

TITLE INSURANCE (C) TASK FORCE

Title Insurance (C) Task Force Aug. 14, 2024, Minutes

Draft Pending Adoption

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Title Insurance (C) Task Force
Chicago, Illinois
August 14, 2024

The Title Insurance (C) Task Force met in Chicago, IL, Aug. 14, 2024. The following Task Force members participated: Eric Dunning, Chair (NE); Kevin Gaffney, Vice Chair (VT); Mark Fowler represented by Jimmy Gunn (AL); Lori K. Wing-Heier represented by Sian Ng-Ashcraft (AK); Barbara D. Richardson represented by Tom Zuppan (AZ); Michael Yaworsky represented by Jeffrey Joseph (FL); Doug Ommen represented by Mathew Cunningham (IA); Dean L. Cameron represented by Shannon Hohl (ID); Vicki Schmidt (KS); Timothy J. Temple represented by Chuck Myers (LA); Mike Causey represented by Robert Croom (NC); Jon Godfread represented by Blaine Bergstedt (ND); Scott Kipper represented by Todd Rich and Gennady Stolyarov (NV); Glen Mulready represented by Erin Wainner (OK); Michael Humphreys represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Patrick Smock (RI); Michael Wise represented by Melissa Manning (SC); Larry D. Deiter represented by Tony Dorschner (SD), and Scott A. White represented by Angela Crooker (VA).

1. Adopted its Spring National Meeting Minutes

Commissioner Gaffney made a motion, seconded by Rich, to adopt the Task Force's March 17 minutes (*see NAIC Proceedings – Spring 2024, Title Insurance (C) Task Force*). The motion passed unanimously.

2. Received an Update on the Survey of State Insurance Laws Regarding Title Data and Title Matters

Director Dunning said the collection of filings from jurisdictions is complete, and NAIC staff are in the process of compiling the results to produce the updated *Survey of State Insurance Laws Regarding Title Data and Title Matters*. It is anticipated that the report will be adopted at the Fall National Meeting.

3. Heard an Update from NAIC Government Relations Staff on Recent Federal Activities

Alexander Swindle (NAIC) said title insurance made a surprising appearance in President Biden's State of the Union Address in March when he said the administration would eliminate title insurance fees for federally backed mortgages. Since then, there was a U.S. House Financial Services Subcommittee on Financial Institutions and Monetary Policy hearing on housing and insurance in March that included some discussion about the Federal Housing Finance Agency's (FHFA's) pilot program to waive traditional title insurance and effectively allow the Federal National Mortgage Association (Fannie Mae) to self-insure, or reserve money for unexpected title losses. While Rep. Mike Flood (R-NE) highlighted the gap between average income and average home costs, Rep. Andrew Garbarino (R-NY) emphasized the critical protections against future legal action against the property ownership or mortgage priority that title insurance provides.

In May, the Federal Home Loan Mortgage Corporation (Freddie Mac) expanded its program to bypass traditional title insurance on mortgage loans it purchases. This move allows attorney opinion letters (AOLs) to replace title insurance in most states, aligning with the Biden-Harris Administration's efforts to address housing affordability issues by exploring alternative approaches to traditional insurance. However, the move is likely to face resistance from lawmakers concerned about consumer protection and small title insurers.

Rep. Garbarino introduced the Protecting American's Property Rights Act (H.R. 5873) in May. This bipartisan bill would require title insurance on all loans purchased by Freddie Mac and Fannie Mae, the government-run mortgage financiers underpinning about half of the housing market. The bill has gained the bipartisan support of 15 cosponsors.

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In June, NAIC staff responded to Rep. Emanuel Cleaver (D-MO), addressing his concerns about title insurance, AOLs, and consumer protection. The NAIC emphasized the Task Force's efforts to analyze the benefits and risks of alternatives to title insurance and the NAIC's commitment to educating consumers. The NAIC also reiterated its support of federal-state cooperation in information gathering and stakeholder engagement in this area. This communication is part of the NAIC's ongoing work to address concerns and provide information on industry practices and regulations.

