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## LAWYERS' TITLE GUARANTY FUND

GEORGE B. CARTER\*

In a real estate transaction the essential is an examination of the public records that affect the title to the property and an appraisal of their legal effect, a function involving a broad knowledge of law. That has long been and remains within the scope of the practice of law. There is some risk of errors in making record entries, in abstracting the records, in forgeries, lack of legal competency of grantors in conveyances, and other defects in records; but that risk is not nearly as great as the risk of an erroneous conclusion as to the legal effect of the documents in the chain of title.

As an area's economy changes from an undeveloped or agricultural one to that of a commercial area, its real estate becomes more and more a matter of commerce than of inheritance. Instead of its land passing from generation to generation by inheritance, with relatively low unit value and no great need of marketable title, it is constantly divided into smaller tracts, with greater numbers of owners and costly improvements. Then the tempo of transfer in ownership and use as security for loans increases, resulting in a greater need for marketable titles of record.

The legal profession has always recognized the importance of marketable title and has developed the opinion on title, which gives assurance as to marketability as shown by public records. However, an individual lawyer is not in position to furnish assurance against nonapparent risks and, until recently, lawyers have not provided themselves with a facility for providing assurance against the undisclosed and lesser risks.

As a result of that omission by the legal profession, title insurance companies have developed. As they are commercial enterprises and not circumscribed by a rule of ethics that restricts them against advertising and soliciting business, they have been free to play up the lesser and nonapparent risks in a title, and they have fostered superficial thinking in the minds of some people that if a title is insured it is marketable.

In its opinion in a recent case<sup>1</sup> the Supreme Court of Florida

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<sup>1</sup>Cooperman v. West Coast Title Co., 75 So.2d 818, 820 (Fla. 1954).

succinctly pointed out the limited scope of the assurance that title companies furnish with their policies:

"We do not understand that the appellees [title insurance corporations] undertake to pass primarily upon the marketability or validity of the title or interest, but upon its insurability. In other words, the whole effort of the appellee-corporations is to determine the risk that will be taken if the policy issues. Conceivably a title that would not be declared merchantable by a careful attorney might nevertheless be insured by charging a premium that would compensate for the risk that would be run due to a defect of some kind or other.

"If the purchaser wished to engage an attorney to advise him relative to the marketability of the title, as distinguished from its insurability, there is nothing to prevent his doing so."

It is inconvenient and expensive for a real estate purchaser or mortgage lender to have to obtain assurance as to marketability from one source, his attorney, and assurance against the lesser risk, non-apparent defects, from another source, a title insurance company. Such a situation readily suggests a logical inquiry: Why cannot both assurances be obtained from one source? That inquiry suggests another: As it is a function of a lawyer to furnish assurance against the greater risk, why does he not have a facility for furnishing assurance against the lesser, without either having to accept from a title company a small fee for his greater service or have his client pay a regular charge for each?

Lawyers' Title Guaranty Fund was developed by Florida lawyers as a solution of the problems posed by those questions.<sup>2</sup> The balance of this article is given to an outline of the form of the organization, how it operates, its progress, and its prospects.

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<sup>2</sup>In 1946 the author of this article submitted the original draft of the plan to the Orange County Bar Association. That association approved the proposal and appointed a committee of five of its members to proceed with it. State-wide interest was obtained. The junior section of the Florida Bar Association adopted the plan as its chief project. Approval by the board of governors of the Florida Bar Association followed, with a committee of the Association to co-operate with the Fund's board of trustees. When The Florida Bar was integrated the bylaws adopted under the integration rule provided for a permanent committee for co-operating with the Fund's board of trustees.

## FORM OF ORGANIZATION

The business trust form appears to be near ideal for the purpose. That form provides a simple method for providing the initial capital and a continuous increase of resources directly in proportion to requirements. At the same time, it assures to the lawyers who are the members of the organization and contribute the capital an individual beneficial interest in the assets directly in proportion to their respective contributions. It provides a method for each member or his estate to withdraw his contributions when they have served their purpose.

The name adopted is completely descriptive of the organization and its purpose. It was created and is owned by lawyers. Its business is guaranteeing real estate titles and providing a fund to underwrite the guarantees.

The organic document is the declaration of trust.<sup>3</sup> It was executed by one lawyer in each of the then fifteen judicial circuits in Florida and then, in March 1947, filed with the secretary of state of Florida. Those lawyers became the first board of trustees. One third of them had a term of one year, one third a term of two years, and the other one third a term of three years. All succeeding trustees were and are elected for a term of three years. In that manner there is assurance of continuity in administration. After the original, each succeeding trustee is elected by the members of the Fund in his circuit.

The declaration of trust states that the board of trustees "shall have sole title to the assets that come under the trust hereby created, and, subject to the provisions of this declaration of trust, shall have full control and management of the trust's assets and affairs." The board is required by the trust instrument to meet at least once a year and keep minutes of all meetings.

The trustees may act without meeting by a written statement of the action taken signed by two thirds of all of them. The declaration of trust authorizes the board of trustees to adopt regulations for carrying on the Fund's affairs, and, by its regulations, the board fixes the policies to be followed by the members and officers. The Fund furnishes each member an attractive loose-leaf binder containing the declaration of trust, regulations, and appropriate handbook material.

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<sup>3</sup>A copy of the declaration of trust and regulations adopted by the board of trustees may be obtained upon request to Lawyers' Title Guaranty Fund, Box 2671, Orlando, Florida.

