both), the useful you will likely find the opinion.

The following discussion involves an entirely arbitrary classification of potential opinions of counsel. It has it common with all other arbitrary classifications, the fact that its usefulness will frequently depending upon you not forgetting that it is arbitrary.

- **Assessment of Risks and Alternatives Opinion**

This is the broadest possible category of opinion from counsel. In fact, you could say it is not a category at all, because ultimately every opinion of counsel comes down to an assessment of risks and alternatives.

Consider for example:

"If I am sued for this, who is likely to prevail?"

"I want to reduce my workforce; how should I decide who to let go; when to let them go; and how to go about doing that?"

"My neighbor's house is for sale. Should I tell potential purchasers that I am about to sue him for an encroachment onto my lot?"

"My neighbor's house is for sale. Should I tell potential purchasers that someone died there last year?"

"My neighbor's house is for sale. Should I tell potential purchasers that I believe the neighbor has been conducting satanic rituals in an effort to communicate with someone who died there last year?"

- **Acquisition Opinion**

What are the risks associated with acquiring an interest in real property, and how are those risk to be avoided? That may seem a very narrow and straightforward question. In fact, it is likely much broader than it should be; and that overbreadth is likely to seriously diminish its value to you while increasing its cost.

You wish to acquire a 640-acre oil and gas producing property. What are the risks involved in that? A major risk is going to be that of failing to acquire all of the interest that you need; a risk of similar magnitude will be purchasing one or more interests that you do not need. So let's begin with, *"What interest(s) do you want to acquire?"* That depends on a number of things, including why you are interested in this; what you are planning to do with the property and when.

If you want to continue the current oil field operations into the indefinite future, then you likely only need to acquire the interest of the existing oil field operator. If that current operator is a lessee, you may need consent from a lessor (or other third party) to acquire the interest—and some third party may have a preferential purchase right, or the lease may be part of the security for a loan. Those are all matters of risk you would want to identify and address, but they do not necessitate for you acquiring any interest other than that of the current operator.

If you want to continue the current oil field operations for 3-5 years while arrange for a "unitization"[7] of this and substantial adjoining properties, then you have a host of addition risks to consider—particularly insofar as this anticipated unitization plays a substantial role in your decision to acquire this specific oil field property and

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[7] Refer to Cal. Public Resources Code section 3630, et seq., for voluntary and/or compulsory unitization in general; and PRC section 3315, et seq., for compulsory unitization to address subsidence.

the price you are prepared to pay for it. The more significant the prospects for ultimate unitization are to the acquisition, the more important to you will be the answers to questions such as: "What is the potential—and realistic—extent of the unit area?" "Will I be able to commit the interest I am considering to a unit; or will I need the consent of one or lessors, a lender or lien holder, or others?" "What consents to unitization are required with respect to other interests/lands; and what are the prospects for getting them?"[8]

If your contemplated acquisition (and the value you assign to it) is predicated on an intention to introduce residential, commercial and/or industrial development—whether or not in conjunction with continuation of existing oil and gas operations, secondary recovery operations, unitization, etc.—you will have an additional need for assurances concerning the risks and feasibility of such aspirations. Are there specific interests held by third persons—other than regulatory agencies and the general public—who will have some ability to limit or prevent the realization of those aspirations?

- **Financing Opinion**

A financing opinion of counsel is a near-cousin of an acquisition opinion. This is not a coincidence—and not merely a matter of timing. Clearly, not every acquisition involves financing, and not every financing is concurrent with an acquisition. Rather, the underlying commonality is in reliance upon the interest to be acquired or understood to be already owned. In the context of a financing opinion, a potential lender or equity participant is considering undertaking a financial risk on the strength either of the interest to be acquired or the interest understood to be already held by another party.

However, while the substance of the concerns of a purchaser, on one hand, and of a potential lender or equity participant, on the other, may be similar, the range and relative importance of the concerns involved may differ among them.

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[8] PRC 3632 requires for compulsory unitization consent by both 75% of working interest owners and 75% of royalty owners within "tracts of land" included in the unit area. CAUTION: PRC 3635.5 defines such tracts of land to require that all such lands are contiguous in ownership (surface or subsurface), located in a field which has been producing for at least 20 years, and located in a field "over 75% of which lies within incorporated areas."

Of course, a potential lender wants assurances that the new or existing owner either will acquire or already owners the "collateral" interest. But, the lender is also quite concerned about the priority of its security interest – a matter with which the new or existing owner may have little or no concern. A new or existing owner will have great interest in the achievement of its concerning use and improvement of the property in question. The lender, and to a certain extent an equity participant, is likely to be far more concerned about the return of the loan or investment with a reasonable rate of return—and, apart from that, not much concerned with achieving the expectations of the new or existing owner. In fact, it is not entirely unknown for an equity participant to be secondarily relying on alternatives to the hopes and expectations of the new or existing owner (or even counting on failure of those hopes and expections and success of its preferred alternatives) to provide the recovery of its investment along with a reasonable profit.

Additionally, a lender (and perhaps an equity participant) may have concerns for details that may not seem particularly significant to a new or existing owner. Such things as the mechanics of recording and filing in county land records, secretary of state records, etc., may need to be dealt with in some detail in a financing opinion, but find little if any mention in an acquisition opinion.

- **Operations/Development Opinion**

If you want to subdivide land, or construct one or more improvements, or seek to obtain a land use permit or approval (including, perhaps, exemption from otherwise applicable regulations), you might want to obtain an opinion of counsel concerning the requirements for doing so and its feasibility insofar as concerns your existing or contemplated interest in the real property involved. A convenient example would be a "drilling title opinion" An oil and gas operator wishing to drill a well on lands which it has under lease, or in which it owns the oil and gas rights, or in which it otherwise believes itself to have the right (and perhaps the obligation) to do so, often asks for an opinion of counsel to assure it not only of its legal right to conduct such operations but of the legal consequences of conducting (or failing to conduct) such operations and the limitations or constraints upon doing so.

- **Division of Revenue Opinion**

The proper division of revenue accruing from activity on or involving real property is largely if not entirely a matter of contractual and real property interests, rights and obligations. A convenient example involves the division of revenue from the

production and sale of oil and gas. In that context, the opinion will categorize the various interests entitled to participate in revenue as, for example, lessor royalty interests, overriding royalty interests, net profit interests, carried working interests, contractual interests (if any) and participating working interests. In the oil and gas industry each of these terms for categorizing rights to participate in revenue has a more-or-less specific and shared meaning.

6. CONCLUSION: Now aren't you glad you asked?

It has been said that one way to succeed is to set a very low bar for yourself. We have tried here to convince that the search for title assurances in any context should never start with the choice between the services of a title company or those of legal counsel. In the first place, you should not begin to consider *where* to get the assurances you want before assuring yourself that you have thought through *what* assurances you want. In the second place, if you have thought through what you are trying to achieve or avoid, and familiarized yourself with the produces and services you can obtain from a title company, on one hand, and from legal counsel, on the other, you will understand that it is not a matter of a mutually exclusive choice between the title company and legal counsel.

Remember this, if nothing else: Don't go shopping without a list; and don't go looking for title assurances without some understanding of why you are doing so.

■ July 2019