1978

# Carl Haueter v. Marvin E. Peguillan, Wilma J. Peguillan, His Wife; Francis H. Kellogg, Et Al : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL HAUETER,

Plaintiff-Appellant,

vs. ) Supreme Court No. 15497

MARVIN E. PEGUILLAN, WILMA J. PEGUILLAN, his wife; FRANCIS H. KELLOGG, et al,

Defendants-Respondents.

# BRIEF OF APPELLANT

Appeal from Judgment of the District Court of Salt Lake County, State of Utah, Honorable Bryant C. Croft, District Judge

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SECTION 19 OF THE UNIFORM REAL ESTATE CONTRACT DOES NOT MODIFY, CHANGE, OR ALTER IN ANY WAY THE PROVISIONS OF PARAGRAPH 18 OF THE UNIFORM REAL ESTATE CONTRACT.

## POINT III

THE COURT ERRED IN HOLDING THAT KELLOGG WAS A BONAFIDE PURCHASER FOR VALUE WHEN HE PURCHASED FROM PEGUILLAN AS THE ASSIGNMENT PLACED HIM IN THE SHOES OF PEGUILLAN.

## NATURE OF THE CASE

This is a suit to quite title and to have the Court interpret paragraphs 18 and 19 of the Uniform Real Estate Contrac

## DISPOSITION IN THE LOWER COURT

Judge Bryant H. Croft held Peguillan and Kellogg, his assignee, could collect twice under paragraph 19 of the Uniform Real Estate Contract. Haueter paid Thayne the Judgment of $3,114 as permitted by paragraph 18. Then the Court required him to pay again prior to quiting title in him.

## RELIEF SOUGHT ON APPEAL

Decree quiting title and return of money paid over and above what Peguillan and Kellogg were entitled to under the Unifor Real Estate Contract.

## FACTS

PROPERTY. This case involves real property described as follows:

> Beginning at a point 32.95 feet East and 462.08 feet South of the Northwest corner of Lot 15, Block 16, Five-Acre Plat "A", Big Field Survey, running thence East 157 feet; thence South 36.25 feet; thence West 157 feet; thence North 36.25 feet to the place of beginning.

This property is also described as 1463 South 10th East, Salt Lake City, Utah.

CHAIN OF TITLE. On June 30, 1969 Florentine L. Scarlet and Ruth S. B. Scarlet, his wife, did contract and sell by Unifor Real Estate Contract the house and lot at 1463 South 10th East.

Salt Lake City, Utah. The Uniform Real Estate Contract showed the Scarlets as the sellers and Marvin E. Peguillan and Wilma J. Peguillan, his wife, as the buyers. This contract is annexed hereto as Exhibit A and by reference made a part hereof. This contract is still in full force and effect. Carl Haueter, assignee and plaintiff herein, is now paying the Scarlets $125 a month directly and there is a balance still due the Scarlets on the contract of approximately $4,000.00

THAYNE JUDGMENT. Marvin E. Peguillan gave Cleon Thayne a check in the amount of $2,000 which failed to clear the bank. Thayne sued Peguillan. Peguillan was duly served with a Summons out of the District Court of Salt Lake County, State of Utah and, on April 17, 1972 Judgment was rendered in favor of Cleon Thayne against Peguillan in the amount of $2,000, $7 costs, and $558 attorney fees. Said Judgment was docketed and entered in the District Court of Salt Lake County, State of Utah on April 13, 1972 in Docket 121, Page 548, Civil Case 203794. Peguillan made no attempt to pay the Judgment. (TR 37)

PEGUILLAN SELLS TO LARSON. On April 24, 1972 Marvin E. Peguillan and Wilma J. Peguillan as sellers sold to John C. Larson, as buyer, the above-described property by Uniform Real Estate Contract. The sale was for $17,200: $4,000 cash and the balance of $13,200 to be paid as follows: $175 due June 1, 1972 and $175 due each and every month thereafter until the property is paid in full. (Of this $175, $125 was to be paid to the Scarlets under the first Uniform Real Estate Contract.) Paragraph

6 of the contract stated,

> "It is understood that there presently exists an obligation against said property in favor of Florentine L. Scarlet and Ruth S. B. Scarlet with an unpaid balance of $9,884.41, as of May 15, 1972."

This April 24, 1972 contract made no mention of the Judgment in favor of Cleon Thayne in the amount of $2,565 even though the Peguillans well knew that the Judgment existed and was a good and sufficient lien against the property.