On June 13, Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra testified before the House Committee on Financial Services about the CFPB's role in regulating title insurance. He emphasized the importance of disclosures in the Real Estate Settlement Procedures Act (RESPA) and the CFPB's commitment to consumer protection. Rep. Blaine Luetkemeyer (R-MO) argued that insurance is regulated at the state level and that title insurance is outside the CFPB's authority. Chopra emphasized that the CFPB does have authority over disclosure practices related to mortgage insurance but respects the state model for the business of insurance.

On July 10, following White House directives to reduce housing costs, the Federal Insurance Office (FIO) held a title insurance roundtable. Deputy Commissioner Myers and Commissioner Ommen both participated. Various stakeholders attended, including White House representatives, industry, trade associations, consumer representatives, housing groups, and academics. Overall, industry and consumer advocates drove the discussion. Industry emphasized the need for regulatory consistency across states. Consumer advocates also mentioned a mismatch in the variety of services offered by title insurers across states and the relative consistency of title insurance pricing as a percentage of housing as "proof" that the market was not functioning and as a flaw in state regulation. The overarching themes were the demands for more competition, transparency, and consumer protection in the title insurance sector. The FIO is contemplating no further action at this time.

Director Dunning thanked Deputy Commissioner Myers for attending the FIO roundtable to discuss the important role of state regulation of title insurance.

Steve Gottheim (American Land Title Association—ALTA) said he had heard that the FIO was contemplating a report and asked if Swindle had heard the same. Swindle said his impression from speaking with FIO staff is that they are ready to wrap up the matter for now. FIO's roundtable was in response to the White House's address on the topic.

Deputy Commissioner Myers said it is important for state insurance regulators to be involved and reach out to title insurers to ensure they are aware of what products are coming out. He acknowledged that October Research was in attendance and that its coverage of the Task Force's meetings would provide a good source of communication in the industry.

Gottheim stated that ALTA expects FHFA Director Sandra Thompson to testify before the House Committee on Financial Services in mid-September. Title insurance is likely to be discussed. It might be helpful to the Task Force to look into the technology and partners the FHFA is using in its pilot program. ALTA has also noted the wider use of AOLs, especially in a program run by United Wholesale Mortgage (UWM). AOLs are being marketed very aggressively in a number of states, even in those states where AOLs are not the more common factor. Consumers are paying more for AOLs than they would have if they had purchased title insurance. ALTA will notify the affected states to ensure they are aware of this situation. Transactions are occurring in Florida, Pennsylvania, and Texas, where marketing is ramped up.

Swindle said the NAIC would reach out to FHFA before Director Thompson testifies in September. It will also reach out to the House Committee on Financial Services to better understand what to expect regarding title insurance.

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4. Heard an Update on Soon-to-Be Initiated Title-Related Research

Steven Jackson (American Academy of Actuaries—Academy) said the Academy is starting a broader look at homeowners insurance and related topics. The Academy just chartered a Homeowners Insurance Task Force that is still organizing. The research on title insurance will be done by a working group under the Homeowners Insurance Task Force. Title insurance is one of the few insurances required in most households, which differs greatly from most insurance products. Most consumers paying for title insurance do not understand what they are paying for and why they are paying for it. Consistent with the Academy’s mission of serving the public and the actuarial profession, the Academy sees this research as informative. Title actuaries sign statements of actuarial opinion (SAOs) and insurance departments approve rate filings based on submitted reports, which include pre-issue expenses associated with title searching, identification and remedy of title defects, and post-issue loss experience. Actuaries are experienced in converting loss experience into premiums. However, they are much less experienced in reviewing pre-issue expenses that account for a majority of the premium. The Academy believes that understanding more about these pre-issue expenses would be useful to title actuaries and state insurance regulators and help inform the Academy’s consumer education. Outside of ALTA, little publicly available research exists on pre-issue title expenses. With its commitment to independence and objectivity, the Academy is in a good position to contribute to this needed public research.

