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MORE THAN THEY BARGAINED FOR: ARE TITLE INSURANCE COMPANIES LIABLE IN TORT FOR UNDISCLOSED TITLE DEFECTS?

James Bruce Davis

Title insurance has become the prevailing method by which real estate purchasers and mortgage lenders protect themselves against the risk of defects in their titles. Title insurance policies typically provide that the title insurance company will indemnify the insured owner or lender for loss or damage caused by a title defect that existed on the date of his policy, unless the defect was excluded from policy coverage. If the title insurance company fails to perform its obligations under the policy, the insured may recover his loss from the company in an action for breach of contract.

This Article explores the question of whether insured owners and lenders may also recover in tort from a title insurance company for title defects it failed to disclose in a title insurance policy. The cases addressing this question have split into two opposing branches over the past twenty years, with the authorities more or less evenly divided. One line of cases holds that the title insurance policy’s terms and conditions provide the insured’s exclusive remedy against his title insurance company for an unt-
disclosed title defect. The alternative line of cases holds that a title insurance company has an implied duty to search public records for title defects, that it may be held liable for negligently performing that duty, and that contractual disclaimers of tort liability are void.

The issue of tort liability usually arises when a property owner or mortgage lender discovers a title defect that his policy did not disclose, and becomes dissatisfied with his remedies under the policy. Insured owners

4. See, e.g., Southland Title Corp. v. Superior Court, 282 Cal. Rptr. 425, 428-29 (Cal. Ct. App.) (holding that a title insurance company is not subject to liability in tort based on the issuance of a preliminary report), review denied, 1991 Cal. LEXIS 4321 (Cal. 1991); Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 764 P.2d 423, 425-27 (Idaho 1988) (finding insurer free from tort liability because it only assumed a duty to insure); Anderson v. Title Ins. Co., 655 P.2d 82, 86 (Idaho 1982) (imposing no duty to search on the title insurance company even though it provided a preliminary title report); W.E. Erickson Constr., Inc. v. Chicago Title Ins. Co., 641 N.E.2d 861, 865 (Ill. App. Ct. 1994) (enforcing the ALTA Commitment Form's exclusive remedy clause by relying on the principle that "[a]n exclusive remedy clause will be enforced unless it violates public policy, or something in the social relationship of the parties works against upholding the clause") (citing Harris v. Walker, 519 N.E.2d 917 (Ill. 1988)); Walker Rogge, 562 A.2d at 218-20 (defining the title company's relationship to the insured as purely contractual); Horn v. Lawyers Title Ins. Corp., 557 P.2d 206, 208 (N.M. 1976) (holding that the title insurance company has no contractual duty to perform a search of the public records because no such duty was imposed by the language of the policy) (superseded by statutory tort remedy as stated in Ruiz v. Garcia, 850 P.2d 972 (N.M. 1993)); Citibank, N.A. v. Chicago Title Ins. Co., 632 N.Y.S.2d 779, 784 (App. Div. 1995); Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 654 (Utah 1990) (holding that the title company is not liable as an abstractor when it issues a commitment or policy); Greenberg v. Stewart Title Guar. Co., 492 N.W.2d 147, 152 (Wis. 1992) (ruling that a title insurance company has no duty to search the public records when it issues a commitment for title insurance).


6. See Malinak, 661 P.2d at 14 (recognizing insured's ability in tort action to seek damages for travel costs, attorney fees, and other expenses). Note also that if the insured viewed his remedies under the policy as adequate, he would most likely pursue the no-fault contractual remedy available under the policy rather than taking on the burden of proving that the insurer was guilty of negligence or some other fault that would give rise to tort liability.
and lenders may wish to recover damages that the policy does not cover, such as damages exceeding the policy amount,\textsuperscript{7} damages for emotional distress,\textsuperscript{8} punitive damages,\textsuperscript{9} damages for making a loan on which the borrower subsequently defaults,\textsuperscript{10} or damages for purchasing property that the buyer otherwise would not have purchased if he had known the true status of the title.\textsuperscript{11}

Dissatisfaction with policy remedies also may arise when the title insurance company requires the insured to defer his claim until the company exercises its contractual right to cure the title defect.\textsuperscript{12} Delays and uncertainties of litigation may inflict very real damages upon the insured, even if the defect ultimately is cured.\textsuperscript{13} Those damages may not be recoverable under the policy, however, because policies often preclude claims

\textsuperscript{7} See, e.g., Parker, 614 So. 2d at 978 (noting that some authorities argue that tort recovery need not be limited by the policy amount). But see Southland Title Corp., 282 Cal. Rptr. at 429-30 (ruling that the policy controlled the company's liability where the insured sued in tort because his damages exceeded the policy amount).

\textsuperscript{8} See, e.g., Jarchow, 122 Cal. Rptr. at 486.

\textsuperscript{9} See Ford, 553 P.2d at 270.

\textsuperscript{10} See, e.g., Focus Inv. Assocs., Inc. v. American Title Ins. Co., 992 F.2d 1231, 1234 (1st Cir. 1993). A mortgage lender sued its title insurance company for damages associated with a failed mortgage loan transaction. Id. The lender was insured as having a second mortgage on two parcels of property, but later discovered that it actually had only a fifth lien on the first parcel and a fourth lien on the second. Id. at 1233-34. Notwithstanding the undisclosed prior liens, the lender sustained no loss under the policy because the value of the security property was insufficient to pay any liens beyond the first mortgage. Id. at 1234. Claiming that the title company had committed the tort of negligent misrepresentation, the lender sued for the full amount of its loan, which had gone into default, on the theory that the lender would not have made the loan knowing the true status of title. Id. The United States Court of Appeals for the First Circuit, applying Rhode Island law, found no basis for the claim of negligent misrepresentation because the title insurance policy was not a representation of the status of title, but solely a contract of indemnity. Id. at 1237. For a similar case, with a similar outcome, see Citibank, N.A. v. Chicago Title Ins. Co., 632 N.Y.S.2d 1779 (App. Div. 1995).


\textsuperscript{12} See, e.g., \textit{AMERICAN LAND TITLE ASSOCIATION, POLICY FORMS HANDBOOK 1992 Loan Policy, § II-1, at § 4(b) (1994) [hereinafter 1992 Loan Policy]. This policy contains the following as an example of a right to cure clause:

\[\text{The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.}\]

\textit{Id.; see also id. 1992 Owner's Policy, § II-2, at § 4(b) (containing a similar provision) [hereinafter 1992 Owner's Policy].}

\textsuperscript{13} See Bank of Cal., N.A. v. First Am. Title Ins. Co., 826 P.2d 1126, 1131 (Alaska 1992) (prohibiting an insured from filing any contract claim under a title insurance policy
where the title insurance company succeeds within a reasonable time in establishing title to the real estate as insured.\textsuperscript{14}

Tort actions, where permitted, may enable the insured to recover damages outside the scope of the policy or to bring an action immediately upon the discovery of a title defect, without waiting for the title insurance company to cure the defect. In these actions, plaintiffs typically allege that the company acted negligently in searching the title, that it misrepresented the condition of title, that it breached a fiduciary duty to the insured, or that it committed a deceptive trade practice.\textsuperscript{15}

This Article embraces the position that a title insurance company's duty to its insured is contractual and that the company has no express or implied contractual duty to search public records when it issues a title insurance commitment or policy. This Article also asserts that a title insurance company generally is not liable in tort if the commitment or policy fails to disclose title defects, and that the insured's remedies for undisclosed title defects are limited to the remedies provided by the policy.

This limited liability view does not preclude tort liability if the title insurance company engages in conduct that constitutes an independent tort against the insured. If the company agrees to provide the insured with an abstract of the public records, the company could be liable to its customer for damages it caused by negligently conducting a record search.\textsuperscript{16} Similarly, if the company serves as settlement agent in a real estate transaction, the company may be liable in tort if it fails to perform its duties as a settlement agent with reasonable care.\textsuperscript{17}

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In states that impose upon title insurance companies a statutory duty to search public records prior to
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until the company had a reasonable time to cure the defect, but allowing the insured to proceed immediately with a tort action against the company).
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14. See, e.g., \textit{id}. (allowing the insured to file a claim in tort despite its inability to maintain a contract claim); cf. \textit{Soutullo}, 646 So. 2d at 1354 (holding that the title insurance company's curative actions may have precluded a claim under the policy, but could not preclude the insured's tort claims).
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15. See, e.g., \textit{Martinka v. Commonwealth Land Title Ins. Co.}, 836 S.W.2d 773, 778 (Tex. Ct. App. 1992) (holding that the title insurance company's failure to disclose a defect did not violate the Texas deceptive trade practice statute); \textit{Greenberg}, 492 N.W.2d at 149 (rejecting insured's tort claims based on misrepresentation, negligence, and breach of fiduciary duty).
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17. See, e.g., \textit{Aronoff v. Lenkin Co.}, 618 A.2d 669, 687 (D.C. 1992) (finding that a title company serving as a settlement agent in a real estate transaction had a non-policy fiduciary duty to inform the seller of known title defects so that the seller could take steps to resolve them prior to the settlement date); \textit{Culp Constr. Co. v. Buildmart Mall}, 795 P.2d 660, 654-55 (Utah 1990) (determining that a title company is not liable as an abstractor when it issues a commitment or policy, but could be liable as a settlement agent for negligent misrepresentation in failing to carry out the lender's closing instructions).
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issuing a title insurance policy, the statute may provide a tort remedy for the insured. However, apart from claims arising independently of a title insurance policy or commitment, this Article concludes that a title insurance policy limits an insured's remedies for a title defect to the remedies provided by the policy.

In drawing this conclusion, this Article first will examine the transactional context that gives rise to the opposing views regarding tort liability. This Article will then review each line of cases, analyzing the opposing viewpoints and illuminating the weaknesses of the tort liability theories. Finally, this Article will discuss and critique the public policy arguments that have been advanced in favor of a tort remedy, leading to the conclusion that a title insurance company generally should be held liable only within the limits of the policy.

