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Title Insurance - New Mexico Sets the Date for Determination of Value in Title Insurance Cases: Hartman v. Shambaugh

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TITLE INSURANCE—New Mexico Sets the Date for Determination of Value in Title Insurance Cases: *Hartman v. Shambaugh*

In *Hartman v. Shambaugh*,[1] a case of first impression in New Mexico, the supreme court addressed two issues concerning property valuation under a title insurance policy. The first was how value of property covered by title insurance is determined when, as in *Hartman*, title to a portion of that property fails. The court held that when the value of an entire tract is adversely affected by title failure of a part, the reduction in value of the entire property is the proper measurement of loss.[2] The second issue was at what date such value is to be determined. As to this issue, the supreme court held that the amount of recovery will be determined by assessing the reduction in the value of the property on the date at which the defect in title is discovered.[3]

Although the date the defect is discovered has been used by the majority of courts which have ruled on the issue of when actual loss is determined, it is by no means the date used in all jurisdictions.[4] This Note will discuss the *Hartman* decision in light of decisions reached in other jurisdictions, and will analyze the possible impact of the *Hartman* decision on title insurance law in New Mexico.

THE *HARTMAN* CASE

Charles Williams, Carolyn Williams, and Betty Hartman ("petitioners") purchased 2.0528 acres of land in Bernalillo County, New Mexico, from Olive Shambaugh ("Shambaugh") for $22,000. Petitioners agreed to sell 0.52 acres of this tract to Valle Grande Real Estate Development Corporation ("Valle Grande") for $4,100, and retained 1.5328 acres for themselves.[5]

USLife Title Company of Dallas ("USLife") insured title to both tracts. The 0.52 acres was insured for the purchase price of $4,100. Title was

1. 96 N.M. 359, 630 P.2d 758 (1981).
2. On this issue, the court followed the line of reasoning that makes a distinction between agricultural and urban land. The court held that where the value of an entire tract is diminished by the loss of a portion, such as with urban property, "the proper measure of damages requires consideration of impairment of the value to the entire lot." *Id.* at 362, 630 P.2d at 761. *See also* Annot., 60 A.L.R.2d 972, 975 (1958).
3. 96 N.M. at 364, 630 P.2d at 763.
4. M. Friedman, Contracts and Conveyances of Real Property, § 3.11 at 232 (3d ed. 1975). *See infra* notes 21–23 and accompanying text [hereinafter cited as Friedman].
5. Appellants' Brief in Chief at 4, Hartman v. Shambaugh, 96 N.M. 359, 630 P.2d 758 (1981).

good and no controversy arose over this piece of land. Petitioners insured title to the 1.5328 acres which they retained for $30,000, an amount in excess of the purchase price. Petitioners requested the additional insurance, and they paid the additional premium which resulted from the increased coverage.

The dispute in this case arose when Valle Grande successfully sought to quiet title to a portion of the land retained by petitioners.[6] Shambaugh then sought a declaratory judgment concerning her liability to petitioners and the amount of insurance afforded by USLife. USLife filed a complaint in intervention naming petitioners and Shambaugh as parties.[7] The complaint acknowledged that title failed to 1.1064 of the 1.5328 acres which USLife insured to petitioners. USLife sought a determination as to the rights and duties of the various parties.[8]

At trial, the only evidence given as to the value of the property was an affidavit filed by one of the co-petitioners, Charles Williams. In the affidavit, Williams stated that the value of the 1.1064 acres was $35,000 at the time of purchase from Shambaugh, $50,000 when petitioners first discovered any adverse claim to the land, and $80,000 at the time of the filing of the affidavit.

The trial court entered a declaratory judgment granting to petitioners the 0.4264 acres of land to which they had good title. The court also released petitioners from the $15,242 balance owed to Shambaugh on the original purchase. The court held that due to this release, petitioners had suffered no loss and were not entitled to a judgment against USLife.[10]

On petitioners' appeal, the New Mexico Supreme Court reversed the trial court and ruled that petitioners could recover from USLife. The court reasoned that insuring the purchaser of land against future loss while at the same time protecting title insurance companies from any inactivity[11]

6. Petitioners' title to this portion of the retained land was defective and failed when challenged by Valle Grande. Record at 43.

7. 96 N.M. at 360–61, 630 P.2d at 759–60. A complaint in intervention is described in New Mexico's rules of civil procedure:

> Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.M. R. Civ. P. 24(a).

