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NY Title Agent Crackdown Opens Door For Alternatives

By Kaitlin Ugolik

Law360, New York (March 12, 2014, 8:40 PM ET) -- Increased regulatory scrutiny of New York's title insurance industry has paved the way for reforms addressing issues like pricing and licensing while also encouraging innovation that experts say could cut title agents out of the real estate deal process altogether.

Title insurance is a vital, if behind-the-scenes, element of any residential or commercial real estate transfer because it guarantees clear ownership of the subject property. But the standard way of obtaining it is in question in New York, as the Department of Financial Services investigates alleged fraud and sweeping new regulations pepper Gov. Andrew Cuomo's 2014 budget proposal.

"There have been some horror stories in recent years," said Andrew Weltchek, an attorney who represents businesses and individuals in both commercial and residential deals in New York.

For years, title agents have acted as "middlemen" between insurance companies, mortgage lenders, buyers, sellers, attorneys and real estate agents. But under increased regulatory scrutiny and calls for more competitive rates, new regulations and alternatives are emerging.

Late last year, New York's Department of Financial Services held a hearing to look into whether bribes or other fraud had been perpetuated between title agents and brokers.

The issue came to a head last week when a title insurance agent on Long Island pled guilty to stealing about $1 million from two title insurance companies, a couple of homeowners and the state Labor Department. Nassau County District Attorney Kathleen Rice said in a statement that the agent, Gerard Timoney, was charged with stealing fees, taxes and money meant to be held in escrow for recorded deeds.

Such fraud is rare, but it's still a reality that transactional attorneys and their clients grapple with regularly, experts say.

In response, Cuomo has recommended lowering closing costs across the board and requiring certification for title agents who serve as brokers between insurance companies and property owners. In his 2014 budget, which is quickly approaching its March 31 deadline, Cuomo also called for new education, training and disclosure requirements for title agents.

Experts say all of this scrutiny has opened the door for innovation in the industry, and at least one new title company has emerged in an attempt to disrupt the status quo.

OneTitle National Guaranty Co. works directly with homeowners, developers, attorneys and lenders, eliminating title agents. Company executives argue that the new method has two main benefits: lower prices and less fraud.

The new company's filed rates are 10 percent lower than those of other title insurers, and its fees are lower, so savings are expected to be about 20 percent, according to co-founder Daniel Price. Many attorneys and their clients aren't aware that lower it's possible to offer lower premiums, Price said, but rates simply require approval from the state's Department of Financial Services.

OneTitle also aims to combat the fraud that has made headlines in recent months by eliminating the possibility of a title agent stealing escrow funds or failing to record important documents.

“The direct model gives a tremendous advantage in safety and security, because the real [issue] when working through a traditional model today is being exposed to fraud from an agent you’re working with,” Price said.

These promises may be attractive to the parties doing the buying, selling, insuring and lending, but Price argues they are beneficial for attorneys as well. When fraud happens, an attorney’s time, money and reputation can be at stake, so it’s beneficial to not have to entrust so much vital work on a deal to an agent, according to price.

“For attorneys, it’s faster and easier. They’re talking to the ultimate decision maker, so when they have an issue on a title, we’re able to work with them and resolve it for them rather than just giving them work to do,” Price said. “In effect, we’re bringing the level of service they might have gotten on a $100 million transaction down to smaller commercial and residential transactions that they never would have been able to get this level of service on.”

OneTitle officially launched Monday, but the company already has a loyal following that includes some real estate attorneys.

“Nobody else has dared to address [fraud] from the business side,” said Weltchek, who has utilized OneTitle’s services. He lauded the new company as “faster, better, cheaper and safer,” but he acknowledged that the existing business model is strong and that he tries to give business to "whoever will give me the best service.”

“The logic of taking out the middle person and streamlining the service, not to mention reducing the cost, just seems to me to be obvious,” he said.

But OneTitle is a new player, and others are a bit more skeptical.

Bruce Bronster, a partner with Windels Marx Lane & Mittendorf LLP who counts numerous title companies among his clients, told Law360 that the general idea of reducing costs and expediting the process is indeed an obvious positive, but it’s not clear whether a direct method like OneTitle’s will be the best way to achieve those goals.

