



**NEW YORK
CITY BAR**

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**REPORT ON LEGISLATION BY THE
COMMITTEE ON REAL PROPERTY LAW**

**A.02015
S.3569**

**M. of A. Weprin
Sen. Adams**

AN ACT to amend the public relations authorities law, in relation to creating the New York title guaranty authority.

THIS LEGISLATION IS OPPOSED

The bill, filed under two different bill numbers on January 12, 2011, is essentially the same as a predecessor bill, which was opposed by this Committee of the Association of the Bar of the City of New York in a Report on Legislation by the Committee on Real Property Law dated March 2010. A copy of the March 2010 Report is attached.

The Committee opposes this bill and endorses completely and without reservation the contents and conclusions of the attached March 2010 Report.

Moreover, in the face of the state's current fiscal circumstances and Governor Cuomo's intention to reduce the number of state agencies, this proposed enterprise, requiring the creation of a new state entity with new state employees, has become particularly untimely.

June 2011

Respectfully submitted,
Committee on Real Property Law

Melvyn H. Halper, Chair
Joseph I. Marchese, Secretary



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**REPORT ON LEGISLATION BY THE
COMMITTEE ON REAL PROPERTY LAW**

**A.9441
S.6288**

**M. of A. Brodsky
Sen. Adams**

AN ACT to amend the workers' compensation law, in relation to directing the state insurance fund to offer title insurance or certificates of clear title

**A.9445-A
S.6290**

**M. of A. Brodsky
Sen. Adams**

AN ACT to amend the public authorities law, in relation to creating the New York title guaranty authority

THIS LEGISLATION IS OPPOSED

The Real Property Law Committee of the New York City Bar Association opposes this legislation, which would put New York State in the business of selling title insurance. In New York, the title insurance service industry has a unique position in rationalizing title and related issues, and their role goes well beyond the mere issuance of title insurance policies. No evidence is cited that the title insurance industry is not operating well in New York. Yet this legislation would radically change the title insurance landscape. The contribution of the title insurance service industry is a lynchpin of New York's real estate industry, which is a major engine of development in New York, drawing vast investments from around the world. Respect for New York's title insurance service industry has made New York the center for closing global real estate transactions no matter where the real property is located. We believe efforts to establish a state-run title insurance entity would engender great uncertainty in this industry, threatening public and private industries' confidence in real estate transfers, and would endanger the stability of marketable land transfers. We see no justification for potentially jeopardizing this important pillar of the State's economy. The argument advanced that the cost of title insurance is too high is currently within the full control of the State to regulate, through the State Insurance Department.

We recognize that the legislation was drafted almost word for word from an Iowa statute. However, as will be discussed below, Iowa is a state with needs very different from New York's and its system is derived from totally different circumstances than those present in New York. In Iowa, no private entity may sell title insurance. Despite that, nearly all of the commercial real estate sold in Iowa utilizes private title insurance companies. However, those companies are based in other states, and their revenues enhance those other states.

There is a very real risk that a government-run title insurance company would undermine the provision of title insurance services in New York. We cannot be certain of the ramifications, but we are concerned that the results, at the least, would be:

- a less efficient title insurance industry in New York;
- substantial title insurance work being done by firms outside New York; and
- a reduction in the extensive use of New York's title insurers to insure out-of-state title if the strength of private title insurers is brought into question.

This memo will outline what title insurers do, examine the Iowa experience, address the regulatory issues and express our concerns.

What Title Insurers Do

The task of providing title insurance in New York real estate transactions encompasses far more than simply selling insurance. Title insurance companies' function is not limited to the issuance of the title insurance policy and payment of a claim after the harm occurs. Title insurance companies do much to prevent real estate calamities from occurring in the first place through careful research of title and participation in the real estate transaction itself, including reviewing and aiding in the preparation of documents, before the transaction closes. The fee being paid for the insurance, therefore, is not only for the mathematical probability that the title is defective, but is for the very real service of having reviewed the history and taken steps to ensure the efficacy of the transaction in the first place. Subsequent to the closing, the title insurer backs the success of its work with the financial resources of the company.

Title companies do a full search of title, tax and judicial records to remove any judgment or liens against the property. Skilled title examiners check property records. Title insurers underwrite and provide risk analysis in many areas, including land under water, building loans, and foreclosures. Title insurers advise counsel on how to clear title issues and prepare documents and determine whether to write over open but satisfied mortgages. Title companies pay transfer taxes, real estate taxes and mortgage recording taxes within statutory periods to avoid the imposition of interest and penalties.

They also perform the following other services:

- Reviewing closing documents;
- Proposing title insurance policies and endorsements;
- Advising on the application of mortgage recording tax, including NYC issues;
- Advising on the application of State, NYC and other local transfer taxes;
- Handling claims administration;
- Managing complicated multiple site, multi-state or multi-NY county closings;
- Closings for a single site property located in another state;
- Recording in multiple counties in New York and in other states;
- Handling accommodation recordings;
- Correcting recording issues with the local recording officers; and
- Issuing UCC-based policies for cooperative units and for mezzanine loans.

