# REVIEWING THE TITLE SEARCH

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## INTRODUCTION

Before one can discuss what a title agent or examiner should or must review in the course of searching the chain of title, it is necessary to understand the basics and history of title examination.

### *The Basics*

In Florida, it is common for title agents to receive either Title Search Reports or *pro forma* title insurance commitments from an examiner. The examiner may be an independent contractor, an employee of the title agency, or an employee of the title underwriter that will ultimately insure the title to be conveyed or mortgaged. In other instances, the title attorney or agent may conduct a personal search of the Public Records of the county where the real property to be insured is located. Examples of a title search report, *pro forma* commitment and raw title search are included in the appendix to this chapter. We will discuss all three methods of receiving the title information, and focus on the personal search method so that the agent may gain an understanding of the process the examiner will use to provide the end title information product.

### *A History Lesson*

Prior to 1963, when the Florida legislature passed the Marketable Record Title Act (the "MRTA"), which will be discussed in more detail by Mr. Horak in another section of this manuscript, the examiner was required to search and abstract the insured property's chain of title back to the beginning. This could require the examiner to search to find a land patent from the United States Government, a deed from the state of Florida, the Board of Trustees of the Internal Improvement Trust Fund, or a land grant from the King of Spain or the King of England. It was extremely time-consuming and therefore expensive.

With the passage of the MRTA, this lengthy historical search was shortened considerably. Examiners are now only required to search the chain of title back to a sufficient "root of title" that is recorded at least thirty years prior to the current effective date of the search. This is because the MRTA extinguishes claims, clouds and defects against the title to real property that occur *prior* to this time period, unless they are specifically renewed by reference in a document recorded within the thirty-year period. The MRTA also does not extinguish statutory ways of necessity. Therefore, a very important threshold question that must be answered by every examiner and every agent relying upon that examiner's search is:

## HOW GOOD IS YOUR ROOT OF TITLE?

The root of title is where a title search begins. It is "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined." Section 712.01(12), F.S. The root of title recently has been defined as "the most recent deed or other title transaction recorded in the unbroken chain of title at least 30 years in the past." *Blanton v. City of Pinellas Park*, 887 So.2d 1224 (2004). Therefore, the root of title may be any deed (even, sometimes, a wild, forged or tax deed) that is executed and delivered with special or general warranties of title. It may also be certain court proceedings, such as final judgments in actions to quiet title or certificates of title in foreclosure actions. However, a root of title *never* can be a quitclaim deed. *Wilson v. Kelley*, 226 So.2d 123 (Fla. 2d DCA 1969).

The effective date of the root of title is the date on which the instrument is recorded; not when it was made or acknowledged. Also, to be a sufficient root of title, the instrument or court proceeding must sufficiently describe the insured property to identify its location and boundaries.

Therefore, in summary, a *good* root of title is a title transaction instrument that:

a. arises from a court proceeding such as a quiet title action or foreclosure, *or*
b. is a deed or indenture that contains general or special warranties of title and meets all the other formalities required of a valid deed; and
c. describes the conveyed property properly and with particularity.

A title examiner and agent must know when they have found a "good" root of title, so they will know if they should be:

## ORDERING ADDITIONAL SEARCHES

*Going Backward*

There are times when additional searches must be ordered to take the chain of title back to an adequate root of title. The agent or examiner must review the title search report or copies of the recorded documents provided along with the pro forma title commitment to ensure that the search starts at a valid root of title. If the documents do not reveal such a valid starting point of the search, then the searcher or examiner should be questioned as to why the search did not go back at least thirty years to a root of title. It must be noted that searchers and examiners, depending on their title underwriter's guidelines, often rely upon previously issued policies of owners or lenders title insurance policies. Underwriters often permit a title search to begin at the effective date of a policy of insurance that already insures the property. However, it is the best practice for the

examiner to search the chain of title of the owner immediately prior to the insured owner of the title policy. In any event, the agent must review the examiner's or abstractor's notes, and question the examiner if necessary to ensure that additional searches are not required to take the title chain back to a root of title or at least a valid prior title policy.

