

TITLE INSURANCE, THE INDUSTRY PROSPECTIVE

**A Submission to the New York Insurance Department
By the New York State Land Title Association, Inc.**

The ownership of real property and the ability to freely transfer mortgage or lease that property is one of the hallmarks and strengths of American society and the economy on which it depends. For most people the purchase of real property is a major investment, and for residential purchasers, it may be the largest investment they make during their lifetime. It makes sense to protect that investment. Title Insurance is a product that provides a vehicle for the quick, efficient and secure transfer of real estate not only in our State, but throughout the United States. The purchase of title insurance is as equally important as the purchase of liability, fire or casualty insurance for the property and the owner.

The New York State Land Title Association, Inc. (the "NYSLTA") formed in 1921, is a statewide association that advances the interests of all those involved in abstracting, examining or insuring title to real estate. Our membership includes title insurance companies licensed by the State of New York, title insurance agents, abstract companies, law firms, individual attorneys, surveyors and others actively involved in real estate transaction. The NYSLTA is dedicated to the education and the professional enrichment of its members and consumers. Although the NYSLTA's members are business people, they also serve the public interest in many ways. The NYSLTA believes it is important, especially in light of recent investigations that have focused upon the title industry, to discuss the purpose of title insurance, its importance to the consumer and its vital role in expediting the safe and secure transfer of real estate titles in New York.

Because title insurance is very different from other forms of insurance that are available, title insurance and its value and benefit to purchasers and lenders in real estate transactions goes largely unnoticed and when noticed, is often not understood. The title insurance policy is a contract of indemnity whereby the title insurer agrees to indemnify its insured against loss or damage sustained because of a defect in the title to a particular

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parcel of real property. The most significant factor distinguishing title insurance from other forms of insurance is that title insurance protects an insured against title defects that arose prior to or at the time of the issuance of the policy, and which may be asserted against the insured's interest in the property sometime after the policy is issued. For this reason, title insurers and their agents perform extensive searches of the public records pertaining to the ownership of the property, the purpose of which is to identify title defects so that owners can eliminate these defects prior to the issuance of the policy.

When not eliminated, defects and other matters are not insured against by the policy. Usually the buyer or lender will require that the owner take action to "clear" the title so that coverage can be obtained with as few exceptions to coverage as possible. Based on the action taken by the parties, the insurer can remove the defect as an exception from the policy or in the alternative; it may be willing to craft special coverage acceptable to a buyer or lender. In the later situation, the insurer's ability to give special insurance against the defect, lien or other matter, insurance which is backed by the insurer's financial resources, makes it possible to close a transaction that might otherwise have been doomed because of title defect, lien or encumbrance.

The risk elimination feature is very different from other forms of insurance such as life, automobile or other casualty insurance which rely on statistical loss data or actuarial tables to assess the probability of future losses. Moreover, policies written by insurers other than title insurers provide protection for matters that may or may not occur in the future, such as a casualty loss, or illness occurring during the policy period. Consequently, the analysis of title insurance must recognize that considerably more cost and effort goes into risk identification and elimination than in those other insurance products making title insurance unique in the world of insurance.

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Title insurers and their agents¹ expend a good deal of time and employee manpower examining the public record to identify title defects, liens and other encumbrances. The risk elimination process is complex and costly. Individuals known as searchers or examiners comb through the land records in the recording office in the county where the real property is located to prepare an abstract or search of title which identifies the ownership of the property, the correct legal description of the land and any liens, mortgages and other matters affecting the title. The abstract is then reviewed by another highly trained individual known as a title reader who prepares a report or certificate of title containing the list of exceptions or objections to title. The purpose of the report is to inform the parties to the transaction or, in most cases, their attorneys, of the condition of title prior to closing. The information contained in the report or commitment affords the attorneys and their clients the opportunity to reduce the risk of loss by eliminating as many of the title objections as possible. During this phase of the risk elimination process, a clearance officer or counsel is usually required to explain to the parties or their attorney how a particular objection might be eliminated and provide other technical assistance that will expedite the closing of the transaction. Objections are eliminated at or prior to closing through delivery to the insurer or agent of documentation or other evidence called “proofs” satisfactory to the title insurer or its agent. The insurer or its agent is also obligated to send a representative, referred to as the “Title Closer”, to the closing to review and supervise the delivery of the proofs and title documents upon which the insurer will rely to issue its policy.