I. THE TRANSACTIONAL CONTEXT OF TITLE INSURANCE: INFORMATION OR INDEMNITY?

In determining the extent of a title insurance company’s liability, authorities disagree on whether a title insurance company, in issuing title commitments and policies, has undertaken a distinct duty to provide its insured with title information. Courts that view title insurance companies as suppliers of information tend to hold that the companies are subject to the rules of tort liability applicable to title abstractors. Courts that do not view title insurance companies as suppliers of information usually find tort principles inapplicable on grounds that the title insurance policy provides both the source and measure of the company's liability.
The disagreement between the divergent lines of cases arises because purchasers of real estate often rely on the title insurance company to serve not only as an insurer, but also as a supplier of information regarding the titles they will acquire. Some courts and commentators have suggested that applicants for title insurance are as interested in obtaining the results of the title insurance company’s search of public records as they are in obtaining insurance coverage.

Even courts that decline to hold a title insurance company liable in tort concede that the insured expects the title insurance company to conduct a reasonable search of public records. Contracts to purchase real estate usually specify that the purchaser must receive good and marketable title and provide that the purchase may cancel the contract if this condition is unsatisfied. The purchaser usually relies on his attorney or a title insurance company to assure that title is marketable; but in most cases the purchaser has little or no understanding of the process involved in obtaining such assurance. Usually the attorney or a settlement company will order a commitment for title insurance, often called a binder, from a title insurance company, either directly or through a title insurance agent.

Commitments for title insurance contain statements that purchasers and their attorneys use as title information. A section of the commitment entitled “Requirements” typically lists mortgages that must be paid and other conditions that must be met before the title insurance company will insure the purchaser’s title. A separate section in the commitment entitled “Exceptions” lists various aspects of title (e.g., mortgages, ease-

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22. See Bank of Cal., 826 P.2d at 1129.
23. See, e.g., id. at 1129-30 (stating that “[t]itle insurance is often ordered not for the insurance itself but to obtain the use of the insurer’s title plant and the expertness of its employees in handling the search process”) (quoting D. BURKE, LAW OF TITLE INSURANCE § 12.1, at 362 (1986)); see also Quintin Johnstone, Title Insurance, 66 YALE L.J. 492, 494 (1957). Professor Johnstone noted that:

Applicants for a title insurance policy are interested in obtaining the insurance coverage, but they are sometimes more interested in what the company examination of title discloses. This is perhaps partly at the base of the prevailing philosophy of title insurance companies — stressing the service of risk delineation rather than risk coverage.

Id.

24. See, e.g., Walker Rogge, 562 A.2d at 220.
25. See CUNNINGHAM ET AL., supra note 2, § 11.12 (explaining that a prospective purchaser must search the land records to ensure that title is good).
27. See id. at 874-75.
28. See AMERICAN LAND TITLE ASSOCIATION, supra note 12, 1982 Commitment Form, § III-2, at 4 [hereinafter 1982 Commitment Form]. If the requirements are satisfied, the commitment obligates the company to issue a policy of title insurance. Id.
ments, or covenants) that the title insurance policy will not cover. A purchaser usually assumes that if the commitment's requirements are satisfied, he will receive good title to the property, subject to only the specified exceptions. If the purchaser finds the exceptions acceptable, he will proceed to closing, pay the purchase price, and obtain a deed to the property. After the deed is recorded, the title insurance company will issue a policy based upon the commitment.

A purchaser's reliance on title insurance as a source of information contrasts with commitment and policy provisions that limit a title insurance company's liability to that of an insurer. Most title insurance commitments and policies follow standard forms published by the American Land Title Association (ALTA), with variations in some states. The title insurance policy itself is a contract of indemnity. It requires the title insurance company to defend the insured against any legal challenges to his title and, if the title proves to be defective, to indemnify the insured for any loss, up to the face amount of the policy.

29. See id. at 5. For example, in a typical title insurance commitment for the purchase of a home, the requirements would include paying off the seller's mortgage and recording the purchaser's deed. The exceptions would include any mortgage that the purchaser uses to finance the transaction as well as various recorded easements and covenants affecting the property.


32. The 1992 ALTA Owner's Policy provides, in Paragraph 4(a) of the policy's Conditions and Stipulations, that:

> Upon written request by the insured . . . the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy.


33. The first page, or jacket sheet, of the ALTA standard Owner's Policy provides that the title insurance company:

> insures . . . against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
Neither the commitment nor the policy purports to constitute a report or an abstract of title.\textsuperscript{34} Although a title insurance company usually will have searched public records prior to issuing a commitment for title insurance,\textsuperscript{35} and in some states is required by statute to conduct such a search,\textsuperscript{36} a commitment for title insurance typically does not state that any title search has been conducted.\textsuperscript{37} Instead, the commitment purports to be nothing more than an undertaking to issue a policy of title insurance if certain conditions are satisfied.\textsuperscript{38}

The standard ALTA Commitment Form states that the commitment is "preliminary to the issuance of [a policy] of title insurance."\textsuperscript{39} The ALTA Commitment Form further provides that all of the company's liabilities and obligations under the commitment terminate upon issuance of the policy.\textsuperscript{40} Thus, a title insurance company's duties under the commitment, even if they included a duty to search the public records, would not sur-

4. Lack of a right of access to and from the land.
1992 Owner's Policy, supra note 12, § II-2, at 1. The jacket sheet of the ALTA Loan Policy contains the same insuring clauses, as well as additional clauses insuring the validity and priority of the insured mortgage. 1992 Loan Policy, supra note 12, § II-1, at 1.

34. See American Land Title Association, supra note 12, 1966 Commitment Form, § III-1 [hereinafter 1966 Commitment Form]; 1992 Owner's Policy, supra note 12, § II-2.


36. See, e.g., Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 218 (N.J. 1989) (holding that the title insurance company was required by statute to conduct a title search, regardless of whether the owner made such a request).

37. See generally Burke, supra note 1, § 15.2, at 15:9 (stating that the commitment is "neither an insurance agreement nor an abstract; as a matter of contract, it does not reflect the state of the title, but only the terms under which an insurer will issue a policy").

In practice, title insurance companies do not always conduct a full search of the public land records each time they issue a policy of title insurance. If a title insurance company has access to a previous title search of the property — a "back title" — the company may conduct only a "bring down" search for the time period after the date of the previous search. Some title insurance companies maintain their own "plants," comprising private copies or abstracts of the public records, which the companies use as their source of title information in preparing commitments and policies.

38. Id.

39. 1966 Commitment Form, supra note 34, § III-1, at 1. In accordance with the title insurance company's view that its only undertaking under the commitment is the issuance of a policy, the 1966 ALTA Commitment Form identifies the customer as the "proposed Insured." Id. The 1982 ALTA Commitment Form, which endeavors to use plain language, refers to the customer simply as "you." 1982 Commitment Form, supra note 28, § III-2, at 1.

40. Specifically, the form provides that "all liability and obligations hereunder shall cease and terminate (here state the time) after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company." 1966 Commitment Form, supra note 34, § III-1, at 1.
vive the issuance of the title insurance policy contemplated by the commitment.

Additional provisions of the ALTA Commitment Form define and limit the title insurance company's liability in instances when it does not issue a policy. The ALTA Commitment Form limits the company's liability to out-of-pocket costs the proposed insured incurred while preparing to close the transaction for which the commitment was issued, subject to an overall limit equal to the amount of insurance under the proposed title insurance policy. The ALTA Commitment Form also incorporates by reference the "insuring provisions and Conditions and Stipulations and the Exclusions from Coverage" that a policy issued pursuant to the commitment would contain, thereby making the policy's contractual limitations on the company's liability applicable to any claim arising under the commitment. The ALTA Commitment Form limits any claim by the proposed insured based on the status of title to the property to the terms of the commitment.

Consistent with the ALTA Commitment Form, ALTA's standard owner's and loan policy forms provide for the integration of prior deal-

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41. Id. at 4.
42. Id. This paragraph provides:
   Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and Stipulations and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

Id. Paragraph 4 of the Conditions of the 1982 ALTA Commitment Form similarly states that "[w]e shall not be liable for more than the Policy Amount shown in Schedule A of this Commitment and our liability is subject to the terms of the Policy form to be issued to you." 1982 Commitment Form, supra note 28, § III-2, at 6.
43. See 1966 Commitment Form, supra note 34, § III-1, at 4.
44. Paragraph 4 of the Conditions and Stipulations of the 1966 ALTA Commitment Form provides:
   Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

Id. Paragraph 5 of the Conditions of the 1982 ALTA Commitment Form provides: "Any claim, whether or not based on negligence, which you may have against us concerning the title to the land must be based on this Commitment and is subject to its terms." 1982 Commitment Form, supra note 28, § III-2, at 6.
ings between the company and the insured. In addition to incorporat-
ing all prior dealings between the insurer and the insured, the ALTA
policy forms restrict the liability of the insurer solely to the terms of the
policy.

II. Judicial Views of the Title Insurer's Obligation

A. The Contract View

Perhaps the leading authority establishing that a title insurance policy
is the exclusive source and measure of a title insurance company's liabil-
ity is the Supreme Court of New Jersey's decision in Walker Rogge, Inc. v.
Chelsea Title & Guaranty Co. In Walker Rogge, an investor purchased
a parcel of land which he thought comprised eighteen acres, but actually
comprised only twelve acres. His title insurance policy afforded him no
remedy for the shortage because he had received good title to the prop-
erty covered by his contract. Lacking a contract remedy, the purchaser
sued his title insurance company in tort, alleging that the company negli-
gently failed to search its own records, which showed that the actual size
of the land was less than the purchaser expected. The purchaser argued
that he had engaged the title insurance company not only to insure the
title but also to examine the title. The purchaser further contended that
the company, as a title examiner, had a duty to advise him of any infor-
mation in the public records which would materially affect his purchase of
the property, and that the title insurance company breached this duty by
failing to advise him of the deficiency in acreage.