The Fund holds a certificate of authority issued under section 626.02 of Florida Statutes 1953 and has voluntarily deposited with the insurance commissioner of Florida \$100,000 in government bonds, authorized by section 626.25. The Fund's accounts are regularly audited by the insurance commissioner.

The declaration of trust provides for an executive committee to be elected from the members of the board. The executive committee meets quarterly and as special needs require. It is not authorized to act without meeting. It is required to keep minutes of its meetings and submit them by mail to the other trustees. There is a claim committee, an investment committee, and special committees as needed.

The executive duties are performed by an executive secretary, assisted by an assistant executive secretary, field service representatives, and such others as are needed. There is a treasurer and a general counsel.

#### MEMBERS<sup>4</sup>

The cestuis que trust are designated as members and, of course, are the real owners of the organization. The members in each judicial circuit elect a trustee for their circuit. Membership is limited by the declaration of trust to lawyers who reside in the circuit, are licensed to and actively engage in the practice of law in Florida, and are approved for membership. Approval for membership is by the membership committee for the circuit in which the applicant practices.

Each trustee is ex officio chairman of the membership committee for his circuit. He appoints either two or four fund members in his circuit for the other members of his membership committee. For self-evident reasons, it is the practice not to publicize the names of the committee members in addition to the trustee. A dissent by one committeeman bars approval of the application by the circuit committee. When there is a dissent to approval, the executive secretary investigates to obtain the reasons for the dissent and then submits the application and the results of his investigation to a committee from the board of trustees, which does not include the trustee for the applicant's circuit. In that manner, a rejection of an applicant because of a purely personal objection by a local committeeman is avoided.

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<sup>4</sup>At the present time, there are over 1400 Fund members. No direct efforts have been directed toward increasing the membership since 1951. The membership is increasing about ten a month. The increase in the number of field service representatives is expected to increase membership more rapidly.

## CAPITAL

The Fund's capital and income for operating expenses, claims, and reserve for its title guarantees are derived from contributions from its members and income from investments. Contributions are classified as initial and additional.

An initial contribution is that made by a lawyer when he becomes a member.<sup>5</sup> The purpose of the initial contribution is to provide original capital and to provide an initial reserve for each new member.

An additional contribution is the amount a member remits to the Fund for a title guarantee or policy he issues. It is roughly one fourth of one per cent of the amount of the declared value of the property if it is an owner guarantee, or of the amount of the mortgage if it is a guarantee or policy issued to a mortgagee. The rate is graduated as the amount of declared value or indebtedness increases.

Every member has an account. He is credited with his initial and additional contributions, and with investment income in direct proportion of his additional contributions to all additional contributions. Then, in like proportion, he is charged with operating expenses and claims that are paid.

If a claim does not arise out of negligence, fraud, or incompetency of the member it is borne by the Fund as a whole. If it arises out of the fault of the member it is charged to the member to the extent of his credit balance.

Section 41 of the declaration of trust authorizes the board of trustees to allow members to withdraw their credit balances which have existed for seven years.<sup>6</sup>

As the Fund grows in volume of additional contributions and investment income the percentage of credit balance to each member rapidly increases.<sup>7</sup> Already, members have credit balances in varying amounts up to \$15,000. The Fund is providing substantial old age benefits for its members.

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<sup>5</sup>At the beginning the amount was \$100 for each member. A short time later there was a modification for partnerships, \$100 for the senior partner, \$75 for the next, and \$50 for each additional partner. In 1951 the board doubled the amount, to \$200 for the senior partner, \$150 for the next, etc.

<sup>6</sup>The seven-year period was arbitrarily adopted because title by adverse possession can arise in seven years and that appeared to be the natural time to expect liability to come to an end, in most instances.

<sup>7</sup>In 1950 operating expenses consumed 70c of each \$1.00 of a member's additional contributions. In 1954 only 22c of each \$1.00 was consumed, leaving 78c of each \$1.00 as a credit balance, which in 1962 will be available for withdrawal by the

### OTHER FUND BENEFITS

Although the main benefit of the Fund is that it provides the legal profession a facility for furnishing clients complete title assurance, which is not otherwise readily and economically available to the clients, there are other substantial benefits derived from its operation and activities.

The Fund is working for continued improvement in title practices. It is developing standardized procedures and technics in handling real estate transactions, including working for the adoption of title standards and the elimination of ill-founded objections to titles. By having the assistance that an organization like the Fund can give them, members of the bar can more readily develop as title lawyers and be of greater service to their communities than if they had to work alone.

The board of trustees has directed the executive committee to institute and rapidly promote a program for developing modern facilities for furnishing abstracts and other title information in areas where there is now difficulty in obtaining such information and in other areas when difficulties develop. In two areas plants have been established, and work is being done in three other areas. A depository of title information is being accumulated in the Fund's office and being classified for ready use.

Except for investments in government bonds, the policy of the board of trustees is to make investments as much as feasible in the localities from which the members remit additional contributions. A large percentage is placed in the savings and loan association. A percentage is in real estate first mortgages.<sup>8</sup> Of course, as members' credit balances become subject to withdrawal and are withdrawn the money will go back to the areas from which it originated. In that way the Fund is to an increasing extent fostering the state's expanding economy.

The Fund's plan of organization is expanding into other states. In May, 1955, the Ohio State Bar Association started business with an organization patterned after the Fund. The Arkansas Bar Association has requested permission to use verbatim, except for essential changes, our declaration of trust. Progress in varied degrees has been made in several other states.

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member.

<sup>8</sup>At this time the Fund has \$250,000 invested in 38 Florida savings and loan associations. It has \$95,000 in first mortgages.