8. Appellants' Brief in Chief at 5.

9. The affidavit was filed July 17, 1978. Record at 300. The contract for the purchase of the land was closed and the policy of title insurance issued on April 25, 1974. Appellants' Brief in Chief at 4. Petitioners were first notified of a possible defect in title soon after the last payment they made to Shambaugh on April 15, 1975. *Id.* at 5.

10. Record at 328.

11. *See* note 28, *infra*.

on the part of the insured once a defect in title is discovered best fulfilled the purpose of title insurance.[12] The court then held that petitioners' damages should be determined based on the reduction in value of the entire property on the date of discovery of the defect in title.[13]

DISCUSSION

The primary purpose of title insurance is to eliminate risk due to defects in title arising out of past events.[14] It is a relatively new concept, put into practice in the United States in the latter part of the nineteenth century.[15] Title insurance was developed as a method to increase the efficiency, security and safety of real estate transactions.[16]

Title insurance is a contract of indemnity under which the insured is entitled to recover actual damages or loss suffered.[17] It is generally accepted that any recovery of loss under a title insurance policy is limited by the face value of the policy, barring negligence on the part of the insurer.[18] Courts do not agree, however, on the proper date for determining property value in order to measure the insured's loss. In *Hartman*, the New Mexico Supreme Court accepted the majority view[19] and set the date for determination of loss due to a defect in title in New Mexico as that on which the defect in title is discovered.[20] Various other courts have

12. 96 N.M. at 364, 630 P.2d at 763.

13. *Id.*

14. American Land Title Association, *The Nature of and Need for Title Insurance Services*, in Title Insurance in Major Real Estate Transactions 578, 582 (1978) [hereinafter cited as American Land Title Association]. The specimen title insurance policy entered in the *Hartman* trial record states that the company insures against loss or damages incurred by reason of, "1. Title to the estate or interest being vested otherwise than as stated [in the policy]; 2. Any defect in or lien or encumbrance on such title; 3. Lack of a right of access to and from the land; or 4. Unmarketability of such title." Record at 58. *See generally* Annot., 87 A.L.R.3d 764 (1978) (what constitutes a charge, encumbrance, or lien within the contemplation of a title insurance policy).

15. Johnstone, *Title Insurance*, 66 Yale L.J. 492, 492 (1956) [hereinafter cited as Johnstone].

16. American Land Title Association, *supra* note 14 at 578. Two other methods of protecting against the risk inherent in the uncertainty of land titles exist. The first is the lawyer's opinion, based on title searches made by examining lawyers or abstracts of title prepared by professional abstracters. Johnstone, *supra* note 15 at 493. The other method is the Torrens system. This system requires the original applicant to bring an action similar to a quiet title suit. After the resulting decree, the applicant files a certificate of registration. This certificate is determinative of all rights and interests in the land. The decree usually may be attacked for only a limited period after issuance, and then only by individuals who have been deprived of rights. *Id.* at 499.

17. 15 G. Couch, Cyclopedia of Insurance Law §57:179 (2d ed. 1966). The specimen title insurance policy included in the *Hartman* record states, under the heading "Determination and Payment of Loss", that "The liability of the Company under this policy shall in no case exceed the least of: (i) the actual loss of the insured claimant; or (ii) the amount of insurance stated in Schedule A." Record at 60. The face amount of the policy is stated in Schedule A.

18. Annot., 60 A.L.R.2d 972, 975 (1958).

19. "[T]he loss should be measured as of the time of its discovery. This is the majority rule." M. Friedman, *supra* note 4, at 232.

20. 96 N.M. at 364, 630 P.2d at 763.

used the date of *purchase*,[21] the date of a *bona fide contract of sale* by the insured,[22] and the date of *failure of title*,[23] to establish property value for the purpose of determining the amount of loss.

The date chosen has a great impact on the amount of damages awarded.[24] This can be demonstrated using the *Hartman* facts. If the date of purchase had been used in *Hartman* to determine value, damages would have been limited to the value of the property on the date of purchase.[25] If the court had used the date of discovery of defect, damages would have been based on the $50,000 value of the property at that time.[26] Value at the date of failure of title would have been determined at the time judgment was entered in favor of Valle Grande.[27] The value at the date of a bona fide contract of sale possibly could be at some future date if Petitioners held the property to which they had good title in an attempt to increase their award.[28] The *Hartman* court considered the various dates which could be used, but rejected the minority views in favor of using the date of discovery of defect.