Title insurance is incredibly complicated, and there are many very talented, honest title agents who do valuable work on deals, Bronster said. “In-sourcing” the agent work could be a boon for the customer, or it could potentially weaken the value of some of that work.

With just one such company on the market, it may be too soon to tell, though several attorneys told Law360 that they hoped it would succeed.

“I’m wholly in favor of reducing the costs to the consumer,” Bronster said. “[But] I want to make sure that the quality of the title and the people selling title and explaining and researching title doesn’t diminish.”

--Editing by Kat Laskowski and Philip Shea.

Note: This story has been updated to reflect the process by which premiums are approved.

Understanding The Economics Of Title Insurance

Law360, New York (September 2, 2016, 4:27 PM ET)

By: Alan M. Doran, Esq. and Rachel D. Jaffe, Esq., OneTitle National Guaranty Company

Title insurance economics — at both the industry and company levels — are widely questioned, often because title insurance has diametric characteristics compared to other forms of insurance, including basic underwriting theory, the time period covered, loss ratios, the way in which risk is priced, and the overall expense ratio. As a result, the basic economics of the industry differ significantly from more commonly understood forms of insurance.


Alan M. Doran


Rachel D. Jaffe

Title insurance is unlike any other insurance product. It insures against future loss based on prior risk whereas other insurance — such as auto, homeowners and life — insures against future loss based on future risk. In other words, while other forms of insurance guard only against risk that arises after the policy is purchased, title insurance is the inverse: it only covers risks that exist prior to policy inception.

The basic underwriting premise is also different. Most forms of insurance are based on a statistical or probabilistic model that estimates the likelihood of a specific event occurring while the policy is in effect. The extent of the loss or when the loss will occur are unknowns, but statistically a loss will likely happen if given a sufficiently long period. Put another way, while there is no certainty whether a specific policy will experience a claim while the policy is in effect, if an insurer writes enough policies, it is highly likely that a certain number of losses will occur when considering all of the policies in force. Loss ratios vary depending on the type of insurance. For property-casualty insurers in 2015, loss ratios averaged about 70 percent.[1] In other words, for every $100 collected by property-casualty insurers, about $70 was paid out for claims.

Title insurance, on the other hand, is a noncasualty product. Rather than basing underwriting decisions on a probabilistic estimate of loss, title insurance professionals examine the title history to determine the status of title in the present and then insure the title based on known risks, greatly minimizing or eliminating the risk of loss caused by past events that have impacted the title. High-risk events that a title insurer chooses not to cover are excepted from coverage and are listed in Schedule B of the policy.

The result is that, in contrast to casualty-based insurance products, loss ratios for title insurers are far lower. In 2015, they averaged about 6 percent.[2] Conversely, however, the cost to underwrite each policy as a percent of premium is significantly higher for title insurance as compared to most other forms of insurance. The title insurance structure of loss prevention means fewer claims but higher upfront operating and underwriting costs.

The casualty versus noncasualty difference between insurance types is also reflected in how the different types of coverage are purchased by the policyholder. Property-casualty insurance premiums consist of recurring premiums paid by the insured to the insurer, with multiple payments at regular intervals for the life of the policy. Title insurance, on the other hand, is paid with a single premium at the beginning of the policy term. The title policy covers the insured as long as they retain an interest in the property — for a bank with a lender's policy coverage lasts for the duration of the mortgage and owners' coverage lasts as long as they have any legal interest in the property. There is no renewal premium for title insurance, nor are there cancelation provisions. The term "insured" also includes successors to title by operation of law (as opposed to subsequent purchasers for consideration). An unusual — but not unique — characteristic of title insurance is that one of the insured parties — the mortgage lender —does not pay for the loan policy coverage. Instead, the buyer pays for the lender's title insurance coverage.

A majority of the cost of title insurance coverage goes to pay for operating costs and professional services, i.e. the work performed by the title insurance professional before the policy is issued. Operating costs include office expense such as advanced technology and underwriting expenses as well as sales and marketing expense. Title insurers must identify the risks of insuring a particular title by performing a title search, including examining clerk's records, judicial records and other relevant documents. Once that search is complete, the title insurer determines insurability, takes curative actions and clears defects. Then, the title professional must prepare the commitment and final policy documents and handle the escrowed funds.