For the agent who performs searches personally, using an underwriter's or third party's database, additional searches often are required, because the database is incomplete. While many counties' Public Records indices are now freely available on the Internet, along with images of the documents, underwriters and third parties also maintain their own databases. While Public Records Clerks must index documents by the names of the grantors and grantees (or plaintiffs and defendants) shown on the instruments, underwriters and third parties often index documents based on legal descriptions. In all events, however, the databases' coverage period often does not cover thirty years, or the property may not have a root of title at least thirty years old within the databases' coverage. In this instance, without a valid title policy to use for a starting point, additional searches must be ordered to engage a local searcher who can physically inspect the microfilmed or paper records of the Clerk inside the Clerk's office.

*Going Forward*

Additional searches should be requested or performed as time lapses between the effective date of the search and the closing date. So, as the "gap" widens, additional searches must be ordered to ensure there are no intervening documents recorded that may adversely affect the title of the seller or borrower. Copies of the results of these gap searches or title updates should be retained in the agent's closing file for later reference.

*Name Changes*

Up to this point, the discussion has focused on the search of the insured property's chain of title. However, in addition to searching the property records, searches are also performed on the name of the grantors and grantees in the chain to determine if there were adverse actions, such as judgments, against those parties that would also attach to the property's title. The name indices must be searched for each person or entity that owned the property for the previous twenty-one years to ensure that no adverse judgments have been entered and attached to the property. Fortunately, while the property records may not be complete online, the name indices for most counties in Florida are complete for at least the past twenty-one years. Therefore, while it may not be necessary to order an additional search because the database is inadequate, it may be necessary to order additional searches because new names or other information is discovered. For instance, if the closing agent discovers that the borrower in a refinance transaction has become married since taking title as a single person, a search should be ordered of the newly discovered spouse to check for adverse actions against the spouse. Likewise, if the once-married seller informs the agent that the spouse has died or divorced the seller, then an additional search should be performed to determine if a probate or divorce action was filed and the outcome of those cases. Finally additional name searches must be ordered if

the seller (or borrower in a refinance transaction) has changed names for any reason, such as marriage or divorce, since taking title to the property.

Some matters, such as municipal utility liens and open permits, may not be indexed in the Public Records. Unless an exception will be made on Schedule B-II of the title commitment and policy for any items arising under Chapter 159, Florida Statutes, this search must be made to ensure that there are no unrecorded liens for utility services. Such searches may be conducted directly by the agent through the municipality or county utility where the insured property is located, or – for a nominal fee – a third-party company may be engaged to perform the search instead.

In summary, additional searches must be ordered if the search did not go back far enough, if it is not current, or if new information about the name or status of the parties is discovered prior to the closing. Further, unless exception is to be made for the existence of such liens, additional searches for open permits and unrecorded utility liens should be conducted.

Once the agent or examiner is satisfied that the root of title is good enough, that the search is of a sufficient period of time, and that no additional searches are needed (other than updates), then the searcher must determine:

## WHAT APPLIES TO THE PROPERTY

Which items or exceptions apply to the property is a function of the property description and the names of the grantors and grantees in the chain of title. The examiner will review the list of documents that are produced by a search of the legal description (in the event that a database is used that can search based upon the legal description), and will note every document that contains a legal description encompassing the insured property. Additionally, any document that is of record adversely against any owner in the chain of title within the previous twenty-one years should be noted as a potential exception that applies to the property. While this may sound simplistic, it is sometimes difficult to ascertain what applies to the property.

In the jargon of title examiners, an "exception to" the title is a limitation of the fee simple title, whether by a claim of a title interest in the property, a claim of a lien or encumbrance on the property, a restriction or limitation in the use of the property, or a defect in legal requirements pertaining to or in effecting the previous transfers of title to the property. *Florida Real Property Title Examination and Insurance, 5th Ed.* (Florida Bar and LexisNexis, 2006). While other sections of this manuscript by other authors explain in more detail what exceptions must be cleared and what risks are covered, the author feels it is necessary to touch upon the types of exceptions that apply to the property in order to address a complete review of the title search.

