TITLE INSURANCE (C) TASK FORCE

Title Insurance (C) Task Force Aug. 11, 2022, Minutes

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Draft Pending Adoption

Draft: 8/22/22

Title Insurance (C) Task Force
Portland, Oregon
August 11, 2022

The Title Insurance (C) Task Force met in Portland, OR, Aug.t 11, 2022. The following Task Force members participated: Eric Dunning, Chair, and Connie Van Slyke (NE); Kevin Gaffney, Vice Chair (VT); Mark Fowler represented by Erick Wright (AL); Michael Conway represented by Peg Brown, Neil A. Derr, Kris Fabricius, Evelyn Keuter, and Dennis Newman (CO); David Altmaier represented by Anoush Brangaccio and Jeffrey Joseph (FL); Colin M. Hayashida represented by Grant Shintaku and Randy Jacobson (HI); Vicki Schmidt represented by Jessica Lillibridge and Barb Rankin (KS); James J. Donelon represented by Warren Byrd and Matthew Stewart (LA); Kathleen A. Birrane represented by Mary Kwei and David Zitterbart (MD); Grace Arnold represented by Jason Broberg (MN); Chlora Lindley-Myers represented by Carrier Couch and Marjorie Thompson (MO); Troy Downing represented by Ole Olson (MT); Mike Causey represented by Angela Hatchell (NC); Barbara D. Richardson represented by David Cassidy (NV); Judith L. French represented by Tom Botsko, Tynesia Dorsey, Maureen Motter, and Michelle Brugh Rafeld (OH); Glen Mulready represented by Diane Carter (OK); Michael Humphreys represented by Shannen Logue and Michael Mckenney (PA); Elizabeth Kelleher Dwyer represented by Patrick Smock (RI); Michael Wise represented by Daniel Morris (SC); Larry D. Deiter represented by Tony Dorschner (SD); Cassie Brown represented by Randall Evans, David Muckerheide, and Jamie Walker (TX); and Scott A. White represented by Richard Tozer (VA).

1. Heard an Educational Roundtable Discussion on the Various Approaches States Use to Regulate Rates

Joe Petrelli (Demotech) and Sharon Romano Petrelli (Demotech) discussed the approaches Ohio and Louisiana take to regulating title insurance rates. They are retained by the members of the Ohio Title Insurance Rating Bureau (OTIRB) and the Louisiana Title Statistical Services Organization (LATISSO) to serve in a non-voting, administrative support role. Ohio and Louisiana require prior approval of title insurers' rates and forms and use statistical agents. The OTIRB is the statistical agent for Ohio. The current OTIRB was incorporated July 29, 1991. Chapter 3935 of the Ohio Revised Code references rating bureaus. Chapter 3953 of the Ohio Revised Code references title insurance. All meetings, whether full membership or committee meetings, are coordinated to accommodate the participation of antitrust counsel. The meetings include an agenda approved by antitrust counsel prior to distribution and begin with an antitrust statement of direction. All rate, rule, and form filings are submitted to the Ohio Department of Insurance (DOI) for its review, evaluation, and, if sufficiently documented, approval. Virtually all submissions have had questions, comments, or requests for clarification or additional documentation. Some of the OTIRB's rate, rule, and form filings have been disapproved by the Ohio DOI. Ohio law requires that a financial and statistical plan be completed and approved by the DOI each year. The compilation is reviewed and the aggregated, completed financial and statistical plan is forwarded to the Insurance Department for its review, consideration, and acceptance. Updates to the financial and statistical plan are also submitted to and approved by the DOI. The OTIRB uses a certified public accountant to compile and submit its annual filing requirements with the Internal Revenue Service (IRS). Dues, including minimum dues, are set by members with input from antitrust counsel to ensure that minimum dues are reasonable. Throughout its history, several deviations from the manual, rules, forms, and rates filed by the OTIRB have been submitted to and approved by the DOI.

The LATISSO is the statistical agent for Louisiana. The LATISSO was incorporated Feb. 7, 2002, and commenced business circa 2003–2004. Section 22 of the Louisiana Revised Statutes addresses title insurance and rating organization. The LATISSO is member-managed with constant communication with antitrust counsel. All meetings, whether full membership or committee meetings, are coordinated to accommodate the participation of antitrust counsel. All meetings have an agenda and begin with an antitrust statement of direction. All rate, rule, and form

filings are submitted to the Louisiana DOI for its review and, if sufficiently documented, approval. Virtually all submissions have had questions, comments, or requests for clarification or additional documentation. Some of the LATISSO's rate, rule, and form filings have been disapproved by the Louisiana DOI. A financial and statistical plan, approved by the DOI, is completed each year. The compilation is reviewed, and then the completed financial and statistical plan is forwarded to the DOI for its review, consideration, and acceptance. Updates to the financial and statistical plan are also submitted to and approved by the DOI. The LATISSO uses a certified public accountant to compile and submit its annual filing requirements with the IRS. Dues, including minimum dues, are set by members with input from antitrust counsel to ensure that minimum dues are reasonable. Throughout its history, deviations from the manual, rules, forms, and rates filed by the LATISSO have been submitted to and approved by the DOI. The LATISSO has never contested a deviation filing by a member. By statute, the Louisiana commissioner of insurance, chair of the Louisiana House of Representatives Insurance Committee, and chair of the Louisiana Senate Insurance Committee are ex-officio members.