LARSON SELLS PROPERTY TO HAUETER. On June 20, 1972 John C. Larson conveyed all the right title and interest he had in the April 24, 1972 contract to Haueter by a good and sufficient written assignment and by way of a Quit-Claim Deed. The assignment of contract and the Quit-Claim Deed were both dated June 20, 1972. On this date Haueter paid to John C. Larson $3,678.44 (TR 59) and assumed the balance then and there due the Scarlets in the amount of $9,884.41, with the understanding that the Scarlets were to be paid at the rate of $125 a month (TR 59). Any and all interest the Peguillans had in the property would be paid to them at the rate of $50 a month. It being represented that the Peguillans interest was $3, 223.09 (TR 60). (Again there was no mention of the Thayne Judgment.) At the closing of the sale between Haueter and Larson there was taken from the down payment of Haueter $65 to purchase title insurance. The $65 premium was charged against the monies to be received by John C. Larson.

On June 29, 1972 Pioneer National Title Insurance Company issued a title insurance policy to Haueter in the amount of $17...

and they agreed to insure the above-described property. The Thayne Judgment did not appear in the policy under special exceptions. Therefore, the policy insured Carl Haueter against the Thayne Judgment (TR 75). See Exhibit 19-D.

Marvin E. Peguillan testified at the trial that he gave John C. Larson a policy of insurance when he sold to Larson and that the title insurance policy between Peguillan and Larson failed to show the Thayne Judgment under the special exceptions. Therefore, Marvin E. Peguillan claims that he insured the title when he sold to Larson.

It was admitted by Peguillan that the contract of insurance issued to Larson provided therein under Exclusions from Coverage:

> defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured claimant not known to the company and not shown by public records, but known to the insurance claimant either at the date of the policy or the date such claimant acquired an estate or interest insured by the policy.

It cannot be denied that Marvin E. Peguillan was not covered under the insurance policy as he was the wrongdoer and he was the one who claims to have purchased the policy well knowing that the property in question had a good and sufficient Judgment lien against it. Certainly Peguillan knew that under the policy he was not covered as he had taken out the policy after the Judgment was docketed against him.

SHERIFF SOLD HOUSE. On August 21, 1975 Cleon Thayne did levy on the house and lot and the Sheriff of Salt Lake County

did place the house for sale on September 30, 1975. At the sale Haueter repurchased his property from the Sheriff for $3,114.61 which was the total amount of the Thayne Judgment and lien (TR 60). Peguillan was fully paid by reason of Paragraph 18 of the Uniform Real Estate Contract which provided,

> "In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payment herein provided to be made may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid."

Prior to the Sheriff selling said property, Carl Haueter paid Peguillan and Kellogg $1,150 (TR 20). In addition thereto, he paid off the Thayne Judgment in the amount of $3,114.61. (TR 6 As of September 30, 1975 Carl Haueter had, in effect, paid Peguil and Kellogg $4,264.61 when, in truth and in fact, he only owed $3,223.09. (TR 60). It was the position of Carl Haueter that he had more than paid Peguillan and Kellogg. He therefore brought suit against Peguillan and Kellogg to quite title to the above-described property.

PEGUILLANS ASSIGNED TO THEIR UNCLE, FRANCIS H. KELLOGG. (TR 22) On July 11, 1972 Marvin E. Peguillan and Wilma Peguilla assigned by a standard Assignment Agreement, a copy of which is annexed hereto as Exhibit B and by reference made a part hereof. all of their right title and interest in said property. The

assignment was to Francis H. Kellogg and Josephine Kellogg, his wife, dated July 11, 1972. In addition to the assignment there was a Quit-Claim Deed issued by the Peguillans to the Kelloggs, also dated July 11, 1972, but not recorded until August 30, 1972. Said deed was recorded by Marvin E. Peguillan.

In the assignment Kellogg did solemnly agree that he stood in the shoes of Marvin E. Peguillan and that he would duly perform all conditions and be bound by all of the provisions of the Uniform Real Estate Contract which existed between the Peguillans and Carl Haueter. The Kelloggs did further solemnly agree to keep, observe and perform all terms, conditions, and provisions of the Uniform Real Estate Contract.

The Kelloggs did, by the assignment, further agree to save and hold harmless the Peguillans from any and all actions, suits, costs, damages and claims whatsoever rising out of the acts or admissions of the Peguillans. The Kelloggs lived in the State of Washington. Therefore, Haueter was unable to serve them in his suit to quite title. Peguillan went through bankruptcy (TR 28, TR 88) and duly listed Carl Haueter and the title insurance company, after which Francis H. Kellogg (Josephine Kellogg was deceased) did Counterclaim against Haueter (TR 39) and allege that because of Paragraph 19 of the Uniform Real Estate Contract which reads,

"The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described

premises free and clear of all encumbrances except as herein mentioned, and except as may have accrued by or through the act or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of the deed, at the option of Buyer."