The title search, review and clearance procedure are intended to and do minimize the risk of loss to the insured from matters found in the public record. Title insurance also protects against loss sustained from off-record matters that are not and cannot be found in any examination of title, for example, a forgery of an instrument in the chain of

¹ A title insurance agent is an independent business person or entity that functions much like a contract branch office of the insurer. In this role, the agent incurs most if not all of the policy risk elimination and production costs associated with the issuance of a title insurance policy. As an independent business, the agent pays the salaries, rent and other normal operating costs that the insurer would have were the insurer to operate the office.

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title, or the execution of a deed or mortgage by a minor, an incompetent or other person lacking legal capacity. The complexity and sometimes the deficiencies of public records or even human error can lead to situations where the title insurer is called upon by its insured to provide the insurer's financial indemnity or defense obligation.

The value of title insurance cannot be fully appreciated without an understanding of the liability that the title insurer assumes for its insured. In addition to paying the actual loss, the insurer is also required to pay the cost of defending an attack on the title, without regard as to the merit of the claim being asserted. Furthermore, although the insurer's liability to the insured for actual loss resulting from defects in the title is capped at the policy amount, its liability for the cost of defending the insured's title is unlimited.

While other types of insurance require the payment of premiums on a quarterly, annually, or other recurring basis, a title insurance policy premium is paid only once – when the policy is purchased.. Once paid, the policy remains in force and effect for as long as the insured retains an interest in the property. Title insurance therefore has an indefinite duration which can last many years.

The ever increasing complexity of a real estate transaction in New York has also impacted on the closing process and the issuance of a title policy. As parties require more sophisticated coverage for ever more complex transactions (e.g., special coverage for commercial or residential revolving credit loans is but one example), the title insurance industry has responded by adding policy coverage. The industry has shown that it is keeping pace with the changing needs of consumers.

Title insurers and their agents are also responsible for recording the closing documents that pass title to, or create insured mortgage liens upon the insured property. To accomplish this, the insurer or its agent must submit to the County Clerk a large number of specialized forms together with the appropriate transfer and mortgage recording taxes. These taxes vary not only from county to county but also from one local

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municipality to another. Recording fees similarly vary greatly from county to county which further complicates the essential process of recording the closing instruments. The title insurer and its agent have become the collection and transmittal agent for these taxes, tax returns, and fees and provide a valuable service to the governmental authorities by undertaking these functions.²

In a number of cases, title insurers have incurred losses where transfer tax returns have not been timely filed and/or the underlying deed or mortgage have not been timely recorded because of recording office delays errors. The work responsibilities of the title insurance industry have undergone a transition from merely being the insurer of the title to that of also being a major service provider to the real estate industry. The phrase, “let the title company take care of it”, has often been applied to the troublesome, unglamorous aspects of real estate transactions such as cleaning up title questions, securing corrective instruments, obtaining delinquent tax bills, verifying mortgage and lien payoff amounts, all responsibilities formerly assumed by the parties to the transaction or their professional representatives.

Ironically, Title insurers and their agents have often been the target of criticism at closing over the amount of fees and taxes the title representative collects at closing. In the vast majority of cases, however, the largest portion of the title bill is made up of transfer and mortgage recording taxes, real estate taxes and assessments that are not income for the title insurer or agent but are imposed by and paid to various governmental agencies. In addition, the insurer or its agent may be required to collect monies to be held in escrow as security for liens or matters that were not be cleared up at closing. Only a small portion of the charges are payable to the title insurer or its agent for title insurance premiums and related charges. However, this fact is often missed by those present at the closing.