Each underwriter employs a staff dedicated to claims administration. In addition, the title company must, as a matter of common law, administer claims in “good faith.” Private title insurance companies are well equipped to handle claims in a fair, just and expeditious manner since to do otherwise would be to impair business relationships and incur the risk of “bad faith” damage claims.

Title insurers and their agents serve the real estate community by their quick turnaround of title reports; being available outside normal business hours; and being able when necessary to handle escrow transactions, wire funds and make closing disbursements.

Title insurers’ ability to work quickly, utilize reinsurance and other methods of addressing risk is particularly notable with regard to large and multi-state transactions, where the title company or its agent is required to obtain clearance on multiple sites throughout the country and with title and recording systems that differ from New York.

Title insurance companies use the skill and knowledge of their employees and all available resources to clear a homebuyer’s path of financial potholes and potential disasters. When a fraud, forgery, stolen identification, missed mortgage or other problem surfaces, the title company not only provides the home buyer with a defense and lawyer at no charge to defend the home but when the property has been decreed lost, the title insurance company acts like other insurers such as homeowners’ insurance and reimburses the buyer the value of the home at the time of the purchase. It is the title insurance company’s willingness to stand behind its work—even when the defect originated in faulty public records—that provides lenders the confidence to release funds once the title guarantee is in place.

In other countries, where there is no title insurance available, lenders must wait until a transfer is actually recorded on the public record to release funds. This takes more time than the New York system, drives up the overall cost of real estate, and makes the chains of transactions so common in the US, where the proceeds of one transaction are used to fund the next one in the chain, far more difficult to achieve. We should not take New York's title insurance capability for granted.

With regard to the expenses of the title insurance industry, we note that the firm of A.M. Best reports that, over the last twenty years, the operating expenses in the title insurance industry, including expenses incurred during the title search, examination, curative measures and policy issuing functions, average about 92% of the premiums collected. The title insurance industry spends approximately 98.4 percent of its income on searching properties, curing problems and paying claims.¹

The Iowa Experience

Title Insurance became state-run in Iowa as a result of the bankruptcy of two title insurance companies that left a void and a need for the government to step in to protect and secure real estate transfers.² In 1947, the Iowa legislature banned the sale of commercial title insurance within the state.³ And it is little wonder why. In 1947, Iowa recorded a grand total of 115 land transactions.⁴ After a 38 year void without title insurance in Iowa, the Iowa State Title Guaranty was created in 1985 to assist and open the Iowa mortgage market to encourage more loans to Iowa citizenry.⁵ Had Iowa created Iowa State Guaranty the year it banished private insurers from its borders, the state-run company would have had to issue at most 115 title policies.⁶ However, if New York were to take on the same burden in the year it is contemplating forming its own title company, it would be issuing title policies for a figure more on the order of 65,000 deeds and mortgages per annum.⁷

¹ Best's Special Report, December 14, 2009, http://www.alt.a.org/images/PDF/09-12-14_AM_Best_Report.pdf (last visited February 18, 2010).

² See Joseph B. Treaster, *Iowa Cuts Added Costs in Title Insurance Policies*, N.Y. TIMES, July 6, 2005, at C3.

³ Iowa Code § 515.48 (2010); *Id.*

⁴ In contrast to New York's well in excess of 60,000 land documents each year. See, Bulletin of the New York State Land Title Association, *infra*.

⁵ Title Guaranty Division, *Manual*, (2009), http://www.iowafinanceauthority.gov/documents/filelibrary/tgd/forms_and_documents/TitleGuarantyManual.pdf; See Iowa Code § 16.91 (2010).

⁶ According to the Iowa Land Records website, <https://iowalandrecords.org/portal/clris/ShowHomePage> (last visited February 17, 2010) there were 115 land documents recorded in 1947.

⁷ <http://www.nyslta.org/news.htm> (last visited February 17, 2010). This is the Bulletin of the New York State Land Title Association. It shows a current slump in the deeds and mortgages recorded per annum being at approximately 65,000. At the height of the real estate boom, it was 152,000 deeds and mortgages per year.

As John Eisenman, the president of the Iowa Land Title Association noted:

“This, in my opinion, is the most significant fact in the national discussion of the ‘Iowa System’. Title Guaranty, a public entity, was sought by the private sector to fill a void that had existed for 38 years! This would obviously not be the case in New York, where the bill would put the state in direct (and most likely unfair) competition with its own citizens and taxpayers. Again, when Title Guaranty was created, there were no title agents or underwriters in the state of Iowa. Title Guaranty filled a void, while the state of New York, by contrast, is proposing to go into direct competition with its own citizens.”⁸

It should also be noted that many of the titles in Iowa are insured by private title insurance companies based in adjoining states such as Nebraska where the selling of title insurance is not prohibited by the State.