Francis H. Kellogg duly alleged in his Counterclaim that by Marvin E. Peguillan giving a title policy to John C. Larson when he sold to him on April 24, 1972, even though this policy terminated when Larson sold to Haueter on June 20, 1972. Kellogg asserts that he is the beneficiary of the policy issued to Carl Haueter on June 29, 1972 because of the $65 premium taken from Haueter's down payment and deducted from Larson's share, and claimed Haueter must now pay Peguillan and Kellogg two and one-half times because Paragraph 19 of the Uniform Real Estate Contract so states.

The facts are undisputed that the policy that existed between the insurance company and Larson was terminated, disposed of and held for naught when Larson sold to Haueter. A new and different policy was duly issued on June 29, 1972 in which Pioneer National Title Company contracted and agreed with Carl Haueter as the sole insured. Said policy being introduced into evidence and identified as Exhibit 19-D and by reference made a part hereof. Kellogg makes no claim that he paid for any premiums or that his money was in any way involved in the premiums paid the insurance company for the June 29, 1972 policy. (See Exhibit 19-D)

It was not until May 1974 that Carl Haueter found out about the Thayne Judgment. (TR 64)

After the Sheriff's sale Carl Haueter, the sole insured, brought suit against the title insurance company under the policy he had purchased on June 29, 1972. As a result of that suit he recovered $6,000. It should be kept in mind that he had to pay his own attorney, and the suit was pending for more than a year.

There was no privity of contract between Kellogg and the Pioneer Title Insurance Company. The policy insured Carl Haueter and Carl Haueter only. Francis H. Kellogg, the assignee of Marvin E. Peguillan, stood in the shoes of Peguillan and was disqualified from insurance under any policy as Peguillan had no right to buy title insurance once he knew there was a judgment lien against the property. Peguillan actually defrauded Carl Haueter when he sold the property to him and represented in writing that the title was clear, with the exception of the monies owed the Scarlets. Carl Haueter relied on this representation when he bought the property. When Carl Haueter found out about the judgment lien in May 1974, he went to Peguillan and Kellogg and requested that they remove the lien. They refused to do so. (TR 37, TR 63, TR 65)

It is undisputed that the lien judgment which was paid by Carl Haueter accrued to the benefit of Peguillan and Kellogg as it removed the judgment lien which was against the property.

The issue of title insurance is completely foreign to this case and never should have been made a part in any respect.

## ARGUMENT - POINT I

THE COURT ERRED IN HOLDING THAT KELLOGG WAS A BENEFICIARY AND COULD BENEFIT FROM THE INSURANCE POLICY PURCHASED BY HAUETER ON JUNE 29, 1972.

Marvin E. Peguillan, well knowing that the property in question had a good and sufficient judgment lien against it, sold to Larson. Immediately thereafter he conveys by assignment and quit-claim deed all of his remaining interests to Kellogg, his uncle, both of whom had been in business together. (TR 31) Peguillan admittedly remained his agent and collected $1,150 for and on behalf of Kellogg (TR 30). Subsequently, Peguillan filed bankruptcy in the United States District Court for the Central Division listing the following as creditors: Carl Haueter, Cleon Thayne, Airflow Heating and Electric, White Concrete, American Finance, John Jepkins d/b/a Quality Tops, American West Acceptance Corporation and Pioneer National Title Insurance Company. (TR 8) After Peguillan was well into his bankruptcy proceedings Kellogg returned from Washington and brought suit under his Counterclaim against Haueter, claiming that he is the beneficiary under the insurance policy issued to Carl Haueter when he purchased the property on June 29, 1972. At this point Peguillan and Kellogg had been paid over $4,250; $1,000 more than they had coming under the contract. There can be little doubt that Peguillan was the wrongdoer. He, in effect, purchased a policy after his house was on fire. This policy was extinguis

and held for naught when Larson sold the property to Haueter. A new and different policy was issued, new search was made and different parties contracted with the insurance company. Peguillan had no privity, no connection of any type or nature, with the purchase of the policy by Haueter.

Louis M. S. Livingston, President and counsel of Western States Title for more than 14 years, and an eminent authority on title insurance law, testified as follows:

Q: Mr. Livingston, when you issued the policy to Mr. Haueter, when your company issued that policy to Mr. Haueter, that policy then took the place of any other policies that had been issued, did it not?