Below is a short list of exceptions that may apply to the property to be insured:

- Mortgages
- Claims of Lien
- Notices of Commencement
- Judgment liens
- Restrictive Covenants / Declarations of Condominium (and their amendments)
- Easements
- Matters as reflected on the plat of the subdivision
- Memoranda/Affidavits of Agreements or Leases
- Unpaid homestead, *ad valorem*, and *non ad valorem* taxes
- Federal tax liens, and
- Suggestions of bankruptcy

If any of the above instruments are located in the chain of title, and they either encompass the legal description of the insured property, or – in the case of judgments and other types of liens -- are in the name of a grantor or grantee in the chain of title, then it should be considered an exception that applies to the property. Copies of such applicable exceptions should be reviewed and retained in the title agent's file for future reference.

Other exceptions that apply to the property may arise from an examination of the deeds in the chain of title. Each deed purporting to convey the title from one grantor to the next grantee should be carefully examined to ensure they are legally sufficient. Each deed must be properly executed by all grantors, holding an interest in the property. The execution must be witnessed by two witnesses and be properly acknowledged and notarized by a notary whose commission is not expired at the time of notarization. The marital status of the grantor must be properly noted. If it is executed by a married person, and not joined by the spouse of the grantor, the deed must include a legend that the property is not the homestead of the grantor. Finally, the legal description of the property consistently must be complete and correct in each deed in the chain of title. If any inconsistency or defect in a deed is noted, this is an exception that applies to the property.

In summary, an exception is anything that applies to the property. Exceptions can include defects in the execution or drafting of the instruments in the chain of title, as well as liens, judgments and other claims that describe the property or the owners in the chain. When it comes to judgments, mortgages and other liens, the examiner must then determine:

**WHAT MUST BE PAID OFF?**

This question is answered by the contract of purchase that exists between the buyer and seller of the property to be insured. If the standard contract jointly drafted by the Florida Bar and the Florida Association of Realtors (the FAR/BAR Contract) is used for the transaction, then Standard A of the contract requires that marketable title be conveyed at the closing of the sale. The definition of "marketable" title has been the subject of many articles and treatises on the topic. As such, it is too complex to discuss here. However, it

is suffice to generalize that all unpaid liens affecting the property should be considered an exception that must be paid off to be removed from the chain of title to render it marketable. The author assumes for purposes of this section that marketable title is to be conveyed at closing.

In such case, all judgments, liens, mortgages, and unpaid taxes affecting the property must be paid off at or before closing to comply with the terms of the contract.

In the event that the property being conveyed is the homestead property of the seller or borrower (in the case of a refinance), judgment liens will not attach to the property as provided in Section 4, Article X of the Florida Constitution. However, underwriters will require payment of all such judgment liens or claims of lien, unless there is a judicial determination that the property is in fact the homestead property of the grantor/borrower, and that the liens do not attach to the property. Until fairly recently, this was a major undertaking, requiring litigation which would hinder the closing process considerably. However, with the passage of Section 222.01, F.S. in 2000, this process was streamlined. Now, the debtor can serve notice of homestead on the judgment creditors. If the creditors fail to respond by filing an action to foreclose on their lien within the time period prescribed by the statute, the property is deemed homestead, and the lien will not attach to the property for the transaction (be it a sale or mortgage), noted in the homestead notice that was served on the judgment creditor. While this appears to be a simplified method to avoid the need to pay off outstanding judgments against the homestead of the seller or borrower, the author has personally experienced at least one underwriter who refused to accept this method of avoiding payment of the lien at closing. The underwriter felt that the amount of the lien in proportion to the insured amount was too great, and that the law had not been constitutionally tested, yet. Therefore, before relying upon this method of avoiding the payoff of an outstanding judgment lien against homestead property, agents and examiners are advised to consult underwriting counsel prior to doing so. The agent is also advised to have an attorney to handle the client counseling, drafting and filing of any notice under Section 222.01, as it is the practice of law.

In some cases, the buyer agrees to purchase the property subject to such liens, or to assume the obligations. In the case that the purchaser agrees to such terms, then – in that event and only in that event – such exceptions may not be paid off at closing, and will remain exceptions to the marketability of the title. The way to properly reflect these exceptions on title in the title commitment will be discussed later in this chapter.