21. *See* Beaullieu v. Atlanta Title & Trust Co., 60 Ga.App. 400, 4 S.E.2d 78 (1939). In *Beaullieu*, plaintiff sought to use present market value to determine his loss. The court rejected market value and used instead the date of purchase as determinative of value, stating:

> the measure of damage for a breach by an insurer under a policy insuring the title against encumbrances or encroachments is the difference between the value of the property when purchased with the encumbrance or encroachment thereon, and the value of the property as it would have been if there had been no such encumbrance or encroachment.

Id. at ———, 4 S.E.2d at 80.

22. *See* Flockhart Foundry Co. v. Fidelity Union Trust Co., 102 N.J.L. 405, 132 A. 493 (1926). In *Flockhart*, plaintiff entered into a contract for the sale of two acres of its land. When plaintiff examined its title in preparation for the sale, it discovered a defect. Plaintiff then sued upon a contract of title insurance to recover for the damages it suffered due to the defect. The court held that damages were to be based upon the value of the land on the date plaintiff contracted for its sale.

23. *See* Fohn v. Title Ins. Corp. of St. Louis, 529 S.W.2d 1 (Mo. 1975). The *Fohn* court did not specifically state that the date the title failed was used for determining the property's value in order to establish damages. The evidence on which the court relied, however, was testimony as to the value of the land before and after severance of a portion. This severance apparently took place a short time after title to the property was insured. The date Fohn's title failed would be the date the court held that a superior title existed. Failure of title has been defined as the entire or partial loss of title suffered by a grantee or one who has contracted to purchase property, resulting from failure or inability of the grantor or vendor to pass a satisfactory title. Alger-Sullivan Lumber Co. v. Union Trust Co., 207 Ala. 138, ———, 92 So. 254, 258 (1922).

24. The analysis is similar whether the title failure is total or partial. The difference is that when title failure is partial, damages are determined by taking the property's value if unimpaired and subtracting its value as impaired. 96 N.M. at 362, 630 P.2d at 761.

25. Petitioners purchased the property for $22,000. Williams testified in his affidavit that the property had a value of $35,000 at the time of purchase. The court would have to determine which figure was a more reasonable indication of the property's value on the date of purchase. Appellants' Brief in Chief at 4, 5.

26. *See supra* note 10 and accompanying text. The figures given are the upper limits of possible damages, actual recovery being limited by the face value of the policy. Annot., 60 A.L.R.2d 972, 975 (1958). Total damages would also be mitigated by the good title to the .4264 acres of land that remained in petitioners.

27. *See supra* note 23.

28. This assumes increasing property values, which would lead to a greater recovery for the property owner, the longer he waited before contracting to sell the property. Should property values

The Minority Views

One method of determining damages in a defective title case is to use the date of purchase as indicative of the value of the property. The *Hartman* court pointed out that the cases holding that the date of purchase be used to determine damages fail to state a basis for this determination.[29] The seminal case which used the date of purchase is *Glyn v. Title Guarantee & Trust Co.*[30] *Glyn* cited *Kidd v. McCormick*[31] as authority for the proposition that the purchase date is the correct date on which to determine damages. *Kidd,* however, was based on the breach of a building contract and not upon title insurance, which makes it weak precedent. Later cases using the date of purchase relied on *Glyn*[32] or wording in the insurance contract[33] as the basis for their decisions, but did not explain why this date should be used. Other courts which adopt the date of purchase have compared title insurance to covenants or warranties of title contained in a deed, and have held that the same rules of damages apply.[34]

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decline, the property owner need only contract for the sale of the insured property in order to secure a given amount of damages.

29. "The cases which hold that the value must be determined as of the date of purchase do not explain the basis for their reasoning." 96 N.M. at 362, 630 P.2d at 761.

30. 132 App. Div. 859, 117 N.Y.S. 424 (1909).

31. 83 N.Y. 391 (1881).

32. *See, e.g.,* Beaullieu v. Atlanta Title & Trust Co., 60 Ga.App. 400, 4 S.E.2d 78 (1939), where the court stated:

> The rule as laid down in Glyn v. Title Guarantee & Trust Co., . . . , is that, for a breach of the policy, the insured who purchased the property to which the title was insured by the insurer, "is entitled to recover the difference between the value of the property when purchased, as it was with the encroachments, and its value as it would have been if there had been no such encroachments."