A: To the extent that there was no longer any insurable interest in any prior insured, it did. (TR 110)

Q: But that policy, the policy that you issued to Carl Haueter, was a new and different contractual relationship between your company and Mr. Haueter's; isn't that correct?

A: Yes.

Q: And nobody else had a right to sue under that policy except Mr. Haueter, did they?

A: Yes, correct.

Q: Who else?

A: I am saying, correct. I agree with you. (TR 111)

Carl Haueter was the sole insured under the June 29, 1972 title insurance policy. (See Exhibit 19-D) Neither Kellogg nor Peguillan made any claim that they paid or contributed to any premiums whatsoever for this policy. It is conceded that neither Peguillan nor Kellogg could sue under this policy, nor did they

have any rights of any type or nature by virtue of the terms and conditions of the policy. (In fact, Peguillan was barred under the terms of the policy from suing as he well knew there was a judgment lien against the property at the time he sold the property to Larson.) Subsequently, Larson sold the proper to Haueter at which time the title insurance policy (Exhibit 19 was issued. Peguillan and Kellogg assert and claim that becaus of Paragraph 19 of the real estate contract they became the beneficiaries under the title insurance policy.

Paragraph 19 reads as follows: "The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned, and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amou of the purchase price or at the option of the Seller, an abstra brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of the deed, at the option of Buyer."

Paragraph 19 in no manner or in any terms or conditio alters, modifies, or changes the language in paragraph 18 of th Uniform Real Estate Contract. There is nothing in Paragraph 19 which gives a wrongdoer the right to collect twice under the contract.

The issuance of the title insurance policy (obtained by fraud) certainly does not permit a seller to saddle a twice-removed unsuspecting buyer with a judgment lien and a sheriff sale. To permit this conduct would permit and encourage the defrauding of title insurance companies and the saddling of

twice-removed buyers to a potential lawsuit. This insurance policy (Exhibit 19-D) by its very terms confers rights and imposes liabilities only upon the parties to it. Pioneer Title Insurance contracted solely with Carl Haueter. There were no third party beneficiaries provided for in the policy. In interpreting the policy the established rules should be applied as follows:

1. The policy and document themselves are the best evidence of contents.

2. No oral testimony should be admitted to prove otherwise, nor is it permissable to add or contradict the terms of the writing by oral testimony.

It should be kept in mind that this was a second sale and the title insurance policy was twice removed from any transaction between Peguillan and Larson. The transfer of the title from Larson to Haueter did not transfer any rights or privileges, nor give any rights or privileges under any previously issued title insurance policies. When Larson conveyed to Haueter the policy between Peguillan and Larson became void. A new policy was issued and the new owner became the insured under the new policy. The policy between Peguillan and Larson became null and void. In this regard the Court should be aware of the established law concerning the issuance of insurance policies which requires the highest good faith between the contracting parties. A person desiring insurance is bound to make a frank disclosure of all circumstances which are likely to influence the insurer in accepting the risk. He is bound to communicate

all facts of which he has knowledge. If a material fact is concealed the policy would be void because the insured would not have accepted the risk had he known of said defect in material fact. It is universally held that where there is concealed a material misrepresentation of a material fact and such misrepresentation is intentional, the policy between the parties would be void. The concealment by Peguillan of the Thayne Judgment certainly disqualified Peguillan and Kellogg from recovering under any policy which might have existed between Peguillan and Larson.

The damages Haueter received from Pioneer Title Insurance Company merely reimbursed him for his actual damages suffered because Peguillan had his house and lot placed for sale. Haueter was required to hire an attorney and to bring suit on the policy. He was required to go through the entire lawsuit. The Court should keep in mind that Haueter received insurance money on a contract to which the defendants, Kellogg and Peguillan are in no way privy and, in respect to which, their own wrongful acts can give them no equities. The extent of the liability of the wrongdoers (Peguillan and Kellogg) is dependent on the extent of the injuries inflicted by their wrongful acts, not by the question of whether Haueter received damages under his title insurance policy.

Haueter can bring but one suit under the Uniform Real Estate Contract for the wrong done him by Peguillan and Kellogg. Peguillan's wrong should not be rewarded and he should not rec-

a windfall by reason of a second and distinct title insurance policy which paid damages under a policy that Peguillan was in no way privy and his wrongful act can give him no equities.

The Collateral Source rule was adopted by the Utah Supreme Court in the case of Phillip vs. Wendell Bennet, 21 Utah 1, and Otley vs. Hill, 21 Utah 397. Certainly the collateral source doctrine is not and should not be limited to cases where the plaintiff has previously paid consideration (in form of insurance premiums) for the benefits or services he received or where there has been a payment of cash. To do so would result in the wrongdoer receiving a windfall. (Such as in this case, the wrongdoer would be paid two and one-half the amount he had coming to him.)