In addition to determining what must be paid off at or before closing, the examiner must determine what other defects in the chain of title may render the title unmarketable. This includes the defects in the deeds discussed above, as well as defects in foreclosure, probate or bankruptcy actions in the chain of title. All of these exceptions must be noted by the examiner, and – instead of being paid off – must be corrected with corrective instruments or additional filings and affidavits, to rectify the earlier mistakes to render the title marketable. It should be noted here that sometimes it is impossible to obtain such corrective documents, and the parties are unwilling or unable, due to financial

constraints, to pursue the necessary litigation to cure the defects of marketability. In that case, the agent should determine if the seller or borower has a policy of owner's title insurance on the property being sold. If that is the case, then the agent must obtain a copy of it and request from the policy's underwriter (not the agent who issued the policy) indemnity for the defect and an undertaking to correct it. With such undertaking and indemnity in hand, with permission from the agent's underwriter, the agent should be free to disregard the defect, issue a commitment and – ultimately – a policy of title insurance, insuring the marketability of title for the new owner.

After the agent, examiner or searcher has determined that the root of title is sufficient, no further searches are necessary, what is applicable to the property, and what applicable exceptions must be paid off, it is time for the agent to proceed to

## WRITING THE REQUIREMENTS SECTION FOR THE COMMITMENT

*The Standard requirements*

Schedule B-I is the "requirements" section of the standard ALTA title commitment. On this schedule, the searcher or examiner sets forth all exceptions that must be cleared at or before closing. The first set of exceptions always listed on every title commitment is the "standard exceptions." These are listed as:

1. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.
2. Instrument(s) creating the estate or interest to be insured must be approved, executed and filed for record:
    a. Deed requirement
    b. Mortgage requirement
3. Payment of all taxes, charges, assessments, levied and assessed against subject premises, which are due and payable.

The first standard requirement is stating, in complicated terms, that the funds for the purchase of the property must be paid, and/or the proceeds from the lender to the borrower must be disbursed for the borrower's account. The second is requiring that the deed and/or mortgage must be properly reviewed by the underwriter's title agent, executed by the seller or borrower, and filed of record. Finally, the last standard requirement is a catch-all requirement directing the agent to pay any taxes, charges or assessments outstanding against the property. Without doing anything further, if there were no other requirements on this schedule of the commitment, the agent would be permitted to issue a title policy on behalf of the underwriter upon compliance with these standard requirements. However, it is a very rare case indeed when there are no other requirements to be met before the policy may be issued.

*The specific requirements*

*Payoffs*

The first set of requirements that appear after the standard requirements are customarily the payoffs of liens against the property.

Below is a fairly comprehensive list of exceptions that must be included in the requirements to be paid off at or prior to closing:

Mortgages

Releases vs. Satisfactions

In most cases, a mortgage secured by the property will be paid off at closing and replaced with a new mortgage as set forth in the standard exceptions. If this is the case, then a requirement must be made for the satisfaction of the mortgages that were discovered during the title search. However, this is not the case at all times. Sometimes, it will be necessary for the mortgage to remain active and unsatisfied after closing. This arises, for instance, when the seller is a builder/developer who has a large line of credit, secured by a blanket mortgage on many parcels of property, including the property to be insured by the title commitment being issued. In this case, satisfaction of the mortgage cannot be accomplished. In that event, the commitment requirement should be crafted so as to require only a partial release of the insured property from the blanket mortgage.

Special Notes for Privately-Held Mortgages

Particular care must be exercised when a privately held mortgage is revealed by the title examination. For instance, if an individual or small company is the mortgagee of a mortgage, as opposed to an institutional lender such as a bank, then care must be taken to ensure that the satisfaction of mortgage is obtained *prior to* closing. The original executed satisfaction should be held in escrow for the private lender until the funds for payoff are disbursed to the mortgagee.

Judgments, Liens, and Taxes

If the examination reveals judgments against the current or former owners of the property, requirements must be written to call for the payment and satisfaction of these judgments. Further, if liens such as code enforcement liens or mechanic's liens are discovered during the examination a requirement must be written to call for the payment and satisfaction of these liens as well. Finally, in all searches, the real property taxes on the property must be checked to make sure they have been paid in full, and that no new taxes are currently due. Real property taxes in Florida are a lien not-yet-due-and-payable on January 1 of each year. They are due and payable on November 1 of the year, and are delinquent on March 1 of the following year. A call should be written to require the payment in full of any taxes for the current or past year that have not been paid by November 1 of the year in which they are due. Particular attention should be paid to tax

bills that are paid in quarterly installments, because these may appear to be paid in full, but are not.