Jackson said the project will be data-driven, and the agenda and specific research proposals will be built around initial findings in the data. The initial focus of the research is the expenses as reported in the Operations and Investment Exhibit, Part 3 of the Title Insurance Financial Statements. Initial research will focus on identifying trends in a series of expense line items across companies and over time. The Academy will then reach out to experts in the industry and academics to assist in understanding the drivers of these trends. The Working Group will finish determining what data is fit for purpose within six weeks and then begin to determine what questions it can answer with the data. It is also in the process of identifying the key stakeholders to reach out to early in the process to help guide it. Director Dunning said the Academy is in the perfect position to do this type of research, and he looks forward to the information it will provide.

Hohl asked what type of cooperation the Academy anticipates from stakeholders. Jackson said the Academy anticipates other stakeholders will be fully cooperative. The Academy’s results may or may not be agreeable to everyone, but its analysis will be unbiased and informative.

McKenney said that, as a state insurance regulator who reviews title insurer rate information, title insurance is unique in its high expenses. It would benefit state insurance regulators to better understand if title expenses are excessive. Title agents should make a good living but not charge excessive amounts. McKenney said it would also be helpful to better understand where expenses can be reduced. It is his understanding that multiple agents do the curative work on the search and examination results, and the title insurer uses whichever agent finishes first. This duplicative work could be wasteful. It would also be helpful to know the consequences of a title insurer who decided to take higher title losses.

Commissioner Gaffney said expense metrics would be helpful. He asked if they would come from sources other than the annual financial statement since expenses such as commission rates are not reported in the annual financial statement. It would be helpful to know if commission rates differ on refinances versus first-time originations. He asked if the Academy would be willing to update the Task Force on its metrics and allow it an opportunity to contribute additional complementary metrics.

Jackson said the Academy is starting with the Direct Operations and Expense Table in the annual financial statement. It appears difficult to glean much from the agency data. The Academy has started collecting agency call data from states that make data calls for agents and make the results publicly available. This information will go into a companion database, and more data could be added if it becomes available. The Academy will be looking

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for additional data sources as it identifies trends that the current data cannot explain. He said the Academy will not have results by the Fall National Meeting, but it would be happy to share what metrics it is looking at and get feedback from the Task Force.

Gottheim stated that ALTA has offered the Academy the use of its data. With regard to Commissioner Gaffney's inquiry, the annual financial statement includes commercial and residential commissions but not a breakdown of commissions for refinances versus purchases. There is no difference in commissions between these transactions because utilizing centralized operations allows the work to be done in the direct operations channel. Therefore, data from the direct operations channel is more refinance-heavy than the direct agency channel. Title insurance's loss tail is unique, as 50% of the loss claims do not become realized until between years five and seven; thus, pulling one year's worth of expense data does not provide much information. For this reason, ALTA has encouraged the Academy to look at five to seven years of data. It also encouraged the Academy to examine public data call information from states like Florida and Texas.

5. Heard a Presentation from CertifID on its "2024 State of Wire Fraud" Report and "Wire Fraud Liability: Insights from 2020–2024 Court Battles" Report

Tom Cronkright (CertifID) said CertifID is seeing challenges that will not be found by examining title production expenses and losses. Title insurance is closely coupled with the escrow settlement function because of the underwriting standards and what is needed to issue either a lender's or owner's policy. The title industry must remain the neutral forum and last line of defense for the consumer. The disruption in the last 24 months with lending through fiscal policy and the rules that will take effect on Saturday have led to an interesting market.