It is submitted that to permit the wrongdoer to recover under Haueter's policy would be illogical and would shock the most enlightened conscience. This reasoning is based upon the essential fairness and common sense.

## ARGUMENT - POINT II

SECTION 19 OF THE UNIFORM REAL ESTATE CONTRACT DOES NOT MODIFY, CHANGE, OR ALTER IN ANY WAY THE PROVISIONS OF PARAGRAPH 18 OF THE UNIFORM REAL ESTATE CONTRACT.

The document itself is the best evidence of its contents. Paragraph 18 gave Haueter the right to pay off the Thayne Judgment and deduct the amount from his purchase price. This is the plain, ordinary meaning of the words as set forth in Paragraph

18. The contract was drafted and drawn by Peguillan. Therefore, the words should be construed more strictly against him. The mere fact that Paragraph 19 provides that the buyer is entitled to a title insurance policy does not by words or any interpretation, permit the seller to burden a buyer with a sheriff sale and a lawsuit against the title insurance company. When Peguillan sold to Larson he well knew the check he gave Thayne failed to clear the bank. He well knew that he had been served with a summons and knew his time to answer had expired. He also knew he was on the verge of bankruptcy. It cannot be denied or disputed that Haueter would never have purchased the property knowing there was a judgment lien against in in the amount of $3,114. It cannot be denied that Peguillan had a duty and obligation to reveal this fact to Haueter and set it forth in the contract.

This attorney has been unable to find a similar case or any case which interprets paragraphs 18 and 19 of the Uniform Real Estate Contract. By reason thereof, he has been required to fall back on the established law of interpreting contracts. He respectfully requests the Court apply the established rules. The trial court made mention of unknown risks. Peguillan well knew his financial status. This was not an unknown risk.

The purpose of Paragraph 18 is to protect the buyer and enable him to offset any liens he may be confronted with, out of any payments he still owes the seller. It is really a shock to the unsuspecting buyer to be confronted with a Sheriff

sale and, should he desire to protect his home, must immediately seek means to pay the judgment placed thereon by a conniving seller. This being a Uniform Real Estate Contract the words given are plain, ordinary, and generally used in real estate transactions. The intent of the parties was that all liens and encumbrances of any type or nature be revealed and placed in the contract. The contract is clear and unambiguous and is capable of forthright, reasonable interpretation. The Court should put at rest once and for all, whether or not a wrongdoer can collect twice because there was a title insurance policy twice removed from him purchased under Paragraph 19 of the Uniform Real Estate Contract. Paragragh 18 is clear, unambiguous and specifically gives Haueter the right to pay off the Thayne Judgment and deduct it from the purchase price. This clause has been universally accepted by the courts and the legal profession to mean exactly what it says. The defendants, Kellogg and Peguillan, seek to have Paragraph 18 declared uncertain and ambiguous by reason of the fact that the buyer may require the seller to give him a title insurance policy under paragraph 19 of the Uniform Real Estate Contract. If there is any uncertainty with respect to the construction of these two paragraphs, the construction should be resolved against the party which had the contract drawn. In this case this is Peguillan and Kellogg. See Wagstaff vs. Renco Ins, 540 Pac 2d 931. In this regard, the Court has consistently held that the contracting parties have a right to contract clearly and explicitly and that such rights should not be lightly

interfered with. Haueter certainly had a right to assume that there were no liens or encumbrances or judgments against the property when he purchased it from Larson. Larson had a speci right to assume that there were no liens or encumbrances agains it when he purchased from Peguillan. See Jacobson vs. Swan, 3 Utah 2d 59, 278 Pac 2d 294. This Court has consistently held that in interpreting a contract the Court will determine what the parties intended by what they said. The Court will not ig- nore or disregard words in their process, but will attempt to render certain the meaning of the provisions of the contract i dispute by objective and reasonable construction of the whole contract. The foregoing clauses are clear, concise, and mean exactly what they say and should be interpreted as such. See Mark Steel Corp. vs. Eimco Corp., 548 Pac 2d 892. Peguillan and Kellogg failed to perform their duties under the contract. By reason thereof, they subjected Carl Haueter to a long, draw out hard-fought lawsuit resulting in considerable damage to hi This Court has consistently held that if failure of one party to perform his duties under a contract results in damages to the other party, the latter is entitled to recover for breach of the contractual duties. Peguillan and Kellogg violated the contract. Haueter is entitled to the damages which resulted i that breach. He is entitled to offset the Thayne Judgment fr the purchase price. See State Auto Underwriters vs. Salisbur 494 Pac 2d 529, 27 Utah 2d 229. This Court has further held the parties have a right to assume that others will perform h