Terminate Notices of Commencement less than 1-year old

To obtain a permit for certain building activities, owners must file a notice of commencement prior to commencing work on the property. This gives public record notice as to the date that labor or materials are first delivered or provided to the insured property. If the contractor is not paid for the work performed under the notice of commencement, the contractor or its subcontractors may – within one year of filing the notice of commencement – file a claim of lien for the unpaid materials or services and then foreclose on that claim of lien. Notices of commencement automatically expire one year from the date of their recording, unless a claim of lien is filed or an action to foreclose that lien is likewise filed. For this reason, it is imperative to require that any notices of commencement, less than one year old, be terminated by filing of a notice of termination and contractor's affidavit, stating that all of the contractor's bills have been paid in full. Failure to include such a requirement and compliance with it runs the risk that the contractor will file a claim of lien and foreclosure action after the insured closing which would then relate back to the initial filing of the notice of commencement and potentially extinguish the new instruments that are insured under the title policy to be issued pursuant to the commitment.

Correct defects in the chain

If the examination reveals defects in the instruments in the chain of title, then corrective instruments should be required to be produced, executed, and recorded to clear the defects from the chain. Such corrective instruments may include the following:

a. Corrective deeds
    i. Used when there are defects in the execution or content of deeds in the chain of title;
b. Specialized affidavits
    i. Continuous Marriage Affidavits
        1. Used in the event of the death of a spouse or when there are judgments of record against one spouse when the property is vested in the entireties.
    ii. Death Certificate Affidavits
        1. Only used when the agent cannot obtain copy of death certificate that does not contain the cause of death. Otherwise, the best practice is to require the recordation of a certified copy of the death certificate that does not include the decedent's cause of death.
    iii. Non-Identity Affidavits
        1. Used when there are judgments or liens of record against people with the same or similar names as the current or former vested owners

2. The requirement should be specific as to the book and page of the judgment or lien, and reference the type of lien;
3. Include only last four digits of affiant's Social Security Number. The law forbids the inclusion of persons' Social Security Number on any documents to be placed in the Public Records.

iv. Power of Attorney Affidavits
1. Must require these when the insured instruments are to be executed by an attorney in fact.
a. States that the power of attorney is still valid, has not been revoked, and that the principal is not deceased or incompetent.
b. Must remember that a power of attorney can never make an affidavit on behalf of the principal for matters that are personally known to the principal. A person can only make affidavits as to matters for which they have personal knowledge.

*Special Issues*

1. Limited liability companies, partnerships, and corporations
i. If the seller or borrower is an entity rather than an individual, the agent should require proof of existence of the entity, review of the underlying corporate governing documents, along with affidavits of authority

2. Trusts

i. If the trustee of a trust is the seller or borrower, special requirements must be made regarding the trustee's powers as well as the contents of the trust:

1. General *Inter Vivos* Trusts (powers of 689.071 *not* included on the deed)
a. The agent should require review of the trust (to confirm that it is not a passive trust) and an affidavit and recording of portions of the trust, usually with a memorandum of trust
2. Land Trusts under Section 689.071, F.S. (powers of 689.071 *are* included on the deed into the trustee)
a. The agent should require only an affidavit from the trustee that the trust has not been revoked or

amended, and that the trustee is still empowered as trustee;

b. No part of the trust should be examined or recorded

3. Bankruptcy
    i. If the title examination reveals that the seller or borrower has been the petitioner in a federal bankruptcy proceeding during the ownership of the insured property, the agent should require recordation of certified copy of the bankruptcy petition along with its schedules A and C, showing that the property was listed as homestead of the grantors. This will clear certain liens against the property without need for payoff.

4. Probate
    i. If the search reveals that a vested owner in the chain of title of the insured property has died during the vesting period, then a requirement should be made to record tax certification affidavits as well as the homestead order (if applicable) from the probate court as well. Further, it may also be prudent to require recordation of a certified copy of the decedent's last will and testament if it is the instrument that conveys the insured property.

All other exceptions to the title that are not being paid off or otherwise corrected and cleared prior to closing, must be reflected on Schedule B-II of the title commitment as items that will remain as exceptions on the marketability of the title after closing and recordation of the deed or mortgage.