45. Paragraph 14(a) of the ALTA Loan Policy provides: "This policy together with all
endorsements, if any, attached hereto by the Company is the entire policy and contract
between the insured and the Company." 1992 Loan Policy, supra note 12, § II-1, at 12.
Paragraph 15(a) of the ALTA Owner's Policy is identical. 1992 Owner's Policy, supra note
12, § II-2, at 10.
46. Paragraph 14(b) of the ALTA Loan Policy further provides:
Any claim of loss or damage, whether or not based on negligence, and which
arises out of the status of the lien of the insured mortgage or of the title to the
estate or interest covered hereby or by any action asserting such claim, shall be
restricted to this policy.
1992 Loan Policy, supra note 12, § II-1, at 12. Paragraph 15 (b) of the 1992 ALTA Owner's
Policy is identical, except that it makes no reference to the "lien of the insured mortgage."
1992 Owner's Policy, supra note 12, § II-2, at 10.
47. 562 A.2d 208 (N.J. 1989).
48. Id. at 212-13.
49. Id. at 215 (stating that "[t]itle companies are in the business of guaranteeing title,
not acreage").
50. Id. at 213.
51. Id. at 218.
52. Id. at 213.
The title insurance company in *Walker Rogge* apparently used the standard ALTA forms, and thus had made no express contractual undertaking to examine the title to the property.53 Nevertheless, the purchaser argued that the duties of an abstractor should be implied from the company's examination of the title, the separate fee it charged for conducting the examination, and its issuance of a commitment for title insurance.54 In the purchaser's view, the commitment should be construed as an abstract of the public records, and the title insurance company should be held liable in tort because the commitment failed to disclose material title information which could have been discovered by a reasonable record search.55

The court in *Walker Rogge* rejected the purchaser's arguments, holding that, absent some special undertaking outside the scope of the title insurance commitment and policy, the company had no duty to search the title to the property.56 The court explained that the primary issue was whether a title insurance company, by issuing an ALTA Commitment Form and a policy, had a duty "to search for and disclose to the insured any reasonably discoverable information" that might be material to the insured's decision to finalize the transaction.57 The court resolved the issue by applying "the general rule in New Jersey" that the terms of the policy provided the only source of the title insurance company's duties. Under this rule a title insurance company as such could not be sued for the negligent search of title records.58

In the court's view, the title insurance company's issuance of a commitment for title insurance to the purchaser and its $75.00 fee for searching the title were insufficient to charge it with the liabilities of an abstractor.59 The court explained that, for the purchaser to have a cause of action in negligence, some additional agreement would be required — presumably an explicit undertaking by the title insurance company to search the public records or its preparation for the insured of an abstract or report of title.60

53. *Id.* at 216.
54. *Id.* at 217-18.
55. *Id.*
56. *Id.* at 218, 221.
57. *Id.* at 217.
58. *Id.* at 217-18.
59. *Id.* at 218.
60. *Id.* The court in *Walker Rogge* qualified its holding by stating that: "[i]f, however, the title company agrees to conduct a search and provide the insured with an abstract of title in addition to the title policy, it may expose itself to liability for negligence as a title searcher in addition to its liability under the policy." *Id.*
In reaching this result, the court sounded three themes that permeate the cases declining to impose a duty to search on a title company: (1) that neither the commitment nor the policy contains an undertaking by the title insurance company to search the public records;\(^{61}\) (2) that the essence of a customer's transaction with his title insurance company is to obtain insurance protection rather than information;\(^{62}\) and (3) that a title insurance company has a contractual right to limit its liability for damages.\(^{63}\)

Addressing the purchaser's argument that he expected the title insurance company to search the public records, the court in \textit{Walker Rogge} held that this expectation could not give rise to an express or implied duty to conduct such a search because the relationship between the parties was primarily contractual.\(^{64}\) Under the title insurance commitment, the insured could reasonably expect only to be "insure[d] against certain risks subject to the terms of the policy."\(^{65}\) The court further held that the title insurance company had the right to limit its liability to the terms of the ALTA Commitment Form and policy.\(^{66}\) Noting that the title insurance company would be exposed to consequential damages for negligent title searches if it was not permitted to limit its liability,\(^{67}\) the court observed that such an exposure would violate the familiar principle of contract law.

\(^{61}\) \textit{See id.}; see also \textit{Horn v. Lawyers Title Ins. Corp.}, 557 P.2d 206, 208 (N.M. 1976) (superseded by statutory tort remedy as stated in \textit{Ruiz v. Garcia}, 850 P.2d 972 (N.M. 1993)). In \textit{Horn}, the court made the same point, stating:

\textit{The rights and duties of the parties are fixed by the contract of title insurance. . . . Hence, any duty on the part of defendant to search the records must be expressed in or implied from the policy of title insurance. We have carefully read the policy and cannot find any language expressing an intent to impose such a duty on defendant, nor any language from which such an intent can be implied. . . . It is well settled that the courts will not make a contract of insurance, but will only enforce the intent of the parties as manifested by the writing.}

\textit{Id.} After \textit{Horn} was decided, the New Mexico legislature adopted a statute providing that "[n]o title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title." N.M. \textit{STAT. ANN.} § 59A-30-11.A (Michie 1978 & Supp. 1995). This statute has been interpreted as providing purchasers and sellers with a tort remedy if a title insurance company is negligent in conducting the required search. \textit{Ruiz v. Garcia}, 850 P.2d 972, 976-77 (N.M. 1993). The court in \textit{Ruiz} expressly declined to overrule \textit{Horn}, which remains the court's interpretation of a title insurance company's liability under a title insurance commitment and policy. \textit{Id.} at 976 n.3.

\(^{62}\) \textit{Walker Rogge}, 562 A.2d at 220.

\(^{63}\) \textit{Id.}

\(^{64}\) \textit{Id.} (noting that an insured expects to receive a policy in exchange for paying premiums).

\(^{65}\) \textit{Id.}

\(^{66}\) \textit{Id.}

\(^{67}\) \textit{Id.}
that a plaintiff may not recover consequential damages unless both parties contemplated such damages when they entered into the contract.\textsuperscript{68}

The court’s reasoning in \textit{Walker Rogge} comports with the economic principle that systems of insurance protection depend on the insurance companies’ ability to quantify the risk they assume, charge premiums commensurate with the risk, and establish reserves sufficient to cover actuarially predictable losses under their policies. Under this view, a title insurance company’s search of the public records is a function it performs for its own benefit when underwriting a policy, not for the purpose of supplying title information to the insured.\textsuperscript{69} Similarly, a title insurance commitment is not a report or abstract of title, but rather constitutes an undertaking by a title insurance company to issue a policy on the terms and conditions the commitment sets forth.\textsuperscript{70}

\begin{footnotes}
\item[68] Id. (citing Donovan v. Bachstadt, 453 A.2d 160 (N.J. 1982)).
\item[69] Id. at 218. This view is stated emphatically in Martinka v. Commonwealth Land Title Insurance Co., 836 S.W.2d 773, 777 (Tex. Ct. App. 1992) (holding that title insurance company only had a duty to defend insured against actions arising from title defects, not to examine the title). Specifically, the court stated:

\begin{quote}
"[The title insurance] company, before issuing a policy of title insurance, must necessarily take steps to inform itself of the status of the title to be insured. In the search for the information upon which must depend the decision to either issue or decline to commit itself to issue a policy, the insurance company obviously investigates the title for its own use and benefit to determine whether it will undertake the risk. The title information on which the company bases its decision relates to the condition of the title held by the grantor and is not made for the prospective grantee or lienholder to whom the policy will finally issue."
\end{quote}

\textit{Id.} at 777-78 (quoting Tamburine v. Center Sav. Ass'n, 583 S.W.2d 942, 948-49 (Tex. Ct. App. 1979); accord Greenberg v. Stewart Title Guar. Co., 492 N.W.2d 147, 151 (Wis. 1992) (stating that "[a]ny search done by an insurer in preparation for preparing a title commitment is done to protect itself in deciding whether to insure the property and to protect against losses covered in the policy").

Until recently many lawyers believed that New York was one of the jurisdictions holding that a title insurance company could be held liable in tort based on an implied duty to search the public records. \textit{See} L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650, 655 (N.Y. 1981) (noting that "it is because title insurance companies combine their search and disclosure expertise with insurance protection that an implied duty arises out of the title insurance agreement that the insurer has conducted a reasonably diligent search."). However, in \textit{Citibank, N.A. v. Chicago Title Insurance Co.}, 632 N.Y.S.2d 779 (N.Y. App. Div. 1995), the court held that "\textit{Smirlock} did not ... create a right of action in behalf of the insured against the title insurer for negligence in conducting a title search." \textit{Id.} at 782. The title insurance company in \textit{Smirlock} had denied coverage on the ground that the insured had failed to inform the company of a title defect known to the insured, but the court of appeals held that the company could not assert this defense because the title defect was a matter of public record. \textit{Smirlock}, 418 N.E.2d at 652, 654. The court in \textit{Citibank} viewed \textit{Smirlock}'s comment regarding the title insurance company's duty to search as addressing the company's responsibility for searching the public records to protect its own interests as an insurer. \textit{Citibank}, 632 N.Y.S.2d at 782.

\item[70] See \textit{Greenberg}, 492 N.W.2d at 151, where the court explained that:
\end{footnotes}
The economic principles of the insurance business played a prominent role in the development of title insurance company liability law in California. In the 1975 decision of *Jarchow v. Transamerica Title Insurance Co.*, a division of the California Court of Appeals ruled that a title insurance company could be held liable in tort for errors contained in a “preliminary title report,” which is California’s equivalent of a commitment for title insurance. The court in *Jarchow* stated that the title insurance company’s liability in a tort action could include punitive damages, damages for emotional distress, and other damages that fell outside the scope of the title insurance policy. The court further held that the amount of the plaintiff’s recovery in a tort action need not be limited by the amount of insurance purchased under the policy.

Perceiving the holding in *Jarchow* as a threat to the safety and soundness of California’s title insurance industry, the California Insurance Commission supported legislation, which was adopted in 1981 as part of the California Insurance Code, providing that title insurance policies and preliminary reports of title are not to be construed as representations of title.

The California Court of Appeals interpreted the new statute in *Southland Title Corp. v. Superior Court*. In *Southland Title Corp.*, the plaintiffs sued the title insurance company for negligent title examination,

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72. Id. at 485.

73. See id. at 486 (asserting that the insured could recover all damages the title insurer proximately caused in breaching its duty to search).

74. CAL. INS. CODE § 12340.11 (West 1988). The statute defines “preliminary report,” “commitment,” or “binder” as:

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.

arguing that the court should infer a duty to search because “in the everyday world of real estate transactions buyers and sellers continue to order and rely upon preliminary title reports as an integral part of the sale transaction.”