duties with reasonable care, competence, diligence, and good faith. Such is the basis of our contract law. Haueter had a right to assume that when Peguillan specifically set forth in the contract that there were no judgments, liens, or encumbrances against the property, that this representation was true. Haueter had a right to assume that Peguillan would perform his duties with reasonable care, competence, diligence, and good faith, and not to subject him to a foreclosure and a sheriff sale and lawsuit with a title insurance company. This intentional breach subjected Haueter to a year of litigation and the paying to attorneys, borrowing money and extensive litigation, to save his home. This all amounted to a substantial breach of the contractual duties of Peguillan and Kellogg. It is respectfully urged that there is no conflict between the two foregoing paragraphs. Paragraph 19 does not in any way alter, modify, or change Paragraph 18. They sould be enforced as written and Haueter should be permitted to deduct the $4,250 he paid Peguillan from the purchase price. Peguillan should be required to immediately convey by a good and sufficient deed to Haueter as provided in the contract.

## ARGUMENT - POINT III

THE COURT ERRED IN HOLDING THAT KELLOGG WAS A BONAFIDE PURCHASER FOR VALUE WHEN HE PURCHASED FROM PEGUILLAN AS THE ASSIGNMENT PLACED HIM IN THE SHOES OF PEGUILLAN.

Kellogg was Peguillan's uncle. Peguillan assigned to Kellogg July 11, 1972. He agreed:

1. To duly keep and perform all the terms, conditio and provisions of the Uniform Real Estate Contract.

2. The assignee will save and hold harmless (Peguil assignors of and from all claims, demands... (See assignment o contract, Exhibit B.)

Also 3-p: Peguillan had the assignment and Quit Cla Deed recorded. See 4-p. Haueter made all payments to Peguill Peguillan never listed Kellogg in his bankruptcy. (TR 46) Kellogg testified (TR 48):

"I left everything up to him because in previous tim he had been buying homes, fixing them up, selling them. So he and I had been getting out contracts. I had no experience wha soever, so I left it up to him."

After the assignment was executed Haueter made paymen from June 28, 1972 to May 6, 1974 at the rate of $50 per month to Peguillan. (TR 24) Peguillan claimed he cashed the checks and sent a cashier's check to Kellogg (TR 24) totalling $1,150.

Kellogg could remember nothing, nor could he testify to anything. After the assignment Peguillan paid Kellogg nothi and did not list Kellogg in his bankruptcy. (TR 28) He did li Haueter and the title insurance company. Peguillan admitted th he had been served with a summons in the Thayne case prior to assigning to Kellogg. (TR 30)

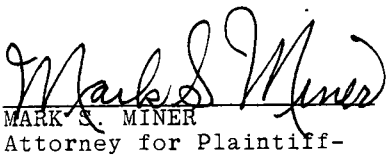
Kellogg, by assignment, accepted all the benefits and burdens of the original Uniform Real Estate Contract. Kellogg stood in the shoes of Peguillan.

It is submitted that the series of events to-wit: Peguillan served with summons, Peguillan assigns to Kellogg, Peguillan collects all monies, Peguillan goes through bankruptcy when sued by Haueter, Kellogg makes appearance and sues Haueter. This shows a pattern.

## CONCLUSION

Peguillan and Kellogg have been paid $4,250 which included a sheriff sale of plaintiff's property of $3,114 and $1,150 in cash. The sellers have been overpaid $1,000. Haueter is entitled to a decree quiting title to the property, judgment for overpayment, and $350 attorney fees.

Respectfully submitted:



MARK S. MINER
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Appellant, Carl Haueter

525 Newhouse Building
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Salt Lake City, Utah 84111

EXHIBIT A

THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD SEEK COMPETENT ADVICE.

# UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 24th day of April, A. D., 19 72, by and between MARVIN E. PEGUILLAN AND WILMA J. PEGUILLAN, his wife, hereinafter designated as the Seller, and JOHN C. LARSEN hereinafter designated as the Buyer, of Salt Lake City, Utah

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Salt Lake, State of Utah, to-wit: 1463 South 10th East (ADDRESS)

More particularly described as follows:

Beginning at a point 32.95 feet East and 462.08 feet South of the Northwest corner of Lot 15, Block 16, Five Acre Plat "A", Big Field Survey; and running thence East 157 feet; thence South 36.25 feet; thence West 157 feet; thence North 36.25 feet to the place of Beginning.