The relative importance of title insurance in New York compared to that of Iowa should not be underestimated. When Iowa first barred title insurance in 1947, it was averaging fewer than a dozen land transactions a month. Currently New York, by contrast, has thousands of land transactions each month. While Iowa possessed relatively few fraud claims during the last decade,⁹ New York consistently ranked among the top six states in the Union. Outside of Iowa, mortgage fraud has taken the lead as the fastest growing white collar crime in the country, accounting for more than 20% of all fraud in the United States.¹⁰ In 2007, the title industry paid fraud based claims just under \$1.3 billion. In New York City alone, the Federal Bureau of Investigation, two branch offices of the U.S. Attorney’s Office and the Manhattan District Attorney’s Office have all restructured to open specialized mortgage fraud bureaus.¹¹

Current Authority to Regulate Title Insurance

The New York State Insurance Department (NYSID) reviews and regulates title insurance companies pursuant to Article 64 of the New York Insurance Law. This regulation extends to assets the companies must have, reserves they must carry, reinsurance requirements, premium rates they can set and even the insurance forms to be used. Title insurance companies cannot legally charge consumers different premium rates than those which are approved.

⁸ Email from John Eisenman to Andrea Golby, editor of “The Legal Description”, dated 11/16/2009. Significantly, Mr. Eisenman concludes his comments with, “The ‘Iowa System’ works for us, but it cannot successfully be replicated anywhere else.”

⁹ Dr. Nelson R. Lipshutz, *Economic Benefits of Permitting Title Insurance Sales in Iowa* (Report to The Iowa Title Insurance Coalition), Aug. 16, 2004.

¹⁰ Adam Leitman Bailey, *Title Litigation, Expense of Theft Prevention Dwarfed By Cost of Fraud*, 4/8/2009 N.Y.L.J. 5, (col. 2).

¹¹ *Id.*

NYSID also has the authority to alter the way in which premium rates are set. If indeed the premium rates set by title insurance companies are too high, NYSID has ample authority to evaluate the situation and make any necessary adjustments.

Fiscal Implications

We note that the Sponsor's memo for the two bills state these measures have no fiscal implications. However, if the State were to decide to compete with the private title industry, it would take tremendous effort and funding to prepare to undertake the work that is currently handled by the private sector, particularly in the short-term. Not unlike the experience in Iowa, the State would have to employ attorney underwriters to service its subscribers as well as audit and claims personnel. This may involve competing for high-quality staff with the private sector, including out-of-New York title companies that may seek to attract the best talent from private New York companies whose business would be jeopardized by the entrance of the State into this activity. There might also be reduced tax revenues, because New York's private title insurance industry would contract along with its ability to attract multi-state and out of state transactions. The uncertainty may also adversely impact the willingness of lenders to make mortgage loans leading to reduced revenue flow, including transfer and mortgage taxes, from real estate transactions.

Conclusion

The risks of creating a state-run title insurance system are great, the need has not been demonstrated, and the Insurance Department can address pricing and regulatory concerns. We believe it unwise to set out, in this fiscal and economic climate, into such uncharted waters. Reliance on Iowa as a model is misplaced: New York is in many ways the hub of the real estate industry in this country and internationally. It runs well and is immensely valuable to the State's treasury. Why would we take the chance of undercutting one of our most valuable assets? Title insurers have reinsurance arrangements to spread the risk in the event of a loss. Unless the State is going to pledge its full faith and credit to support the state operated entity, similar arrangements would have to be established. If the State did seek to reinsure its risks this would add to the State's operating costs and further reduce the revenue to the State.

The ability to furnish title insurance services effectively and on a timely basis is crucial to the functioning of the real estate industry. Delays and the lack of flexibility in the title process would impair the efficient closing of real estate transactions, risking the expiration of mortgage commitments, increasing the cost of the transaction and potentially reducing the tax revenue collected.

The start-up burdens are serious, in an industry that often requires prompt, and always accurate, responses. Once it sets up shop, a state-run title company would need to convince

mortgage lenders and brokers that it can provide the same level of service and efficiency that private title companies now offer. It would need to convince banks and Fannie Mae and Freddie Mac to accept a certificate from a government-run organization when they have become accustomed to accepting the industry standard. Other unforeseen impediments and hurdles may arise from launching such a massive enterprise within state government.

Currently, New York is the center for the closing of major real estate transactions wherever the real property is located. Multi-state transactions are handled by New York based title insurance companies and their agents who rely on a network of contacts in the various states to clear title and prepare the policies to be issued based on local laws, and to record closing documents. A state operated entity would not have the ability to administer these transactions in New York, resulting in a serious loss of business in the State.

For the foregoing reasons, we oppose this legislation.

March 2010

Respectfully submitted,
Committee on Real Property Law

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