Addressing the insured's expectations, the court held that “[t]he prospective insured reasonably concludes a transaction in reliance not on the preliminary report, but on the anticipated policy of title insurance.” A prospective purchaser therefore may not reasonably rely on a preliminary report as providing title information because, by its terms and by statute, a preliminary report does not constitute a representation as to the condition of title to real property. The court explained that “[t]he statutory changes establish that a ‘preliminary report’ is an integral part of the issuance of title insurance and nothing more.”

Focusing on the insurance company's reasonable expectations, the court rejected the purchaser's contention that the title insurance company had issued its preliminary report of title, which was done without charge, for the purpose of inducing the purchaser to enter into the underlying

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76. Id. at 429.
77. Id. at 430.
78. Id. at 429.

Another recent case holding that a title insurance policy is not a representation of the state of a property's title is Focus Inv. Assocs., Inc. v. American Title Ins. Co., 992 F.2d 1231 (1st Cir. 1993). In this case, the title company's agent, in issuing a loan policy of title insurance, had not conducted any search of the title, but simply had relied on the borrower's own statement as to the status of liens against the property. Id. at 1233. The court rejected the lender's negligence claims based on its view that the issuance of a title insurance policy implied no duty on the part of the insurer to search the title. Id. at 1236. The court also rejected the lender's negligent misrepresentation claims based on its view that a policy of title insurance is a “contract of indemnity,” and that the policies issued as an insurer “were not representations of title” and “cannot, as a matter of law, form the basis of a claim of negligent misrepresentation.” Id. at 1237. The court, however, distinguished Focus Investment from cases in which a title insurance company had issued a preliminary report of title, implying that the issuance of a preliminary report could constitute an undertaking by the company of the duties of an abstractor. Id. at 1236.

79. Southland Title Corp., 282 Cal. Rptr. at 429. To clarify this point further for purchasers, California revised its Insurance Code in 1994 to require title insurance companies to disclose that a preliminary report is not an abstract of title. Section 12414.30 of the Insurance Code provides:

(a) When constituting an offer to issue an owner's policy of title insurance, a preliminary report shall incorporate the following statement, in bold print on front of the preliminary report:

“Please read the exceptions shown or referred to below and the exceptions and exclusions set forth in Exhibit A of this report carefully. The exceptions and exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered. It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.”

real estate transaction.\textsuperscript{80} Title insurance companies, the court observed, make their profits from premiums, which are calculated based on the risks the company assumes when it issues title insurance policies.\textsuperscript{81} The court concluded that the issuer of a preliminary report merely intends to induce the prospective insured to purchase a policy of title insurance and to declare in advance of such purchase the precise risk that the company is to assume.\textsuperscript{82}

California's experience shows that tort liability, as imposed by \textit{Jarchow}, disrupted the established system of title insurance protection. Because \textit{Jarchow} allowed insureds to recover damages beyond the scope of the policy and exceeding the amount of insurance, title insurance companies no longer had a predictable basis for determining the risks on which to calculate their premium charges.\textsuperscript{83} The 1981 amendments to the Insurance Code were intended to prevent the unfunded liability\textsuperscript{84} which resulted from the uncertainty \textit{Jarchow} introduced.\textsuperscript{85}

\textsuperscript{80} Southland Title Corp., 282 Cal. Rptr. at 430.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See id. (maintaining that insurance companies derive their profit from premiums, which are directly related to the risk they are assuming).
\textsuperscript{84} Title insurance companies are regulated under state law, and most states have adopted statutes establishing financial requirements for companies engaged in the business of title insurance. These requirements, which may include minimum amounts of paid-in capital, surplus or reserves, are designed to assure that a title insurance company will have the financial resources to pay claims that may be asserted under the company's policies. \textit{See generally} Burke, supra note 1, § 6.3, at 6:13. Tort remedies give rise to unanticipated liabilities for which a title insurance company may have collected insufficient premiums, thereby disrupting state regulatory schemes designed to assure that the company will have sufficient funds to pay claims.
\textsuperscript{85} California Department of Insurance, Enrolled Bill Report on Bill No. AB 334 (June 2, 1981), provided:

Existing law does not expressly define the terms "abstract of title," "preliminary report," "commitment," or "binder," but they have come to have trade definitions through usage over the years. However, several court cases have held preliminary title reports to be abstracts of title, and, thus, the title insurer is held to the standard of an abstractor of title.

This bill would define the appropriate terms to ensure that the distinction between "abstract of title" and "preliminary report" is restored to the usage and practice in effect before the cases were decided. . . .

[The bill . . . will help assure that the title insurers are able to charge appropriate premiums for foreseeable liability, rather than as is the case under current case law. Since the premiums or fees charged for preliminary reports are much less than those for abstracts, the result of such decisions is to impose liability on the insurers to an extent beyond which they have computed the premium charge (i.e., an unfunded liability).]

\textit{Id.}
Because the 1981 revisions to the California Insurance Code did no more than declare the plain meaning of a preliminary report,86 the question naturally arises as to why the court in Jarchow chose to engraft principles of tort liability onto California's system of insurance protection. The same question may be asked regarding court decisions in other states that adopted Jarchow's rule.87

B. The Tort View

Decided in 1975, Jarchow was the seminal modern case holding that a title insurance company may be liable to its insured in tort based on an implied duty to search the public records.88 In the Jarchow court's view, a title insurance company that provides an insured with a "preliminary report" prior to a real estate closing assumes two separate responsibilities to the insured: (1) the duty of an abstractor to examine the public records and to report all matters affecting title,89 and (2) the duty of an insurer under the title insurance policy.90 The court held that the title insurance company's liability as an abstractor sounds "in tort,"91 and that the insured could recover all damages the title insurance company's negligence proximately caused, including damages for emotional distress.92 The

86. CAL. INS. CODE § 12340.11 (West 1988).
87. See supra note 5 (listing cases holding that a title insurance company may be subject to tort liability).
88. Prior cases are sometimes cited to support this position. See Henkels v. Philadelphia Title Ins. Co., 110 A.2d 878, 879-80 (Pa. Super. Ct. 1955) (holding that defendant title insurance company had liability as an abstractor independent of the title insurance policy when it agreed to examine and search the title and had issued a separate "Settlement Certificate" prior to closing the sale which failed to disclose tax liens that the title company's search of the public records revealed); Dorr v. Massachusetts Title Ins. Co., 131 N.E. 191, 192 (Mass. 1921) (finding that the defendant title insurance company was liable after it had agreed at the customer's request to examine the title and only issued the policy at a later date at its own suggestion and without charge to the customer). Henkels and Dorr are of limited usefulness because the title companies' tort liability in those cases was based on express undertakings to examine title. The authority of those cases also is attenuated because they were decided prior to the current ALTA policy forms.
89. Jarchow, 122 Cal. Rptr. at 485.
90. Id. at 487.
91. Id. at 486.
92. Id. at 476. The facts of Jarchow are as follows: the defendant title insurance company issued a preliminary report showing that a parcel the purchasers intended to acquire had no significant clouds on title. Id. at 477. Although the title company discovered an easement affecting the title, the company's preliminary report failed to list that easement as an exception to coverage. Id. Shortly after the closing, the buyers discovered a second easement after the easement holder made a claim against the purchasers. After the title company refused to take legal action to cure the defect, the buyers instituted their own action against the neighbors to remove the second easement as a cloud on title and against the title company for compensatory and punitive damages. Id. at 477-78. The jury declined to award punitive damages, but granted each of the four buyers damages for emo-
opinion suggested that the jury would have been entitled to award punitive damages if it had determined that the title insurance company had acted "maliciously" or "outrageously" toward the plaintiffs, or had "defraud[ed]" them.\textsuperscript{93}

The \textit{Jarchow} opinion gave no explanation for holding the title insurance company liable as an abstractor, relying primarily on a California Supreme Court decision which stated, in an unrelated context, that preliminary title reports are equivalent to abstracts of title.\textsuperscript{94} The title insurance company's bad faith refusal to defend the insureds' title to their property, which is tortious under California law, apparently influenced the \textit{Jarchow} court's decision.\textsuperscript{95}

\textit{Jarchow} is no longer the law of California in light of the 1981 statute cited in \textit{Southland Title Corp. v. Superior Court}.\textsuperscript{96} Nonetheless, \textit{Jarchow} was highly influential in persuading courts in other states to rule that a title insurance company has an implied duty to search public records.\textsuperscript{97}

\textit{Ford v. Guarantee Abstract \\& Title Co., Inc.}\textsuperscript{98} adopted the two-duty rule announced in \textit{Jarchow} — that the title insurance company is liable in

\begin{itemize}
\item \textbf{93.} \textit{Id.} at 476.
\item \textbf{94.} \textit{Id.} at 485 (citing \textit{Hardy v. Admiral Oil Co.}, 366 P.2d 310 (Cal. 1961) (en banc)). \textit{Hardy} held only that a purchaser could recover its down payment on a contract to acquire mineral leases where a preliminary title report showed that the seller did not own the mineral rights to be leased. \textit{Hardy}, 366 P.2d at 313. In reaching this result the court commented that "[p]reliminary title reports are, in effect, abstracts of title." \textit{Id.} The \textit{Hardy} court did not address a title company's responsibility to its insured.
\item \textbf{95.} \textit{See} \textit{Jarchow}, 122 Cal. Rptr. at 486. In one part of its opinion, the court combined the company's duty to search with its duty to defend:

\begin{quote}
[\textit{W}e hold that when a title company insures a buyer of real property against liens and encumbrances of record and negligently fails to discover or disclose a recorded lien or encumbrance or fails to exclude a known recorded lien or encumbrance from coverage and, upon being notified of the existence of a recorded lien or encumbrance, unjustifiably refuses to take any legal action to clear the title or eliminate the cloud, the insurer may be liable to the insured in compensatory damages for any emotional distress which results. \textit{Id.} at 476.
\end{quote}
\item \textbf{96.} 282 Cal. Rptr. 425 (Cal. Ct. App.), \textit{review denied}, 1991 Cal. LEXIS 4321 (Cal. 1991); \textit{see also} supra note 74 and accompanying text (discussing the legislative response to the \textit{Jarchow} decision). \textit{But see} \textit{Lawrence v. Chicago Title Ins. Co.}, 237 Cal. Rptr. 264, 268 (Cal. Ct. App. 1987) (applying the rule of \textit{Jarchow} because the plaintiff's claim arose prior to the 1981 amendments to the California Insurance Code, which the court declined to apply retrospectively).
\item \textbf{97.} \textit{See} supra note 5 (listing cases holding that a title insurance company may be subject to tort liability).
\item \textbf{98.} 553 P.2d 254 (Kan. 1976).
\end{itemize}
contract under its policy and in tort as a supplier of information. The occasion for *Ford* was a jury award of punitive damages in favor of purchasers of a new home whose title proved to be defective. The court relied on *Jarchow* as the basis for its decision and on New Jersey cases that have since been overruled. However, the court in *Ford* contributed its own rationale for the two-duty theory, drawing an analogy between the function performed by a title insurance company and that performed by an attorney. The court reasoned that "a corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate... [which] assumes to discharge the same duties as an individual conveyancer or attorney, has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client." The court reviewed the functions attorneys engaged in real estate transactions historically performed and found them to be comparable to the functions a title insurance company's examiner performs. In the court's view, comparable functions gave rise to comparable responsibilities. Most of the courts that impose a duty to search the public records have not relied on *Ford*’s analogy between title insurance and the practice of