Personal property included in this sale: Carpets, Drapes, Curtains, Stove and Refrigerator.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of SEVENTEEN THOUSAND TWO HUNDRED AND NO/100---------- Dollars ($ 17,200.00) payable at the office of Seller, his assigns or order strictly within the following times, to-wit: FOUR THOUSAND AND NO/100 Dollars ($ 4,000.00) cash, the receipt of which is hereby acknowledged, and the balance of $ 13,200.00 shall be paid as follows:

$175.00 on June 1, 1972, and $175.00 on the first day of each successive month thereafter until the principal balance, together with interest, is paid in full. Buyer shall pay taxes and fire insurance premiums as they become due in additon to the aforementioned monthly payments.

Possession of said premises shall be delivered to buyer on the 30th day of April, 19 72.

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from April 30, 1972 on all unpaid portions of the purchase price at the rate of Seven-1/2 per cent ( 7-1/2 %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of FLORENTINE L. SCARLET AND RUTH S.C. SCARLET with an unpaid balance of $ 9,884.41, as of May 15, 1972

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following Curb and Gutter Assessment, which the buyer agrees to assume

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed seven and one half percent ( 7-1/2 %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

12. The Buyer agrees to pay the general taxes after December 31, 1971

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or [illegible] and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of [illegible] of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to compiy with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto none

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

Seller

Buyer

Uniform Real Estate Contract

To

Approved Forms, Utah State Securities Commission and Utah State Realty Association.
BLANK NO. 108—F. GEM PRINTING CO.

EXHIBIT B

"This is a legally binding form, if not understood, seek competent advice."

# ASSIGNMENT OF CONTRACT

THIS AGREEMENT, made in the City of Salt Lake, State of Utah on the 11th day of July, 19 72, by and between MARVIN E. PEGUILLAN and WILMA J. PEGUILLAN, his wife hereinafter referred to as the assignors, and FRANCIS H. KELLOGG and JOSEPHINE KELLOGG, his wife hereinafter referred to as the assignees,

WITNESSETH:

WHEREAS, under date of April 24, 19 72, MARVIN E. PEGUILLAN and WILMA J. PEGUILLAN, his wife, as sellers, entered into a Uniform Real Estate Contract with JOHN C. LARSEN, as buyers, of Salt Lake City, Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Salt Lake, State of Utah, and more particularly described as follows:

Beginning at a point 32.95 feet East and 462.08 feet South of the Northwest corner of Lot 15, Block 16, Five Acre Plat "A", Big Field Survey; and running thence East 157 feet; thence South 36.25 feet; thence West 157 feet; thence North 36.25 feet to the place of Beginning.

Personal property included in this sale: Carpets, Drapes, Curtains, Stove and Regrigerator

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in and to the said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to the aforesaid Uniform Real Estate Contract of April 24, 19 72, concerning the above described property.

2. That to induce the assignees to pay the said sum of money and to accept the said contract, the assignors hereby represent to the assignees as follows:

a. That the assignors have duly performed all the conditions of the said contract.

b. That the contract is now in full force and effect and that the unpaid balance of said contract is $ 13,014.42, with interest paid to the XXIX 1st day of July, 19 72.

c. That said contract is assignable.

3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.

b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.

Marvin E. Peguillan

Wilma J. Peguillan

WITNESS

ASSIGNORS

TO 1451 PNTI (12 66)

EXHIBIT 19-D

# OWNERS POLICY OF TITLE INSURANCE

ISSUED BY

## Pioneer National Title Insurance Company

a California corporation, herein called the Company, for a valuable consideration, hereby insures the person or persons named as Insured in Schedule A, together with their heirs, devisees, personal representatives of such person or persons, or, if a corporation, its successors by dissolution, merger or consolidation against loss or damage not exceeding the amount stated in Schedule A, together with costs, attorneys' fees and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations hereof, which the Insured shall sustain by reason of:

any defect in or lien or encumbrance on the title to the estate or interest covered hereby in the land described or referred to in Schedule A, existing at the date hereof, not shown or referred to in Schedule B or excluded from coverage in Schedule B or in the Conditions and Stipulations; or

unmarketability of such title; or

lack of a right of access to and from the land;

all subject, however, to the Conditions and Stipulations herein contained, which Conditions and Stipulations, together with Schedules A and B are hereby made a part of this policy.

This policy shall not be valid or binding until countersigned below by a validating officer of the Company.

*In Witness Whereof,* Pioneer National Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers as of the date shown in Schedule A, the effective date of this policy.