Cybercrime business email compromise (BEC) occurs when scammers have found a way to use technology to open-source information, gain access to email accounts, and learn of an upcoming transfer of funds. In real estate, this is the largest transaction the general public faces in their lifetime. These syndicate cartels are globally organized and domestically coordinated from the money laundering perspective, and they have focused primarily on the real estate sector. The Internet Crime Complaint Center (IC3) reported \$446 million in BEC and real estate-related crime. This is likely only about 20% of the actual amount. CertifID's Recovery Services Division has addressed over \$250,000 of wire fraud from victims' inbound phone calls to date. This indicates that much more fraud is occurring than is reported to the IC3.

A CertifID survey administered by a third party found that 17% of title agents sent funds to the wrong account due to wire fraud last year. Additionally, 1-in-20 consumers became victims of fraud during a real estate transaction. The real estate sector is targeted because it provides the perfect conditions for bad actors. Data on property listings is publicly available via Multiple Listing Services (MLS) and county records. Transactions involve large sums of money. The median sale price of existing homes in the U.S. is \$387,000, with typically up to 10 different parties involved in sharing information about the closing.

Everyone in the transaction is being targeted. Buyers—through phishing attacks, spoofed emails, social engineering, and realtor or title agent impersonation—had a \$72,000 median loss and only 28% recoveries. Sellers—through open-source records, identify theft, social engineering, and seller impersonation—had a \$70,000 median loss and only 18% of recoveries. Title and law firms—through compromised systems, lender impersonation, lender callbacks, and fraudulent payoff instructions—had a \$257,000 median loss and 54% of recoveries.

Scammers have weaponized the latest tech in record time. In November 2023, OpenAI announced ChatGPT, a chatbot and virtual assistant that uses artificial intelligence (AI) to generate dialogue. Fraudsters are increasingly using this technology to easily create realistic AI-generated scams. These scams include callback spoofing (SpoofCard) and AI-generated voice, video, or audio replication that seems real but has been manipulated

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(deepfakes). They also include the use of bots leveraging open-source intelligence to boost engagement metrics like views, likes, shares, and comments to create influence, fill in fraudulent registration forms, or generate fake listings. Subscriber Identity Module (SIM) swap, where the device tied to a customer's phone number is fraudulently manipulated, is another scam. AI-driven hacker tools such as FraudGPT are on the rise. FraudGPT is a product sold on the dark web on a subscription basis that works similarly to ChatGPT but creates content to facilitate AI-generated social engineering attacks. In July 2024, Microsoft called on U.S. lawmakers to address AI-generated fraud through a new deepfake fraud statute.

Victims are looking to the courts for answers on who is liable. The proximate cause is the scammer. However, in these types of fraud cases, the scammer is not able to be held accountable. The courts are struggling with this idea that everyone involved has been victimized through reputational risks, actual or indirect loss, or cost of defense, but the bad actor is elsewhere. The legal theory carrying through most consistently when there is a wire fraud loss is simple negligence.

Certifid's "Wire Fraud Liability: Insights from 2020–2024 Court Battles" report analyzed over 100 wire fraud cases and found that title companies, law firms, and real estate professionals are increasingly being held liable for losses when client funds are diverted to fraudulent accounts. Despite criminals being the primary perpetrators, courts hold these professionals to higher standards of care, expecting them to implement robust security measures and educate their clients about the risks of wire fraud.

Cases against insurers rely on clear-cut terms. A business that is a victim of wire fraud would only recoup losses from its insurance carrier under its policy if the loss is specifically covered by the policy and all the requirements for coverage have been met. Policies often include significant sub-limits for wire transfer or social engineering fraud. To win in court, the business must ensure clear contractual language regarding covered claims, terms and conditions, and exclusions. This was evidenced in *Helms v. Hanover Insurance*, where a buyer cash-to-close real estate transaction mishap led to a couple wiring \$120,000 to fraudsters. The couple sued their broker and real estate agent, alleging negligence. Seeking defense from Hanover Insurance, the agent's errors and omissions (E&O) policy claims were denied based on the terms of the insurance agreement. According to the court, the agent's E&O insurance was never designed to cover wire fraud, containing unambiguous "fund misappropriation and fraudulent transfer policy" exclusions. The court cited that "The exclusion's plain language... states that no coverage is provided for claims based on or arising out of the theft, stealing, conversion, or misappropriation of funds."