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99. *Id.* at 268.
100. *Id.* at 258.
101. *Id.* at 264-66. The New Jersey rule that the court in *Ford* found “persuasive” is contrary to the New Jersey Supreme Court’s subsequent opinion in the leading case of *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 562 A.2d 208 (N.J. 1989).
103. *Id.*
104. *Id.* at 263-64. The court in *Ford* noted that:

In the 1950's the use of abstracts to prove the seller's title began to decline, particularly in the metropolitan areas of the state, and the combination of title report and a title insurance policy was increasingly substituted for that purpose. By the late 1960's the transition was almost universal and the abstract method was rarely used in metropolitan areas.

*Id.* at 263.
105. *Id.* at 264; see also *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553 ( Fla. Dist. Ct. App. 1984) (following a line of reasoning similar to *Ford*’s regarding a title insurance company’s tort liability), *review denied*, 464 So. 2d 556 (Fla. 1985). The *Shada* court held:

We see no reason why the principles applicable to an abstracter [sic] should not be applied to a title insurance company where it undertakes the duty to schedule record title defects. The use of a title insurance binder or commitment instead of an abstract and an attorney's opinion of title has become commonplace. A title insurance company has a duty to exercise reasonable care when it issues a title binder or commitment and its failure to do so may subject it to liability in either contract or tort.

*Id.* at 557.
law, nor have they relied on the provisions of the title insurance policy. Instead, they hold that the title insurance company's duty to search can be implied from the title insurance commitment that precedes the policy, especially when the purchaser relies on that commitment. The court's decision in Malinak v. Safeco Title Insurance Co. of Idaho exemplifies this rationale. In Malinak, the court explained that "[a] title commitment is in a somewhat different category from the title policy that follows it" because the "commitment is ordered by the seller for the purpose of exhibiting it to the buyer as a representation of the quality of the title seller expects to sell to the buyer." In the court's view, "[t]he person who seeks a title insurance commitment expects to obtain a professional title search, as well as a professional legal opinion as to the condition of the title and a guaranty that the title expressed in the commitment will be insured to the extent of the policy coverage."

The Supreme Court of Alaska espoused essentially the same view of title insurance commitments in Bank of California, N.A. v. First American Title Insurance Co.. In Bank of California, the court applied the Restatement (Second) of Torts' standard for professional suppliers of information to determine the insurance company's duty regarding a commitment for title insurance. The foundation of this duty, in the court's opinion, was that commitments for title insurance "provide an essential service to prospective buyers and lenders. They are told what transactions must take place before they can receive clear title or an effective security." The court also emphasized that title insurance companies held themselves out as experts, leading parties to rely on information in the preliminary title report as a guarantee of good title.

106. See Focus Inv. Assocs., Inc. v. American Title Ins. Co., 992 F.2d 1231, 1236 (1st Cir. 1993) (declining to impose a duty to search where the title insurance company had issued a policy without first issuing a commitment).
108. Id.
109. Id. at 15.
110. Id.
112. Id. at 1129 n.5. Section 522 of the Restatement (Second) of Torts provides in relevant part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

113. Bank of Cal., 826 P.2d at 1129.
114. Id. at 1129-30.
To hold title insurance companies liable in tort, some courts have relied on state statutes that require the title insurance company to perform a search of the public records prior to issuing a title insurance commitment or policy.\textsuperscript{115} For example, the court in \textit{Bank of California} offered an Alaska statute as an alternative ground for holding a title insurance company liable in tort for a negligent title examination.\textsuperscript{116} The Supreme Court of New Mexico has held that a similar statute in its state gave rise to a private tort action for the insurance company’s failure to conduct a reasonable search of the public records.\textsuperscript{117} The Supreme Court of Idaho held, however, that a title insurance company’s breach of a duty to search under an Idaho statute did not give rise to a private tort action in favor of the insured.\textsuperscript{118} Similarly, the court in \textit{Walker Rogge} held that a title insurance company’s duty to search under a New Jersey statute did not create tort liability even if the company was negligent in conducting the search.\textsuperscript{119} As noted above, the court in \textit{Walker Rogge} held that a title insurance company’s duty to its customer depends solely on the agreement between the parties.\textsuperscript{120}

Once a court finds that a title insurance company has a duty to search the public records, the company is then potentially liable in tort for a breach of that duty. Courts that impose this duty must next determine whether the title insurance company has limited its tort liability by contract, and, if so, whether such contractual limitations are effective. As mentioned above, the ALTA Commitment Form provides that liability under the commitment ceases upon the issuance of a policy of title insurance, and the ALTA policy contains an integration clause merging all of the insured’s claims arising out of the status of the insured title into the terms and conditions of the policy.\textsuperscript{121}

In \textit{Bank of California} the court construed the disclaimer of liability contained in the commitment for title insurance as ineffective because the language of the disclaimer was not sufficiently explicit.\textsuperscript{122} In a tortured construction of the policy’s integration clause, the court determined that the clause applied only to contract claims under the policy and not to tort

\textsuperscript{115} See \textit{supra} note 18 and cases cited therein.

\textsuperscript{116} \textit{Bank of Cal.}, 826 P.2d at 1130 (citing \textsc{Alaska Stat.} § 21.66.170 (1992)).


\textsuperscript{118} Brown’s Tie & Lumber Co. v. Chicago Title Co. of Idaho, 764 P.2d 423, 427 (Idaho 1988) (citing \textsc{Idaho Code} § 41-2708 (1977)).


\textsuperscript{120} \textit{Id.}; \textit{see supra} note 58.

\textsuperscript{121} \textit{See supra} notes 34-38 and accompanying text.

claims under the title insurance commitment.\textsuperscript{123} As an alternative basis for holding that the commitment and policy were ineffective to disclaim liability for negligence, the court reasoned that "[a] title company is engaged in a business affected with the public interest and cannot, by an adhesory contract, exculpate itself from liability for negligence."\textsuperscript{124}

The merits of \textit{Bank of California}'s alternative rationale for invalidating the title insurance company's disclaimer of liability for negligence are worthy of serious consideration. When a duty to search exists, particularly under a statute designed to protect the insured, a court may be justified in concluding that a disclaimer of the statutory duty is contrary to public policy and, therefore, unenforceable.\textsuperscript{125} In the absence of a statute mandating a title search and providing the insured with a private right of action, however, it is difficult for this author to agree that a title insurance company's disclaimer of liability for negligence is an unconscionable provision.\textsuperscript{126} Two reasons mandate this conclusion. First, the insured's no-fault contractual remedy against the title insurance company for undisclosed title defects is fair and reasonable. Second, the company has not bargained for, nor received compensation for, the unlimited liability it potentially may incur if the courts refuse to permit the company to limit its liability to the terms and conditions of the insurance policy. This Article develops these arguments more fully in the next section.

\section*{III. Evaluating the Opposing Views}

\textit{Walker Rogge} and the other decisions that have declined to impose a tort remedy for undisclosed title defects offer a simple and clear rationale for their decision: the relationship between the company and the insured arises out of the policy, which establishes and limits the rights of the in-

\textsuperscript{123} See \textit{id.} at 1131 (stating that the bank's claim was "based on the preliminary commitment rather than the title policy").

\textsuperscript{124} \textit{Id.} at 1130 (quoting \textit{White v. Western Title Ins. Co.}, 710 P.2d 309, 315-16 (Cal. 1985) (en banc)); \textit{see also} \textit{Municipality of Anchorage v. Locker}, 723 P.2d 1261, 1265-66 (Alaska 1986) (noting that exculpatory clauses are "unconscionable" where "circumstances indicate a vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party").

\textsuperscript{125} \textit{Cf. White}, 710 P.2d at 315-16 (recognizing that contractual disclaimers may be void if they are contrary to public policy).

\textsuperscript{126} Title abstractors, who are unquestionably in the business of supplying title information, have been permitted in some states to limit their liability by contract. \textit{See, e.g., Corcoran v. Abstract \\& Title Co. of Md.}, 143 A.2d 808, 810 (Md. 1958) (stating that "[s]ince the [abstractor's] liability is contractual, it may be limited in its scope by apt and clear language brought home to the employer"). Under the view that \textit{Corcoran} espoused, even if a title insurance commitment did comprise title information, the company would have a right contractually to limit its liability unless the limitations were void as against public policy.
Therefore, the insured has no remedy outside the scope of the policy. This view is logical, and its reasoning is sound. The opposing view however, lacks a persuasive rationale.

The courts that afford a tort remedy against a title insurance company for undisclosed title defects have offered three different rationales for their opinion: (1) an implied contractual duty based on the presumed expectations of title insurance customers; (2) a tort duty based on the insurer's relationship to the insured, with some courts drawing an analogy between that relationship and the attorney/client relationship; and (3) a tort duty based on statute.

