

II. Present Situation:

Title Insurance

Title insurance insures owners of real property or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title.¹ Title insurance is a policy issued by a title insurer² that, after performing a search of title, insures the accuracy of its search against claims of title defects. Title insurance is usually taken out by the purchaser of property or an entity that is lending money on a mortgage. Purchasers of real property and lenders use title insurance to protect themselves against claims by others that claim to be the rightful owner of the property. Most lenders require title insurance when they underwrite loans for real property. Title insurance places on title insurers a duty to defend actions related to adverse claims against title, and also promises to indemnify the policyholder for damage to the lender's security interest created by a cloud on title, unmarketable title, or adverse title that was not discovered by the insurer.

Regulation

In Florida, two entities provide regulatory oversight of the title insurance industry: the Department of Financial Services (DFS), which regulates title agents, and the Office of Insurance Regulation (OIR), which regulates title insurers, including licensing and the promulgation of rates. Title insurance forms must be filed and approved by the OIR prior to usage³ and rates and premiums charged by title insurers are specified by rule by the Financial Services Commission (FSC).⁴

Pursuant to s. 627.782, F.S., the FSC is required to adopt a rule specifying the premium to be charged by title insurers for the respective types of title insurance contracts and, for policies issued through agents or agencies, the percentage of such premium required to be retained by the title insurer, which shall not be less than 30 percent. The FSC must review the premium not less than once every 3 years. Also, the FSC may by rule require insurers to submit statistical information, including loss and expense data, as it determines to be necessary to analyze premium rates.⁵ Title insurers may deviate from the prescribed rates by petitioning the OIR for an order authorizing a specific deviation from the adopted premium.⁶ In Florida, title insurers may only transact title insurance and may not transact any other type of insurance.⁷

Challenges

There are no set timeframes in statute as to when disputes to a title of real property must be cured by a title insurance company. The insurance company's primary objective in a dispute is to

¹ Section 624.608, F.S. Title insurance is also "[i]nsurance of owners and secured parties as to the existence, attachment, perfection, and priority of security interests in personal property under the Uniform Commercial Code." Section 624.408(2), F.S.

² Section 627.7711(3), F.S.

³ Section 627.777, F.S.

⁴ Section 627.782, F.S.

⁵ *Id.*

⁶ Section 627.783, F.S.

⁷ Section 627.786, F.S.

validate the policy as issued. If a challenge to title is brought, the title insurance company may settle with the challenging parties, challenge the dispute in court, or tender partial or full policy limits for any damages occurred to the insured from the partial or total loss of title.⁸ Often disputes to title of real property can be settled between the parties involved without the involvement of the courts, thus cutting down on the time it takes for a challenge to title to be cured.

Loss of Title

When a complete loss of title occurs, the insurer will tender full policy limits if at the time of loss the market value of the real property is at or above the policy limits originally insured.⁹ Consequently, if at the time of loss the market value of the real property is below the value initially insured, the insurer will only pay the insured the market value of the real property and not the limits initially insured.

Searches

Florida law does not specify how far back a title search must go. Often new policies are issued based on the results of the previous title search performed. While s. 712.01(2), F.S. does not impose a timeframe it does define the “root of title” to mean “any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.” This distinction is important because of the curative effect of the Marketable Record Title Act on certain defective titles.

Under the Marketable Record Title Real Property Act,¹⁰ any person having the legal capacity to own land in Florida, who, alone or together with his or her predecessors in title, has been vested with any estate in land of record for 30 years or more, will have a marketable record title to such estate in such land, which will be free and clear of all claims, except the matters set forth by statute as exceptions to marketability.¹¹ The Florida Supreme Court has noted: “The chief purpose of the act is to [extinguish] stale claims and ancient defects against the title to real property, and, accordingly, limit the period of search.”¹² “[U]nder the Marketable Record Title Act, most defects or clouds on title beyond the 30 years are removed and the purchaser is made secure in his transaction.”¹³

III. Effect of Proposed Changes:

The bill requires title insurers to pay full policy limits within 90 days after a challenge to title is filed or cover an additional 25 percent of policy limits for costs paid by the insured while the dispute to title is being cured. Costs include attorney fees, moving expenses, property taxes,

⁸ See Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance*, 85 FLA. B.J. 10, 12 (Dec. 2011).

⁹ Interview with an attorney who specializes in title insurance issues.

¹⁰ Sections 712.01 – 712.11, F.S.

¹¹ Section 712.02, F.S.

¹² *Marshall v. Hollywood*, 236 So. 2d 114, 119 (Fla. 1970) (quoting Catsman, *The Marketable Record Title Act and Uniform Title Standards*, III Florida Real Property Practice (1965), s. 6.2).

¹³ *Id.*

architect fees, engineering fees, permitting fees, or mortgage interest paid up until the claim is cured. The bill states the additional coverage applies only if the failure to establish title directly impacts the costs paid by the insured. Additionally, the bill requires title insurers to pay full policy limits regardless of market value whenever a complete loss of title occurs. The bill requires insurers to issue supplemental policies to owners of real property whenever a new “loan title insurance policy” is issued and requires a waiver of the right to purchase supplemental title insurance to cover the amount of the new loan to be made in writing. Finally, the bill requires all title searches to begin from the “root of title” pursuant to s. 712.01(2), F.S., which means the search will begin from the last title transaction at least 30 years before the time for which marketability is determined.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Title insurance companies would be subject to additional costs when trying to cure a challenge to title.

Owners of real property must decline in writing any new supplemental policies issue. The additional coverage required under the bill may also increase costs to the owner of real property when a new “loan title insurance policy is issued,” unless the owner waives in writing the right to purchase supplemental title insurance.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on January 26, 2012:

Section 1 – Creates s. 627.7832, F.S., which requires title insurers to cover an additional 25 percent of policy limits for costs paid by the insured while the dispute to title is being cured. Costs include: attorney fees, moving expenses, property taxes, architect fees, engineering fees, permitting fees and or mortgage interest paid up until the claim is cured. The additional coverage only applied if the failure to establish title directly impacts the costs paid by the insured. In the event of complete loss of title, the insurer shall pay full policy limits regardless of market value.

Sections 2 - Creates s. 627.7844, F.S., which requires insurers to issue supplemental policies to owners of real property whenever a new “loan policy” is issued. Furthermore, owners of the real property may waive in writing the new loan coverage policies.

Section 3 – Amends 627.7845, F.S., which requires all title searches to begin from the “root of title” pursuant to s. 712.01(2), F.S.

B. Amendments:

None.