Id. at ———, 4 S.E.2d at 80–81.

33. *See* Southern Title Guar. Co. v. Prendergast, 494 S.W.2d 154 (Tex. 1973). In that case, the Texas Supreme Court stated: "Under the express terms of Prendergast's policy, the values of [the outstanding interest in the property] and [the value of the whole property without an outstanding interest] are determined as of the date of the policy." The court relied on wording in the policy which stated that damages must be based "on respective values determinable as of the date of this policy." *Id.* at 157.

34. Securities Serv., Inc. v. Transamerica Title Ins. Co., 20 Wash. App. 664, 583 P.2d 1217 (1978). The Washington Court of Appeals quoted 1 W. Freedman, Richards on Insurance § 32. at 108–09 (5th ed. 1952):

> The conditions of a policy of title insurance and the covenants of title contained in a deed are analogous in many respects, and in the absence of express words in the policy the same rules of damages would apply. The measure of damages in an action for the breach of a covenant of seizin is ordinarily the consideration paid by the grantee for the property; . . . . This measure of damages is applied upon the theory, that since the grantor had no title he had none to convey, and the grantee, therefore, may recover the money paid without consideration.

Securities Serv. Inc. v. Transamerica Title Ins. Co., 20 Wash. App. 664, ———, 583 P.2d 1217, 1221 (1978). The court in *Securities Service* held the insured's actual loss to be the amount originally invested plus interest, but went on to contradict this determination by stating: "This is the true measure of what [plaintiff] is 'out of pocket' on the transaction." *Id.* at ———, 583 P.2d at 1224. The court did not consider the fact that out of pocket expenses may not equal actual loss, and therefore, comparing title insurance to covenants or warranties of title contained in a deed may not give the insured the protection for which he contracted.

Not all cases comparing title insurance to warranties of title have held that the proper date of valuation is the purchase date, however. In *Murphy v. United States Title Guaranty Co.*,[35] the court noted: "in many points the covenants of title contained in a deed and the covenant of indemnity contained in a title insurance [sic] are analogous, and in the absence of express words in the contract of insurance the same rules would apply."[36] The court ruled, however, that the date of a bona fide contract of sale was the proper date for determination of value in order to ascertain damages. In support of its decision, the court stated:

> the plaintiffs in this action are entitled to recover only the actual loss suffered by them through the existence of the incumbrances, which at most would be the difference between the value of the property as incumbered and its unincumbered value, or the price which they could have secured for it, if it had been unincumbered.[37]

This wording gives the plaintiff the benefit of any bargain negotiated prior to discovery of the defect of title.

In *Kentucky Title Co. v. Hail*,[38] the court deemed the date of a sales contract, or current market price if no contract existed, to be the proper dates for determination of damages. In that case, the property description in the application for a contract of title insurance was inaccurate in that it included a strip of land not owned by Hail. Upon examination of the title, the insurance company discovered this mistake, yet entered the incorrect description on the policy of title insurance it issued. The court held that Hail could recover for the value of the strip he thought he owned. The court stated that Hail's loss

> should be measured not by the cost price of the property, but by the selling price as determined by a contracted sale, or by the actual market price as determined by an appraisement. As there could be no sale of this strip, under the circumstances, the market price must control.[39]

A third method, application of the date of the failure of title, was used in *Fohn v. Title Insurance Corp. of St. Louis*.[40] There, plaintiffs purchased

35. 104 Misc. 607, 172, N.Y.S. 243 (1918).

36. *Id.* at ———, 172 N.Y.S. at 245. *Cf.* Securities Serv. Inc. v. Transamerica Title Ins. Co., 20 Wash. App. 664, 583 P.2d 1217 (1978) (using similar language, but reaching a different result).

37. 104 Misc. at ———, 172 N.Y.S. at 246. The trial court in *Murphy* had ruled that the insurance company must pay the entire amount of the sale price plaintiffs would have received had title not been defective, yet also allowed plaintiffs to keep title, thus allowing a double recovery. On appeal, the supreme court corrected the trial court's holding, stating, "these damages are entirely excessive and erroneous." *Id.* at ———, 172 N.Y.S. at 245.

38. 219 Ky. 256, 292 S.W. 817 (1927).

39. *Id.* at ———, 292 S.W. at 823.