Mr. Muckerheide stated that Texas employs an extensive body of rules, forms, and a promulgated rate that is set at a hearing about every five years. Promulgated rates are required under Chapter 2703 of the Texas Insurance Code. Rates are set or changed through the insurance commissioner during periodic hearings. Hearings used to be more frequent until legislation in 2011 that lengthened the periodic hearing requirement to about every five years. However, certain stakeholders can request a hearing to change rates. Stakeholders include title insurance companies from the Texas Office of Public Insurance Counsel (OPIC), qualifying trade associations, and interested persons. Under the new legislation, the Department of Insurance conducts rate setting hearings as rulemaking hearings. Once the DOI receives a request for a hearing, it begins as a rulemaking hearing with a tight timeline within which stakeholders can request the hearing be conducted as a contested case hearing. If granted, the process becomes more similar to a litigation process. The few times a contested case hearing has been requested, it proceeded as a rulemaking hearing. The rulemaking hearing must be initiated within 60 days of the hearing request, and then the insurance commissioner has 120 days to issue a final order. Only two petitions to change the rates have been received since the new legislation in 2011. To manage the tight timeline following these petitions, the DOI collected information informally and set up public stakeholder meetings in advance of the formal petition coming in. The insurance commissioner's main statutory charge is to consider all relevant income and expenses of title insurance companies and agents. Unlike most other states, title insurance rates in Texas include costs associated with the title search and transaction, but not the escrow fees. However, the DOI does collect data on escrow data and considers if it is excessive in its ratemaking proceedings. Other annual data collected includes income statement operating revenues and expenses from title agents. From title insurance companies, it collects: income statement operating revenues and expenses; balance sheet; information about policies written and endorsements; claims and losses; and agent ownership and affiliation with underwriters.

Ms. Rankin stated Kansas uses a file and approve system. While the Kansas DOI reviews filings for compliance, it does not regulate title insurance rates. It operates off statutory construct that went into effect in 1999. Insurance companies issuing the title policy in Kansas are required to file policy forms with the DOI according to K.S.A. 40-216(a)(2)(A). In addition, under K.S.A. 40-952(c), companies must file the rates, rate manuals, rate plans, and charges to be used in connection with approved title policy forms. All insurance agents and agencies authorized to transact title insurance in the state must file all the rates they plan to charge with the insurance commissioner. This includes title premium rates and separate agency fees charged to clients for other services, such as escrow settlement and closing fees. There is no standard of review for the DOI. Agencies can either adopt the rates that are charged by the underwriters, or they can decide to deviate from those rates and charge lower rates. The title agency then sends an agreed upon premium to the underwriter. The DOI does not regulate the percentage of premiums allocated. This allows title agencies to decide if they want to take less of the premium to sell more policies. The financial difference is then made up through volume. The market controls the rates and keeps them low. To further increase transparency, the DOI is considering placing all rate filings on its website. This would eliminate the need for a records request. Anecdotally, agencies express they can make more money in states that set the rates, such as Texas.

2. Heard a Presentation on New Title Insurance-Like Alternatives that Use Attorney Opinion Letters Backed by an Enhanced Errors and Omissions Policy Through the Surplus Lines Market

Chris Morton (American Land Title Association—ALTA) stated that in April, Fannie Mae issued selling guidance that for the first time allowed the use of attorney opinion letters in lieu of title insurance in limited circumstances. This provides protection on the lender policy side. Freddie Mac did this several years ago and has indicated there has been little adoption in the marketplace. This shift in selling guidance is the outcome of efforts by the Federal Housing Finance Agency (FHFA), which is over Fannie Mae and Freddie Mac. The FHFA has been asked to put together what are called equitable housing finance plans designed to provide additional opportunities for affordable and sustainable housing amongst minority and low-income borrowers. Components of these plans include consumer education to ensure homeowners understand the housing marketplace, credit reform, improving the appraisal process with technology, and developing special purpose credit programs with lenders. There has been discussion on whether there are ways to reduce costs within the marketplace. The use of attorney opinion letters is being purported as an opportunity to explore. However, there are gaps in coverage, particularly on the consumer side, with this approach. Additionally, there is a question as to how an attorney opinion letter fits into title insurance in the context of these plans.