Banks are mostly protected from liability by Uniform Commercial Code (UCC) Article 4A if they follow commercially reasonable security procedures. Banks consider these "authorized" payments, even if the consumer is tricked into authorizing payment under false pretenses. In 2020, JPMorgan reimbursed three of 41,390 scam disputes, and Wells Fargo did not reimburse any of its 25,061 scam disputes. Bank of America did not track scam data as a separate dispute category until the second half of 2020.

Consumer education is needed. Fifty-one percent of consumers reported they were unaware or only somewhat aware of the risks of wire fraud before closing. Seventy-one percent believe it is someone else's responsibility to educate them. State protective measures are in development across the U.S. Utah is pursuing legislation, and Arizona, Illinois, Rhode Island, New Mexico, and Tennessee are pursuing regulation. Actual knowledge or identity verification is needed as a legal requirement for notarizations, especially for real estate transactions. Public and private partnerships are needed to share data and slow the flow of diverted payments.

Dorschner asked if the real estate industry was interested in establishing different standards. Cronkright said there is an acknowledgment that fraud is bad for all involved parties. However, it ends there because the title settlement industry has taken over the management of the funds. This has led the other industries to say they will help educate, but the title industry is responsible for safeguarding the funds.

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Stolyarov said he would like to better understand the mechanics of how scammers can find out these transactions are occurring. Cronkright said that in a purchase money transaction, the MLS listing is an instantaneous thread into who the listing agent would be, the brokerage firm associated with that agent, and the property owners. The fraudster then sends a phishing email, someone clicks the link, and the fraudster gains access to their information. The fraudster could also call someone and allege they are the consumer unable to get ahold of their agent. The fraudster can even track who the title agent is likely to send the title work to by looking at the register of deeds. Gaining email access and changing the rules behind the email allows a fraudster to filter the email traffic for closing statements, loan estimates, wire, etc. The fraudster then spoofs one of the trusted parties in the communication chain. The real estate agent or mortgage lender is typically the one compromised. For instance, if the buyer is the target, the title company is typically spoofed. From a loan perspective, the fraudster gains access to the email of a loan officer or processor's email. Trigger leads can be bought from the credit bureau. If the title company is the target, the seller is typically impersonated for the net proceeds, or the mortgage lender is paid off through a tampered mortgage payoff letter.

Nicole Moon (Illinois Department of Financial & Professional Regulation—IDFPR) asked what timeframe for fraud notification to the bank would increase victims' likelihood of recovery. Cronkright said that in most cases, the victim is not being asked to transfer the funds to a crypto wallet. Typically, a compromised email that looks authentic because it includes the title company name, logo, and account information will include a routing number that will divert the funds to the fraudster. A bank would need to intercede the same day or, at most, the next day. Fraudsters prey on holiday weekends and the disjointed nature of when a branch is open, but the Federal Reserve System is closed. This allows them access to online banking, cashier's checks, and money movement into crypto wallets. The money goes from the victim's account to a domestic receiving bank, then to gift card purchases or a crypto wallet. Once in a crypto wallet, it gets further anonymized by a crypto tumbler, then goes to an overseas deposit and, ultimately, a fiat bank.

Moon also asked what types of things state insurance regulators could require to increase the notice a bank receives. Cronkright said the challenge is the difference between the receiving and sending bank. The representative of the sending bank believes the funds are heading to a certain title company. A name-matched verification system would be helpful. The barrier is that the Bank Secrecy Act (BSA) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) prevent the display of information to a non-account holder. There should, however, be more training on the banking end for identifying the more egregious wire frauds.

Having no further business, the Title Insurance (C) Task Force adjourned.

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