40. 529 S.W.2d 1 (Mo. 1975).

a tract of land for $6,400 and insured title shortly thereafter for $20,000. The trial court awarded the full $20,000 to plaintiffs based on evidence that $20,000 was the decrease in the land's value after severance of a portion of the property due to a superior title. The Supreme Court of Missouri, in affirming the trial court's award to the plaintiffs of an amount of money greater than the original purchase price, stated, "the extent of plaintiffs' bargain becomes obvious but there is no issue in this case which compels us to reject their right to the benefit thereof."[41]

Murphy, Kentucky Title Co., and *Fohn* all rejected the proposition that the date of purchase should be used in determining actual damages. By discarding the concept of value set at purchase date, these courts recognized that title insurance insures against possible loss, the amount of which is to be established in the future. By using future value as a determination of loss, however, these courts ignored what could result should an insured discover a defect in title, yet not contract for the sale of the property nor have title actually fail, until some future date. Should the property value increase, the insured would reap the benefit of his inactivity at the expense of the title insurance company. The possibility of this result caused the *Hartman* court to discard the use of present value, as well as the value at the date of a bona fide contract of sale and the value at the date of failure of title in determining damages recoverable under a title insurance contract.[42]

The Majority View

The *Hartman* court felt that the most appropriate date to be used in determining damages was the date of discovery of the defect in title, and held accordingly. In adopting the date of discovery of defect as that to be used to determine the amount of the insured's actual loss, the court in *Hartman* relied hevily on *Overholtzer v. Northern Counties Title Insurance Co.*[43] In that case, plaintiffs improved property they had purchased. Plaintiffs then discovered a recorded easement which the title insurance company had failed to find. The California Court of Appeals held that the liability of the insurance company should be measured on the date the defect was discovered. The court stated that title insurance looks to the future and therefore any other rule would not give the insured the protection for which he bargained and paid.[44] The *Overholtzer* court noted the conflict in authority on the subject, but stated that the conflict is due primarily to distinguishable factual situations.[45]

41. *Id.* at 5.
42. 96 N.M. at 363, 630 P.2d at 762.
43. 116 Cal. App. 2d 113, 253 P.2d 116 (1953).
44. *Id.* at _____, 253 P.2d at 125.
45. *Id.*

Title insurance companies also accept the proposition that title insurance is forward-looking; otherwise, they would not insure title for more than the purchase price, as was done in both *Fohn* and *Hartman*. This is a point not discussed by the *Hartman* court, but which is indicative of the insuror's perception of the contract as insuring against a future loss which may be in an amount greater than the purchase price.[46] In New Mexico, the rights and liabilities of the parties are fixed by the contract of title insurance,[47] with insurance policies being construed liberally in favor of the insured.[48] Even a conservative construction of a policy insuring title for an amount greater than the purchase price in anticipation of future price increase would lead a court to determine that the policy must look toward the future.

The *Overholtzer* court failed to state why, in choosing a future date, it chose the date of discovery of defect. The *Hartman* court appears to be the first to articulate the benefits of using the date of discovery of defective title to determine property value.[49] In *Hartman*, the court seemed to adopt reasoning similar to that behind the avoidable consequences doctrine. The avoidable consequences doctrine relieves a defendant from liability for losses a plaintiff reasonably could have avoided, but did not.[50] The *Hartman* court stated:

> Once a defect is discovered, the insured should be required to move with reasonable haste to resolve the problem. If he becomes aware of a defect but does nothing while the value of the property continues to change, he should not be allowed to reap any benefit by his inactivity.[51]

The avoidable consequences doctrine breaks into both positive and negative rules.[52] The *Hartman* court set out the rule in its negative form,

46. The court in *Fohn* did point out the apparent discrepancy between an insurance company's insuring title for an amount greater than the purchase price and then maintaining that the purchase price limits its liability. 529 S.W.2d at 5.

47. "Under New Mexico law the obligation of a liability insuror is contractual and is to be determined by the terms of the policy." Safeco Ins. Co. of Am. v. McKenna, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977).