Tim Kemp (Greenberg Traurig) stated the only information available to him for analysis were marketing materials, policies, and attorney's opinions. In previous times, the Task Force has acted on entities providing title-type coverages without a license. This product should be of concern to state insurance regulators. Attorneys' opinions have been around for a long time. This product combines an attorney opinion letter, service agreement, and specialty errors and omissions insurance into one comprehensive alternative to traditional title insurance. The company currently selling these, Voxtur, is publicly traded and based in Toronto, Canada. Its marketing materials state it accelerates the lending loan cycle with technology-driven settlement services, evaluation tax assessment data, and analytics. Attorney opinions require an attorney license in a state, so this product also includes a partnership with attorneys. There is also a partnership with carriers since the attorney's opinion letter is backed by mortgage service providers. The insurance policy covers the full value of the loan for the life of the loan and is fully transferable in the secondary market. Unlike title insurance, this product uses legal opinions to confirm marketability of title. The product's market materials state that this is not new, but a new iteration that makes these opinions scalable, affordable, and widely available. This allows for the product to be offered as a more affordable option than title insurance. Each attorney is acting under the authority and blessing of the Supreme Court of the state of the subject property, with the protection of a comprehensive liability wrapper. To state it has the blessing of the state Supreme Court could be misleading.

Today, Freddie Mac and Fannie Mae allow the use of an attorney opinion letter in lieu of title insurance. Freddie Mac's guidelines are limited to areas where attorney opinion letters are more commonly used in southern Ohio, Kentucky, and Iowa. There must be a statement stating, "We [I] agree to indemnify you and your successors in interest in the [Mortgage] [deed of trust] opined hereto, to the full extent of any loss attributable to a breach of our [my] duty to exercise reasonable care and skill in the examination of the title and the giving of this opinion." Additionally, the attorney must have malpractice insurance. Similarities between the title policy and the attorney's opinion include that both have some assurance that the title is vested as described, there is protection offered in having a marketable title, protection against having no right of access to the property, and protection in the lean priority of the mortgage. However, there is no closing protection letter (CPL). The insurance wrapper is structured like a service provider policy. The lender is made whole for any monetary loss if the provider fails to meet its obligations, including following closing instructions. However, there are no protections for the consumer if someone absconds with the settlement money. Additionally, the attorney opinion letter with the liability wrap only has a duty to search the most current public records available. Unrecorded interests, mechanic liens, etc., are not within the scope of coverage. Those of the income level who would benefit most from a lower cost alternative to title insurance are least likely to be able to protect themselves in the event of a claim. Also not

covered under the alternative product are fraud, forgery, duress, incapacity, impersonations, and other similar coverages. Proper execution of documents, including the use of a remote notary, is not included. Other core coverages not provided under the alternative product include defective judicial proceedings, boundary line disputes, and marketability line coverage. Additionally, the alternative product has limited or no coverage for liens and encumbrances, other coverages, claims duties, and defalcation.

State insurance regulators are asked to consider if these should be considered title insurance coverages. If they determine they do qualify as title insurance coverage, then state insurance regulators should consider if those selling these alternative products are licensed to do so, if they are reserving, how reserves are being determined, and if other guard rails for the title industry are being adhered to.

Director Dunning stated it was his understanding that a standard title insurance policy did not require proof of error for the policy to respond and clean the title. He asked if the alternative product would require the property owner to show competency failure on the part of the lawyer before he could recover. Mr. Morton stated it does not matter if the policyholder proves anything. It only matters if it is covered under the terms of the policy. Regarding the alternative product, only the lender benefits from the errors and omission policy. There must be a foreclosure before the homeowner recovers anything.

Ms. Rankin asked for clarification on when the malpractice insurance attorneys must have come into play. Mr. Morton stated if the attorney opinion is issued to the lender, then the liability wrap is around that opinion. He did not know if the homeowners could go against the attorney. This begs another question as to who the attorney's client is in this circumstance. Mr. Kemp stated that this product is currently being marketed as available in all 50 states with up to $1 million of coverage.

Birny Birnbaum (Center for Economic Justice —CEJ) stated he has worked on title insurance rates since 1991. The presentations illustrate why title insurance markets are not competitive and why title insurance is massively overpriced. Over the last 30 years, loss ratios have typically been around 4%, outside of the financial crisis, when they reached double digits. The paper-based manual process has been replaced with a digitized automated process. Despite innovations, such as Dolma's underwriting through an algorithm, the innovator struggles to gain market share. This is because competition is based on which real estate professionals can steer business to the title agent or insurer rather than price. State insurance regulators should be skeptical about efforts to exclude innovators. Unlike other types of insurance, title insurance is characterized by reverse competition. This suggests that not all expenses are reasonable. The real innovation in title insurance would be to create a competitive market in which the purchasers of title insurance have the market power to discipline the seller of title insurance. Mr. Birnbaum offered to present at a future meeting on how different states examine title rates for reasonableness.

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

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