A. Critique of the Implied Contract Theory

As noted above, the courts that find an implied common law duty on the part of title insurance companies to search the public records generally do not rely on the title insurance policy as the source of this duty, but instead predicate it on the title insurance company's issuance of a commitment for title insurance and the insured's reliance on that commitment. The insured's right to rely on the commitment as a source of title information, however, finds no textual support in the standard ALTA Commitment Form. On the contrary, the ALTA Commitment Form obligates the company only to issue a policy if and when the commitment's conditions are satisfied, and explicitly provides that all of the company's obligations under the commitment cease when it issues the policy. Thus, the implied contract theory is problematic because the

130. See Bank of Cal., 826 P.2d at 1130; Ruiz v. Garcia, 850 P.2d 972, 975 (N.M. 1993); see supra note 18 and accompanying text. The author would not endorse such a statutory scheme, nor would he favor implying a duty in tort from a statute that merely required a title insurance company to conduct a reasonable search as a condition of issuing a policy. The reason, as argued in this Article, is that tort liability is antithetical to a safe and sound title insurance industry because of the uncertainty the tort remedy would create in a company's risk exposure. A statute that requires a title insurance company to search the public records could be viewed as a measure to protect the safety and soundness of the title insurance industry rather than as a law to provide an extra-contractual remedy to the insured.

This Article will focus primarily on the common law theories governing a title insurance company's liability to its customers and will not attempt to interpret particular state statutes.
131. See supra note 107 and accompanying text.
courts are implying an agreement that the company never intended to make. To find an implied contractual duty to search, a court must disregard the well-established principle that an insurer has the right to limit its liability and to impose conditions and restrictions on its contractual undertaking as long as those restrictions are not inconsistent with public policy. This principle finds expression in the familiar admonition that, although insurance contracts are to be construed liberally in favor of the insured, “courts should not write for the insured a better policy of insurance than the one purchased.”

To ignore the plain meaning of the ALTA Commitment Form, a court ordinarily would need to rely on its equitable powers to decline to enforce unconscionable contractual provisions. Additionally, the court would need to determine that a commitment for title insurance constitutes an unconscionable bargain if the company fails to assume the liability of an abstractor.

*Bank of California* and other decisions have justified disregarding the provisions of the commitment by calling it a contract of adhesion. The company’s use of a standard commitment form, however, does not provide sufficient cause for courts to disregard the contractual language; rather, such cause exists only if the commitment’s provisions are unreasonably favorable to the company. Although none of the court decisions favoring the tort view have ever declared a title insurance commitment “unconscionable”, these courts apparently have concluded, at least implicitly, that the insured will suffer an injustice if his rights under a title insurance commitment are limited to the issuance of a title insurance policy.

The supposed injustice is that the insured’s potential recovery against the title insurance company is more limited in some respects than if the insured were pursuing a negligence claim against an abstractor — notably, the limitation of the company’s liability to the amount of insurance

133. W.E. Erickson Constr., Inc. v. Chicago Title Ins. Co., 641 N.E.2d 861 (Ill. App. Ct. 1994) (enforcing the ALTA Commitment Form’s exclusive remedy clause, the court relied on the principle that “[a]n exclusive remedy clause will be enforced unless it violates public policy, or something in the social relationship of the parties works against upholding the clause”) (quoting Harris v. Walker, 519 N.E.2d 917 (Ill. 1988)). *See generally* 43 Am. Jur. 2d Insurance § 160 (1982).


135. Bank of Cal., N.A. v. First Am. Title Ins. Co., 826 P.2d 1126, 1130 (Alaska 1992); *see also* White v. Western Title Ins. Co., 710 P.2d 309, 315-16 (Cal. 1985) (en banc) (noting that because a title insurance company is affected with the public interest, the company cannot escape liability for negligence through an adhesive contract).

Limiting the insured's recovery to the policy amount would hardly be considered an unconscionable bargain, however, in any other kind of insurance contract. For example, the insured under a life insurance policy (or the insured’s beneficiary) could not recover more than the policy amount simply because the company failed to discover a fatal disease when it gave the insured a medical examination prior to issuing the policy. By analogy, a title insurance company should not be held liable for more than the policy amount simply because it failed to discover a title defect prior to issuing the policy.

Even if a court believed that the policy amount represented an unfair limitation on the insured's recovery, and that the fairness of a contract was a proper subject of judicial inquiry, the court should not limit its considerations of fairness to that single aspect of the policy. Instead the court should consider the totality of the contractual relationship between the company and the insured. Overall, a title insurance policy is a reasonable bargain for the insured because it affords him with rights and remedies far superior in many aspects to the remedies he would have against an abstractor or attorney. The three basic advantages the title insurance system has over a title reporting system are that: (1) the insured may recover for losses or damages sustained because of a title defect without having to prove fault on the part of the company;\(^{138}\) (2) subject to limited exceptions, the insured may recover even for title defects that are undisclosed in the public records;\(^{139}\) and (3) the company will provide services for the administration of title claims against the insured title, and has the financial resources — liquidity and loss reserves — to pay valid claims.\(^{140}\) These advantages are examined below.

The first advantage, a no-fault contractual remedy, has both procedural and substantive benefits. The court in *Walker Rogge* focused on the procedural benefit, noting that:

> [I]n an action under the title policy, the insured may establish a cause of action for breach of contract without establishing that the title company breached the standard of care appropriate for a reasonable title search. In an action in tort for the failure to conduct such a search, the insured would be required to establish the appropriate standard of care applicable to title searching.\(^{141}\)

\(^{137}\) See *Walker Rogge*, 562 A.2d at 220.

\(^{138}\) See infra notes 141-42 and accompanying text.

\(^{139}\) See infra notes 143-44 and accompanying text.

\(^{140}\) See infra notes 145-46 and accompanying text.

\(^{141}\) *Walker Rogge*, 562 A.2d at 220-21.
Thus, in a contract claim against a title insurance company, unlike a negligence claim against an abstractor, the insured is not required to retain an expert witness to prove the standard of care in searching titles, and is relieved of the risk that he will not be able to sustain his burden of proving this element of a negligence claim.\footnote{142}

The substantive benefits of the no-fault remedy may be even greater than the procedural benefits. A title insurance company agrees to indemnify its insured for loss or damage he incurs if the title is not as stated in the policy, irrespective of whether the company could have ascertained the title defects from a reasonable search of the public records. Often, even a reasonable search would not reveal title defects, and, thus, negligence in the search would be impossible to establish.\footnote{143} Examples of title defects that a reasonable search of public records often cannot discover include: (1) defects hidden when deeds or other instruments have been misindexed by the clerk; (2) defects resulting from forgeries of recorded documents; (3) defects that have been concealed by incorrect recitals in recorded documents; (4) defects resulting from the incompetency or other disability of a seller in the chain of title; (5) defects resulting from unrecorded marital interests (in states with dower or other marital rights); (6) defects resulting from unfiled mechanics or materialmen's liens which have priority over an insured deed or mortgage (if the title insurance company has not taken exception for such liens); and (7) defects resulting from the effect of creditors' rights laws on a prior deed in the chain of title (but not the deed or mortgage to the insured).\footnote{144} A purchaser who relied on an abstract of title would have no remedy against the abstractor for these kinds of title defects because the abstractor could not have discovered these defects through a reasonable search of the public records.

\footnote{142} Cf. id. at 221 (upholding the dismissal of the negligence claims against the surveyors based upon lack of expert testimony regarding the appropriate standard of care).

\footnote{143} See generally 65A C.J.S. Negligence § 243(2) (1966) (explaining that to establish negligence, expert testimony is often necessary to determine the standard of care the court should apply to the case).

\footnote{144} For a general discussion of "off record" risks (i.e., risks that cannot be prevented by a search of the public records), see Burke, supra note 1, § 2.1.2, at 2:9. The 1992 ALTA owners and lenders policies of title insurance now exclude coverage for creditors' rights problems in connection with the deed to the insured. See, e.g., 1992 Loan Policy, supra note 12, § II-1, at 3. However, they make no exclusion from coverage if a deed to one of the seller's predecessors in title is voided under creditors' rights laws. These laws include state laws that permit a property owner's creditors to avoid fraudulent or voluntary conveyances and the federal bankruptcy code's provisions allowing a bankruptcy trustee or debtor-in-possession to avoid preferences or fraudulent transfers. See, e.g., 11 U.S.C. § 547 (preferences) and 11 U.S.C. § 548 (fraudulent transfers).
In addition to the procedural and substantive benefits of the no-fault remedy under the policy, title insurance companies provide their insureds with important financial and administrative services which are unavailable from abstractors or attorneys. If the insured's title is challenged, the policy obligates the title insurance company to provide the insured with legal defense, and the company generally will do so by retaining counsel experienced in handling real estate title litigation. Abstractors cannot provide this service; attorneys most likely will not. Because many claims involve suits that are non-meritorious, the insured's right to have the title insurance company provide the defense is one of the most important benefits title insurance affords.

Equally important, the title insurance company maintains the financial resources and liquidity to pay the insured's claim if a loss does occur. Collection of a substantial claim from an abstractor or attorney may prove problematic absent sufficient professional liability insurance. By contrast, collection of a valid claim from a reputable title insurance company rarely involves significant credit risk.

These benefits of title insurance diminish the force of the argument that a policy's limitations on the company's liability are overreaching or unconscionable. Indeed, historically it was the customers' own desires to enjoy these benefits that propelled the emergence of title insurance over title reports or attorney opinions of title as the preferred method by which purchasers and mortgage lenders protect themselves against the risk of title defects. This market phenomenon provides strong evidence that the transaction set forth in the standard title insurance commitment and policy form is an essentially fair bargain, without the overreaching necessary to establish unconscionability. Therefore, the bargain between the title insurance company and its insured provides no basis for the courts to create remedies beyond those provided by the policy.

B. Critique of the Tort Theory

A leading commentator who advocates a tort remedy recognizes that no duty to search is established under the commitment or policy, but argues instead that the duty should be "premised on the relationship be-

145. See generally Burke, supra note 1, § 12 (discussing provisions for, and conditions to, the title insurance company's duty to defend the insured).
146. Id. § 6.3, at 6:13-21 (discussing various statutorily imposed minimums on a title insurance company's capital and surplus accounts, as well as other funds required for the protection of the insured).
147. See id. § 1.1.2, at 1:6-7 (discussing the social and economic factors that led to the predominance of title insurance over earlier forms of title assurance).
tween the title insurer and the insured property buyer and not on any agreement between them.\textsuperscript{148} Some courts embracing this view have drawn an analogy between a title insurance company and an abstractor or attorney, viewing the title insurer's business as that of supplying information for the guidance of others.\textsuperscript{149} This view contains three major flaws: (1) title insurance companies are neither attorneys nor abstractors; (2) unlike attorneys and abstractors, title insurance companies do not undertake to provide the insured with information; and (3) the insurance services that title insurance companies provide differ in kind from the information reporting services that attorneys and abstractors provide.