One of the largest costs for typical title insurers relates to the commission split paid to title agents.[3] Title agents are appointed and authorized by some title underwriters to countersign title commitments and policies but are not party to the two-party indemnity contract (the policy). Whereas in the casualty insurance business, agents typically retain 10 to 25 percent of the premium as commission, in the title insurance industry agents retain approximately 80 percent of the premium as commission.[4] Therefore, if an error of the agent gives rise to a title claim, the underwriter investigates and settles the claim on behalf of the insured and then may pursue recovery from the grantor and/or the agent. The relationship with agents creates another layer of expense for certain title insurance underwriters.

Attorneys have some misunderstandings about title insurance in New York, particularly around how title insurance rates are established. Contrary to broad misconceptions, New York state title insurance rates are neither set by law nor fixed by regulation. In fact, title insurers are free to file independent rate schedules with the New York Department of Financial Services (DFS). If approved by DFS, they must then charge the rates they set. Unlike premium rates, however, fees for related services can vary widely since each company sets its own fees. Title insurance agents may also charge additional administrative fees, which could be unregulated. State regulators have expressed concern that some consumers may actually be paying twice for certain services — once within the premium itself and again as a separate related fee.[5]

Despite the fact that each insurer could file independent rates, nearly all title insurers in New York — operating under an antitrust exemption[6] — collectively file and use a single set of rates (aka “oligarchic pricing”). This uniformity of rates among the vast majority of insurers contributes to the false perception that rates are set by law or regulation. Indeed, even deeply experienced attorneys often hold this misconception. Nationally, four companies receive more than 86 percent of the title insurance premium in the United States.[7] In New York, the four companies file the same rates and collect more than 92 percent of the title insurance premium.[8]

It is, however, possible for companies to break with industry practice and request approval of a different rate structure. While this is rare, there are companies offering lower rates for commercial and residential transactions, so shopping around can make a major difference. Understanding what products and services the premium of each underwriter covers is also essential to the consumer.

Unlike premiums, which are set by the underwriter subject to regulatory approval, the fees —which in total can be larger than the total premium on smaller transactions — are set by either the individual title insurance agent or the underwriter (for policies issued without an agent), so they differ significantly from one company to another. There are even companies that have reduced or eliminated title-related fees on New York real estate transactions.

The importance of title insurance is risk prevention. Consumers benefit when title insurers spend the bulk of their resources on underwriting to have the best talent and technology, and on experts who can navigate increasingly arduous regulatory requirements.

—By Alan M. Doran and Rachel D. Jaffe, OneTitle National Guaranty Company

Alan M. Doran, executive vice president and general counsel, is a senior real estate attorney and title insurance executive at OneTitle National Guaranty Company. He is also a member of the first senior leadership team. Prior to joining OneTitle, he was executive vice president of Entitle Direct Group Inc., the sole shareholder of EnTitle Insurance Company, a national title insurance underwriter. Doran was a name partner in the firm of Doran & Chintz LLC for ten years.

Rachel D. Jaffe, vice president, is a real estate attorney who leads significant aspects of OneTitle’s marketing group and outreach to attorneys and real estate professionals. Prior to joining OneTitle, Rachel was an attorney with Housing Conservation Coordinators. Rachel has worked for a real estate developer in Brooklyn and in a mid-sized Philadelphia law firm’s real estate group.

[1] National Association of Insurance Commissioners (NAIC) Financial Regulatory Services Department 2015 Property/Casualty & Title Insurance Industry Report, p. 1 http://www.naic.org/documents/topic_insurance_industry_snapshots_2015_prop_cas_title_ins_ind_report.pdf

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[3] Consumer Federation of America Testimony of J. Robert Hunter, Director of Insurance

Before the House Committee on Financial Services Subcommittee on Housing and Community Opportunity Title Insurance Cost and Competition April 26, 2006, p. 12.

[4] Consumer Federation of America Testimony of J. Robert Hunter, Director of Insurance

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[6] McCarran-Ferguson Act of 1945 makes title insurers exempt from federal antitrust liability

[7] ALTA Industry Financial Data for First Quarter 2016

[8] ALTA 2016 Q1 Market Share Data by State