² New York State Department of Taxation and Finance – Annual Statistical Report – 2004/05 New York State Tax collections, Table 26 - Mortgage Tax Collections – Fiscal Year 2005 – Total Amount of Taxes collected - All Counties \$2,714,336,897.00, Table 15 – New York State Real Estate Transfer Tax Collections – Fiscal Year 2005 – Taxes Collected - \$729,740,514.00.

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In some counties, the recording officer has effectively ceded responsibility for preparing the land record index to the title industry. This delegation of responsibility comes at a cost that is borne by the title insurer or its agents.³

At a time when the real estate market in New York was faced with a record number of purchase and refinance transactions, many recording offices statewide were experiencing funding cuts and staff reductions. The reduction of key recording personnel resulted in a loss of the expertise and knowledge necessary to keep recording offices running efficiently. Although some recording offices have adopted computerized land records systems, they have done so without uniformity. Moreover, many of the systems which have been adopted have flaws that diminish rather than increase accuracy. These changes have required the industry to add employees or to employ independent contractors who are familiar with the various computer systems in order to access land records.

The responsibility for collecting and assisting in the preparation of an ever greater array of forms and affidavits related to the title transaction and required by governmental agencies, albeit for a variety of well intentioned purposes, has been placed upon title insurers and their agents. Documents such as smoke alarm affidavits, affidavits in lieu of owner registration, preliminary registration, equalization and assessment forms, must be delivered to the recording clerk at the time a deed is delivered for recording. The Industry has, in each case, been delegated the responsibility for the collection and delivery of these forms and affidavits to the recording office. However, these additional responsibilities do not appear to have been considered by industry critics in the overall evaluation of the work and services provided by the insurer and its agents.

³ Many counties require the preparation of specialized cover pages for each instrument. In the City of New York, the insurer is required to prepare the document and payment cover pages on line in a system that creates the official index.

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Many parties benefit from the availability of title insurance in real estate transactions. For a one time premium, backed by the loss reserves and surplus of a licensed title insurance company, the consumer receives real financial protection for the most significant investment he or she is likely to make. Lenders are also able to make mortgage money available to prospective homeowners because of the strong secondary mortgage markets that rely on title insurance to protect the mortgage loans they make and purchase, Commercial real estate developers, and their financing lenders know that the financial investment made by each respectively is protected against defects in title. Lawyers will be better able to protect their clients against defects in title to real property with an insurance policy, the terms of which are a matter of contract backed by the reserves and solvency of a licensed title insurance company.

For all of the above reasons, the title insurance industry should be recognized for the important and valuable role it plays in the real estate transaction in New York State. This paper is not intended to dispute the fact that some consumers may have complaints about real estate transactions in which were involved, and the role of title insurance. The title industry supports the efforts of the New York Insurance Department to remedy these complaints and improve our industry.

In an attempt to address some of these issues, starting in late 2002, the NYSLTA formed a special committee charged with the responsibility of drafting a proposed law to license title insurance agents. After four years of hard work, the committee and the New York State Land Title Association (NYSLTA) Executive Committee approved the measure. The Bill was first introduced at the end of the last (2005-2006) legislative session as Senate Bill S 8132 by Senator George H. Winner, Jr. and as Assembly Bill A 11979 by Assemblyman Adam T. Bradley.

The Association's bill is titled "***An act to amend the insurance law in relation to licensing of agents of title insurance corporations.***" The Bill's purpose is to require persons or entities acting as title insurance agents in this state to obtain a license from the

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New York Insurance Department to ensure that both licensed agents and attorneys acting as title insurance agents adhere to the requirements of the insurance law in the conduct of their business as title insurance agents.

In conclusion, any examination of the title insurance industry must consider the purpose of title insurance, the protection it affords the consumer, the labor intensive and time consuming risk elimination process it involves and the additional duties and responsibilities that those insurers and their agents are required to perform. As it was stated earlier in this paper, title insurance is a product that provides a vehicle for the quick, efficient and secure transfers of real estate not only in our State, but throughout the United States.