48. Fowler v. First Nat'l Life Ins. Co., 71 N.M. 364, 378 P.2d 605 (1963).

49. Cases following *Overholtzer* cite it as authority without considering why the date of discovery of the defect should be used. *See* Happy Canyon Inv. Co. v. Title Ins. Co. of Minn., 38 Colo. App. 385, 560 P.2d 839 (1976), *cert. denied*, 1977. In *Happy Canyon*, the court stated: "The rule to be utilized in determining damages recoverable by an insured resulting from a title insurer's failure to discover defects in title is 'the difference between the value of the property with and without the easement on the date of discovery of the easement by the insured,' "*Id.* at _____, 560 P.2d at 843 (citing *Overholtzer*. *See also* Sullivan v. Transamerica Title Ins. Co., 35 Colo. App. 312, 532 P.2d 356 (1975)). The *Sullivan* court quoted *Overholtzer*, then said: "we adopt as the proper measure of damages in this case, the difference between the value of the property with and without the easement on the date of discovery by the insured." *Id.* at _____, 532 P.2d at 358.

50. D. Dobbs, Handbook on the Law of Remedies, § 3.7 (1973) [hereinafter cited as D. Dobbs].

51. 96 N.M. at 363, 630 P.2d at 762.

52. D. Dobbs, *supra* note 50.

that a plaintiff is denied recovery for harm he might have avoided by moving with reasonable haste to resolve the problem.[53] Other courts, in dealing with title insurance cases, seem to have adopted the positive rule.[54] The positive rule is that the plaintiff should recover for reasonable expenditures made to avoid or minimize damages.[55] This is the reasoning used by courts in cases holding that if the title to insured property is defective due to a lien or encumbrance, the measure of loss is the amount necessary to remove the encumbrance or lien.[56] Although none of these courts have stated that their reasoning was based on the application of the avoidable consequences doctrine, the similarity in application and result between their rulings and the doctrine are strikingly similar.

This reasoning, combined with an understanding of the purpose of title insurance,[57] strongly supports the proposition that the date of discovery of defect is the most reasonable for determining an insured's damage due to a defect in title. Individuals who purchase land often expect an increase in the value of their investment. Title insurance was developed to facilitate such investment, and to shift any risk of loss. An increase in the value of an investment is reflected in the market value of that investment. Investments in land are no exception. Should title to land be good when it is sold, the gain is not considered a windfall reward, but rather the result of a shrewd investment. Should title be defective, it is only fair that damages be based on the value of the property at the time the defect in title is discovered. Damages are then measured by the value the investment would have had if the risk insured against, defective title, had not been discovered.

As the court in *Hartman* stated, "[i]n order to fulfill the intent of the parties in looking to the future, yet provide certainty as to liability, it is proper to determine actual value as of the date of discovery of the defects by the owner."[58] In the future, should title insurance companies in New Mexico wish to limit their liability to the original purchase price of a tract of land, they need only limit the face value of the policy to this amount.[59] The *Hartman* decision guarantees that once a title insurance company accepts a given amount of risk, it be held responsible for that risk.

53. 96 N.M. at 363, 630 P.2d at 762.

54. *See* Arizona Title Ins. & Trust Co. v. Smith, 21 Ariz.App. 371, 519 P.2d 860 (1974) (holding that plaintiff's loss was to be measured by the amount remaining to be paid on a special assessment levied by the city of Tucson, Arizona). *See also* Rove, *Claims Against the Title Insurer*, in Title Insurance in Major Real Estate Transactions 239 (1978): "in some cases the amount has been held to be the amount necessary to remove the encumbrance or lien." *Id.* at 290.

55. D. Dobbs, *supra* note 50.

56. *See* Arizona Title Ins. & Trust Co. v. Smith, 21 Ariz.App. 371, 519 P.2d 860 (1974).

57. American Land Title Association, *supra* note 14, at 578.

58. 96 N.M. at 364, 630 P.2d at 763.

59. "[T]he face amount of the policy has been uniformly held to limit an insured's recovery for breach of the contract as to title," Annot., 60 A.L.R.2d 972, 975 (1958).

CONCLUSION

The New Mexico Supreme Court, following *Overholtzer v. Northern Counties Title Insurance Co.*, adopted the majority rule in holding that the date of discovering a defect in title is the proper date to determine a title insurance company's liability to an insured property owner. Determining damages at the date of discovery of defect does not result in a windfall to persons insuring title to property, nor does it penalize title insurance companies.

Rather than accept this position without question, the court reasoned why it was proper to do so. Few courts have approached the issue at all, and of these almost none have explained their reasons for adopting the various dates they chose. The *Hartman* decision not only set precedent in New Mexico, but in the area of title insurance law as well, by bringing a bit of rationality to an otherwise confused issue in this field.

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