WESTERN STATES
TITLE COMPANY
(Home Office)
243 East 4th South
Salt Lake City, Utah 84111
Tel. (801) 328-8772

Authorized Agent of
PIONEER NATIONAL
TITLE INSURANCE COMPANY

Countersigned:

By _____
*Validating Signatory*

Pioneer National Title Insurance Company

*by* George B. Garbett
PRESIDENT

*Attest:* Richard W. Howlett
SECRETARY

# SCHEDULE A

Policy No. B 1001 — 06833 Effective Date June 29, 1972 at 8:00 a.m. Amount $ 17,000.00 Premium $ 65.00

INSURED

WESTERN STATES TITLE COMPANY 17000dollars00cents

CARL MAUETER,
a single man
as his interest may appear.

1. Title to the estate or interest covered by this policy at the date hereof is vested in:

FLORENTINE L. SCARLET and RUTH S. B. SCARLET,
his wife, as joint tenants.

2. The estate or interest in the land described or referred to in this Schedule covered by this policy is Fee Simple.

3. The land referred to in this policy is located in the County of Salt Lake State of Utah and described as follows:

Beginning at a point 32.95 feet East and 462.08 feet South of the Northwest corner of Lot 15, Block 16, Five Acre Plat "A", Big Field Survey and running thence East 157 feet; thence South 36.25 feet; thence West 157 feet; thence North 36.25 feet to the place of beginning.

The premium specified in Schedule A is the entire charge for the Title Search, Title Examination and Title Insurance.

# SCHEDULE B

Policy No. B 1001 - 06833

This policy does not insure against loss or damage by reason of the following:

Standard Exceptions:

(a) Rights or claims of parties in possession not shown by the public records.

(b) Easements, or claims of easements, not shown by the public records.

(c) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.

(d) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

(e) Unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims or title to water.

(f) Taxes or assessments which are not shown as existing liens by the public records.

Special Exceptions

1. Taxes for the year 1972, now a lien, not yet due or payable. (Serial No. 7-2389). 1971 taxes paid.

2. Installment Contract wherein Marvin E. Peguillan and Wilma J. Peguillan, his wife, appear as buyers and Florentine L. Scarlet and Ruth S. B. Scarlet, his wife, as sellers, dated June 30, 1969, recorded July 10, 1969 as Entry No. 2294976 in Book 2771 at Page 52 of the Official Records, wherein the terms and conditions of sale of said property are particularly set forth.

3. Uniform Real Estate Contract wherein John C. Larsen appears as Buyer and Marvin Peguillan and Wilma J. Peguillan, his wife, appear as Seller dated April 24, 19[illegible] in the original amount of $17,200.00; Notice of which was recorded April 26, 19[illegible] as Entry No. 2452190 in Book 3066 at Page 23 of the Official Records.

   Buyers interest was assigned to Carl Haueter, a single man, by Assignment of Co[illegible] dated June 20, 1972 as disclosed by a copy of said Assignment.

* * *

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# SCHEDULE OF EXCLUSIONS FROM COVERAGE

**The following matters are expressly excluded from the coverage of this policy:**

1. **Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.**
2. **Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.**
3. **Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.**

# CONDITIONS AND STIPULATIONS

### 1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

### 2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

### 3. DEFENSE AND PROSECUTION OF ACTIONS—NOTICE OF CLAIM TO BE GIVEN BY AN INSURED CLAIMANT

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or a defense interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay 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 as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgement or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

### 4. NOTICE OF LOSS — LIMITATION OF ACTION

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

### 5. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to

(Conditions and Stipulations Continued and Concluded on Last Page of This Policy)

the time of such payment or tender of payment, by the insured claimant and authorized by the Company.

**6. DETERMINATION AND PAYMENT OF LOSS**

(a) 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.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

**7. LIMITATION OF LIABILITY**

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

**8. REDUCTION OF LIABILITY**

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.

**9. LIABILITY NONCUMULATIVE**

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by this policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

**10. APPORTIONMENT**

If the land described in Schedule A consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of said parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each such parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

**11. SUBROGATION UPON PAYMENT OR SETTLEMENT**

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

**12. LIABILITY LIMITED TO THIS POLICY**

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice-President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

**13. NOTICES, WHERE SENT**

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the *number of this policy* and shall be addressed to its Home Office, Claims Department, 433 South Spring Street, Los Angeles, California 90013.

PNTI

# Pioneer National Title Insurance Company

**HOME OFFICE**
**433 South Spring Street**
**Los Angeles, California 90013**