The analogy between title insurance companies and attorneys, originally espoused in \textit{Ford} and subsequently adopted by some other courts, reflects the view that the business of title insurance, like the practice of law, is of such overwhelming public importance that a duty to search the public records should be implied even if the title insurance company has not contractually undertaken such a duty. Courts that take this view conclude that provisions through which title insurance companies attempt to limit their liability for negligence should be disregarded as contrary to public policy.\textsuperscript{150} What this analogy overlooks, however, is that no state authorizes title insurance companies to practice law; they cannot hold themselves out to the public as attorneys; and they are not subject to the ethical rules that prevent attorneys from disclaiming liability for their own negligence.\textsuperscript{151}

An even more fundamental difficulty with the \textit{Ford} analogy is that, unlike attorneys who provide title opinions, title insurance companies do not purport to provide title information. As the court explained in \textit{Walker Rogge}:

\begin{quote}
The end result of the relationship between the title company and the insured is the issuance of the policy. To this extent, the relationship differs from other relationships conceivably sounding in both tort and contract, such as the relationship between
\end{quote}

\begin{footnotes}
\textsuperscript{148} Palomar, supra note 1, at 476-77.
\textsuperscript{149} See, e.g., Ford v. Guarantee Abstract & Title Co., Inc., 553 P.2d 254, 267 (Kan. 1976) (analogizing the title insurance company's function to that of an attorney); see also Palomar, supra note 1, at 477.
\textsuperscript{150} Bank of Cal., 826 P.2d at 1130.
\textsuperscript{151} The plaintiffs in Carstensen v. Chrisland Corp., 442 S.E.2d 660 (Va. 1994), pushed the \textit{Ford} analogy to the extreme. They argued that a title insurance company that served as settlement agent in a real estate transaction was liable for "legal malpractice" for failing to advise them that the lots they purchased would be subject to an easement by necessity in favor of another lot. \textit{Id.} at 668. Rejecting this argument, the court noted that "First American is a title insurance company, not a professional corporation qualified to render the professional services of an attorney .... An attorney-client relationship cannot be created by a non-attorney acting as an attorney." \textit{Id.} at 669.
\end{footnotes}
physician and patient, to which plaintiff alludes. Although the relationship between physician and patient is contractual in its origins, the purpose of the relationship is to obtain the services of the physician in treating the patient. The patient reasonably expects the physician to follow the appropriate standard of care when providing those services. By contrast, the title company is providing not services, but a policy of insurance. That policy appropriately limits the rights and duties of the parties.\textsuperscript{152}

Perhaps the most significant shortcomings of the Ford analogy are that it disregards the historical and economic forces that caused title insurance to supplant title opinions and abstracts as the primary method of assuring a purchaser's title, and fails to recognize that title insurance is a fundamentally different system of title assurance than the systems it replaced.

Title insurance supplanted title opinions and abstracts largely because, beginning in the 1920s and accelerating in the 1930s when the federal government intervened in the residential mortgage market, mortgage lenders came to insist on this form of title protection as their best hedge against title risks.\textsuperscript{153} The reasons for this insistence are evident. An attorney who issues an opinion of title does not agree to indemnify his client if title is not as stated in the opinion, and the attorney's liability is limited to cases in which the client can prove the attorney was guilty of negligence.\textsuperscript{154} A title insurance company, by comparison, affords its insured a no-fault contractual remedy if title is other than what the policy states.\textsuperscript{155} Although most attorneys maintain professional liability insurance for their own benefit, they are ill-equipped to administer or to pay claims against themselves, and their liability insurance coverage may be insufficient to cover a substantial claim for a title defect. Title insurance companies, by comparison, maintain not only professional staffs to administer claims, but also the financial strength and liquidity necessary to pay valid claims.

Mortgage lenders, particularly those that purchased mortgages on the secondary market, began to realize that title insurance, issued by reputable insurance companies using standardized forms, granted them far greater protection than title abstracts or attorney opinion letters. Over the years, purchasers likewise came to rely on title insurance as the pri-


\textsuperscript{153} BURKE, supra note 1, § 1.1.2, at 1:6 (discussing the various factors that caused mortgage lenders increasingly to require title insurance as part of their real estate transactions).

\textsuperscript{154} E.g., 7A C.J.S. Attorney and Client § 257b (1980) (stating that attorneys are not guarantors of title and are liable only for negligence or misconduct in their examinations).

\textsuperscript{155} See BURKE, supra note 1, § 1.1, at 1:2 (providing a general overview of common features of the standard title insurance policy).
mary means to protect themselves against the risk of title defects. The Ford court failed to realize that market forces selected the title insurance system over the abstract and attorney opinion letter system, that the company's no-fault contractual liability under the policy obviates the need for any tort remedy, and that engrafting a tort remedy onto title insurance policies is inimical to the safety and soundness of a system of insurance protection.

The decision in Bank of California offered an alternate rationale for recognizing the common law duty in tort, holding that title insurance companies' expertise in title examination, their maintenance of title "plants," and their "advertising and other practices" induces an insured to rely on the title insurance commitment as an accurate report of title.156 Although most purchases probably do assume that a reputable title insurance company will not issue a commitment for title insurance without having first searched the public records, the other factual assertions underlying Bank of California's conclusion are susceptible to challenge.157 It is not true that all title insurance companies maintain title plants; in many instances title insurance companies issue commitments or policies on the basis of a record search that an independent abstractor conducted. It is also untrue that title insurance companies advertise that their commitments are a "guarantee of good title,"158 no advertisement would be more likely to elicit immediate censorship from the companies' legal departments. Furthermore, it is incongruous to contend that one title insurance company's advertisement can be used to establish another company's liability under its own commitment or policy. Perhaps even more important, it is difficult to comprehend how a title insurance company's advertising could effectively alter its own legal documents, such as a title insurance commitment or policy, unless the advertisement amounted to a fraudulent inducement to purchase the title insurance commitment or policy.

Recognizing the weaknesses in the arguments various courts articulate for holding title insurance companies liable in tort, a leading commentator who favors the tort remedy has advanced "three policies" to support a duty in tort: "(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 stan-

157. Id.
158. See Burke, supra note 1, § 2.3, at 2:18-20 (describing the industry standards for title as "insurable" and "marketable," but not as guaranteed).
standard affords to both the insurer and the insured."159 These policies, which Professor Prosser might call arguments for "social engineering,"160 do not withstand critical analysis. In fact, imposing tort liability on title insurance companies will do little to further any societal interests, except to provide the insured with a measure of protection beyond that which the policy affords. This interest provides insufficient justification for engrafting common law principles of tort liability onto a system of insurance protection that generally works quite well.

C. A Critique of the Public Policy Arguments for a Tort Remedy

1. A Tort Remedy Does Not Significantly Reduce the Risk of Undiscovered Title Defects or Increase the Efficiency of Resource Allocation

The goal of the first public policy argument in favor of a tort remedy is to reduce the risk of undiscovered title defects. This argument assumes that holding title insurance companies liable in tort for their title search errors will give them an added incentive to exercise reasonable care in conducting their searches. This stance, however, overlooks the fact that a title insurance company already has ample incentive to perform a careful search of the public records because the terms if the policy impose no-fault contractual liability upon the insurer.161 If a title insurance company fails to search the public records carefully, it exposes itself to a loss under the title insurance policy regardless of the insured's ability to prove negligence. An additional negligence remedy is unlikely to induce greater diligence in public record searches because title insurance companies already must exercise a high level of care to protect themselves from the policy's no-fault contractual liability.

159. Palomar, supra note 1, at 483 (footnotes omitted).
160. Prosser's discussion of "Social Engineering" holds that:

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants . . . . There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future.

161. In Bank of California, the court noted that although a policy of preventing future harm would be "somewhat served" by holding the title insurance company liable in tort, "the deterrent supplied by tort liability is not likely to be of much additional consequence because the title company is usually liable under the title policy which ordinarily follows the preliminary commitment." Bank of Cal., 826 P.2d at 1130.
The argument that society's interest in the assurance of real estate titles militates in favor of a duty to search ignores the historical and economic forces that led to the development of the title insurance industry. The industry arose precisely because the negligence remedy was viewed as inadequate. The mortgage lending industry, in recognition of the inevitability of human error, manifested a distinct preference for title assurance in the form of insurance policies issued by title insurance companies with the financial means to pay potential claims. The societal interest in the assurance of real estate titles therefore militates not in favor of a duty to search, but rather, in favor of a financially sound title insurance industry with the ability to charge reasonable premiums for the risks it assumes.

California's experience demonstrates that the tort remedy is inimical to a financially sound title insurance industry. The negligence remedy divorces the amount of risk a title insurance company assumes from the amount of premium it collects. If tort claims are allowed, the insured may recover all damages proximately caused by the title insurance company's negligence, even if those damages greatly exceed the policy amount on which the title insurance company based its premium. As result of the increased risk, title insurance companies must necessarily increase their loss reserves, perhaps to the point of having unfunded liabilities, and may need to charge higher premiums to fund this increased risk retroactively. By decreasing the predictability of losses, which provides the foundation of a safe and sound title insurance industry, a tort remedy actually works against the societal interest of assuring real estate titles.

Tort remedies have been notoriously ineffective in achieving the societal goal of efficient resource allocation when compared to contractual remedies. This was particularly evident in the 1980s when legislatures in various states replaced the tort system for compensating automobile accident victims with no-fault insurance systems. Their objective was to take premium dollars used to fund wasteful litigation and reallocate the money back to actual compensation of injuries. Tort reform proposals also have led to calls for the curtailment of awards of punitive damages, which have now come under various constitutional attacks.

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162. See supra note 145 and accompanying text.
163. E.g., Stephen D. Sugarman, Doing Away With Tort Law, 73 Cal. L. Rev. 555, 613-17 (1985) (arguing that "cost internalization" achieved through tort liability does not lead to a more efficient allocation of resources).
Similarly, the Supreme Court has recognized that punitive damages may violate due process if juries are not given sufficient guidelines to award them.\textsuperscript{166} In short, experience with using negligence systems to compensate economic loss has demonstrated that they often serve only to divert scarce resources from the socially important goals of preventing and compensating losses into wasteful litigation. By contrast, the existing no-fault insurance system has adequately assured against title defects for nearly a century.

One of the most wasteful aspects of a tort remedy is that it often would deprive title insurance companies of their right to correct title defects, and thereby prevent or mitigate economic losses. Frequently, a title insurance company can prevent loss to itself and to its insured by seeking appropriate legal remedies to cure a title defect. However, in jurisdictions that afford the insured a tort remedy, the insured may bring a tort action against the title insurance company immediately upon discovering a title defect, thereby frustrating the title insurance company's contractual right to cure the title defect and assuring that an economic loss will occur. The tort remedy thus fosters wasteful litigation rather than problem solving and loss reduction.

To supply one example from the author's own experience, a bank, upon learning of a title defect in the security for its mortgage loan, filed an immediate arbitration demand against its title insurance company. The bank commenced this action, which sought full payment of the bank's mortgage loan, even though the title insurance company, at its own expense, could easily have removed the title defect — a prior lien — by litigation. The title insurance company thus became engaged in a two-front conflict: defending arbitration its insured instituted to obtain immediate payment under the policy, while at the same time prosecuting a suit on behalf of its insured to cure the title defect. Fortunately for the company, it succeeded in curing the title defect prior to the arbitration hearing, rendering the arbitration moot. Nevertheless, this case illustrates two inefficiencies in resource allocation that will occur if courts deprive title insurance companies of their contractual right to mitigate damages. Litigation to cure title defects always requires the insured's cooperation, which may range from the insured simply giving the insurer permission to sue in its name to providing extensive assistance in developing the facts the insurer needs to try the case. In this example, the bank's premature arbitration demand not only caused an unnecessary and costly dispute

\textsuperscript{166} TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2722-23 (1993) (plurality opinion) (concluding that "grossly excessive" punitive damages could violate the constitutional guarantee of due process of law).
between itself and the company, but also produced tensions that inhibited cooperation between them in curing the title problem.

2. *A Tort Remedy Does Not Fulfill the Parties’ Expectations*

The second public policy argument in favor of a tort remedy for undiscovered title defects presupposes that the tort remedy fulfills the expectations of the parties. In addition to the points this Article previously raised while discussing whether a title insurance company has an implied contractual duty to search public records, several additional observations serve to undermine the efficacy of this public policy argument.

Each of the opposing lines of authority recognizes that insureds expect a title insurance company to conduct a reasonable search of the public records prior to issuing a title insurance commitment or policy. This recognition of expectations does not, however, mandate the imposition of a tort duty upon the insurer. An additional, decisive question must be asked — whether the insured has a *reasonable* expectation of any remedy or recourse beyond those the policy sets forth. Based on the language of the title commitment and policy, the answer to this question is no. As the courts held in *Walker Rogge* and *Southland Title Corp.*, although the insured may expect the title insurance company to examine the title, the insured is bargaining for the certainty of a contract remedy under the policy, and not for the uncertainty of a remedy in tort.

Similarly, from the title insurance company’s perspective, imposing an additional remedy in tort would be contrary to the expectations of the contracting parties because it might give the insured an unjust windfall

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167. *See supra* part III.A (discussing the implied contract theory).
168. *E.g.*, *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 562 A.2d 208, 220 (N.J. 1989) (stating that “[a]lthough we recognize that an insured expects that a title company will conduct a reasonable title examination, the relationship between the company and the insured is essentially contractual”).
169. *See, e.g.*, *Real Estate Title Ins. Co. v. District of Columbia*, 161 F.2d 887, 889 (D.C. Cir. 1947). In *Real Estate Title*, the court determined that for corporate taxation purposes, title insurance companies are in the business of insurance and not the business of supplying information. Specifically, the court stated:

[For more than half a century the general understanding of petitioners, the bar, and the public has been that each of the policies issued by petitioners creates a limited liability payable to the holder upon the breach of its conditions. It is not their work as title examiners that petitioners insure. What they do certify is that the title to the property involved is good and marketable and their liability is conditioned upon the breach of this certification. This by every token is insurance and nothing else. It would be a shock to the thousands of present policyholders of these companies to be told that all of this is untrue and that petitioners’ liability is limited to a showing of negligence in the examination of the land records of the District.

*Id.*
for which neither party had bargained. As the court noted in *Southland Title Corp.*, a title insurance company's business is simply to *insure* title.\(^{170}\) It derives its income from policy premiums, which are based on the amount of liability that the company assumes under its policy. Armed with a negligence remedy, the insured might recover damages well in excess of the policy amount, which formed the basis of his premium.\(^{171}\) The insured also might recover damages wholly outside the contemplation of the insurance contract. This is exactly what happened for a time in California. Until California adopted remedial legislation, a judicially created negligence remedy\(^{172}\) allowed the insured to recover damages for emotional distress and allowed the jury to consider awarding punitive damages.\(^{173}\)

3. *A Tort Remedy Does Not Provide a More Definite Standard of Liability than the Contractual Standard Provided by Title Insurance Policies*

The third public policy argument for a tort remedy, the supposed increase in clarity of standards, rests on the wholly unwarranted assumption that the standards to be applied in a tort action have greater clarity than the standards to be applied in a contract action.

In a contract action, the court may determine the title insurance company's obligations from the plain meaning of the policy. Under the widely-used ALTA policy forms, these obligations are quite clear. If the insured's title is challenged, the insurance company must provide a defense, and if a loss occurs, the company must indemnify the insured in accordance with the terms and conditions of the title insurance policy.\(^{174}\)

By contrast, in a tort action, the title insurance company's liability will depend on proof that the defect could have been ascertained from a rea-


\(^{171}\) *See Walker Rogge*, 562 A.2d at 220 (recognizing the availability of consequential damages under tort liability).

\(^{172}\) In *Jarchow v. Transamerica Title Ins. Co.*, 122 Cal. Rptr. 470 (Cal. Ct. App. 1975), the court held that a title insurance company's liability for negligence was not limited to the amount of the policy, and included damages for the insured's emotional distress. *Id.* at 486. The California legislature reversed *Jarchow* in 1981 by enacting a statute providing that neither a commitment for title insurance nor a policy shall be construed as a representation of the state of title to real estate. *CAL. INS. CODE § 12340.11* (West 1988); *see also* *Lawrence v. Chicago Title Ins. Co.*, 237 Cal. Rptr. 264, 268 (Cal. Ct. App. 1987) (distinguishing between the viability of the tort remedy before and after amendment of the statute).

\(^{173}\) *See, e.g.*, *Jarchow*, 122 Cal. Rptr. at 476. Though punitive damages were not awarded by the *Jarchow* jury, the matter was submitted for their deliberation.

\(^{174}\) *See supra* notes 143-44 and accompanying text.
reasonable search of the public records. This inquiry is a question of fact, to be decided by the jury rather than by the court, often based on conflicting expert testimony as to whether the title insurance company exercised ordinary care according to community standards.\textsuperscript{175} If liability is established, the amount will depend not on the policy terms, but rather on the jury's determination of what damages were within the foreseeable contemplation of the parties. The jury will make this determination \textit{without} the guidance of the policy, without regard to the amount of insurance purchased, and \textit{with} the possibility of an award of punitive damages, the amount of which is discretionary. Thus, the public policy interest in favor of clarity of standards weighs strongly in opposition to imposing a tort remedy.

\textbf{IV. Conclusion}

None of the public policy arguments for imposing tort liability is so compelling as to justify departure from the general rule that an insurance company's obligation to its insured is governed by the policy contract. Although title insurance policies are contracts of adhesion, so too are most other insurance policies, as well as other important consumer contracts, such as mortgage loan documents. More important, the standard policy forms provide practical benefits far beyond any protection that an owner or mortgage lender could ever obtain through a title abstract or an attorney opinion. It is for this very reason that title insurance now has supplanted these other devices to protect against the risk of title defects. Although the title insurance company's liability under the policy is limited to the amount of insurance purchased, this limitation is neither unfair to the policy holder, nor is it a bargain that a court should describe as unconscionable.

In areas outside real estate, experience teaches that tort remedies are an inefficient means of compensating accidental injuries. This is illustrated by the many efforts at tort reform in automobile accident and medical malpractice cases. Indeed, a reform frequently suggested in these cases is to replace the fault-based tort remedy with no-fault insurance.\textsuperscript{176} Within the realm of real estate, title insurance already has supplanted the

\textsuperscript{175} See supra notes 141-42 and accompanying text. Under a tort theory, the standard of care incumbent on the title insurance company would presumably be analogous to that imposed on an attorney.

\textsuperscript{176} E.g., Jeffrey O'Connell, \textit{A Draft Bill to Allow Choice Between No-Fault and Fault-Based Auto Insurance}, 27 HARV. J. ON LEGIS. 143, 144-45 (1990) (arguing that "no-fault is more effective than the tort system in dealing with auto accident claims," but advocating a consumer option to purchase fault-based insurance).
older, fault-based remedies that a purchaser or mortgage lender had against a title attorney or abstractor.

From a historical perspective, *Jarchow* and similar cases represent tort reform in reverse. Deciding on public policy grounds that an insured’s no-fault remedy under a title insurance policy is inadequate, these cases permit the insured to recover in tort. This remedy imposes upon insurance companies duties they did not undertake; confers upon insureds benefits for which they did not bargain; and superimposes on an efficient insurance remedy the inefficient, uncertain, and anachronistic remedies that apply most appropriately to forms of title protection long out of favor in the real estate market.

In reversing *Jarchow*, the California legislature displayed prudent recognition of the harmful consequence that might flow from the imposition of a tort remedy. The California statute and the contract-view cases, such as *Walker Rogge*, are not anti-consumer; they merely follow the familiar principle that courts should enforce insurance contracts as written unless the transaction is so unfair that enforcement would be unconscionable. Absent an unconscionable bargain — which is not present in title insurance policies — there is no justification for courts to engraft a tort remedy onto a fundamentally reasonable insurance system for managing the risk of title defects.