Supplemental Documents from NAIC Funded Consumer Representatives

1. Proposal to Title Task Force from Birny Birnbaum, Center for Economic Justice
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3. Comments from Brenda Cude, The University of Georgia
Proposal to Title Task Force

From the Center for Economic Justice for

Disclosure to Consumers to Prompt Shopping for Title Insurance

May 5, 2015

During the development of the information booklet by the Title Shopping Tools Working Group of the Title Task Force, consumer representatives suggested an alternative approach of a one-page disclosure provided to a buyer or seller at the first contact with a person affiliated with a title insurance company. The Title Shopping Tools Working Group determined such a disclosure was not germane to the work product under development by the WG and, after discussion at the Title Task Force, the Task Force added the following charge, separate from that assigned to the Title Shopping Tools Working Group:

Determine the feasibility of developing effective consumer disclosures related to affiliated business arrangements and reverse competition for the purchase of title insurance and related settlement services, including, but not limited to, a one-page consumer disclosure at the beginning of the title ordering process to alert the consumer to key issues and opportunities.

We offer the attached disclosure as the starting point for the Task Force’s activities to complete the charge and suggest that the attached be exposed for comment by all interested parties.

The context for the disclosure is the following. Title insurance markets are characterized by reverse competition in which title insurers and title agents view as their customers those entities in a position to refer business, including real estate agents, lenders, developers, attorneys and other players in the real estate transaction. This description of title insurance markets is unremarkable; major title insurers identify real estate professionals as their customers in filings to the Security and Exchange Commission and enter into affiliated business arrangements (AfBA) and marketing agreements with these referrers of business.

Although the Real Estate Settlement and Procedures Act (RESPA) has long prohibited the payment of referral fees, there is a long and extensive history of state insurance regulators, the Department of Housing and Urban Development and, now, the Consumer Financial Protection Bureau, taking enforcement action against title insurers, title agents and real estate professionals for violation of the anti-kickback provisions of RESPA. Recent enforcement actions by the CFPB can be found at:


RESPA does permit AfBAs with certain requirements for such arrangements. There are numerous AfBAs in existence. The major homebuilders have affiliated title agencies and, in at least one case, an affiliated title insurance company. Title Alliance is an organization that works with real estate professionals – primarily large real estate agencies – to develop AfBAs. Some banks have affiliated title agencies. We offer no opinion in this memo about the propriety of such AfBAs other than to note that RESPA permits such arrangements with certain conditions and to identify the incentives for participants in an AfBA to steer consumers to the affiliated title agent or insurer.

Even absent an AfBA, title insurers enter into preferred provider relationships with various organizations involved in the real estate transaction – lenders, realtors, developers, attorneys. The markets for title insurance are not competitive, where competition is understood as consumers possessing market power to discipline providers on price. It has been well established since the late 1970’s starting with a study by the Department of Justice, that the consumers who ultimately pay for title insurance wield little market power in title insurance and settlement markets and are susceptible to being steered to specific providers because the title insurance transaction is a small part of a much larger transaction.

There are several implications of reverse competition in title insurance markets for developing consumer information, education and disclosure. First, title insurers have spent decades and huge sums to build institutional relationships with those real estate professionals in a position to steer business. In some cases, this is a formal affiliated business arrangement. In other cases, there are marketing service agreements with the referrers of business. In yet other cases, there are illegal kickbacks to secure referrals. Because of the institutional arrangements and reverse competition that characterizes title insurance markets, it is essential to identify the key messages which might empower consumers and the critical time to provide those messages so that the consumer can timely act on that information or disclosure.
With this background, we believe the best – and only feasible – type of disclosure to actually empower consumers in the purchase of title insurance is to provide the consumer with a simple, short and very focused disclosure early in the real estate transaction process. We attach such a disclosure as the starting point for the Task Force’s discussion.

As discussed, the usefulness of the disclosure depends on when and how it is provided to the consumer paying for the title insurance. We propose that the disclosure be given to the consumer – and acknowledged by the consumer – at the first instance in which a person affiliated with a title agent or title insurer mentions title insurance to the consumer. For example, if a homebuilder has an affiliated mortgage company and affiliated title insurance agency, the first time the homebuilder offers financing to the homebuyer would be the point in time when the disclosure would be provided. For a second example, if a homeowner is refinancing her mortgage and the lender has an institutional relationship with a title insurer – an AfBA or a marketing agreement designating the title insurer as the preferred provider – the lender would provide the disclosure the first time closing costs are mentioned. For a third example, if a real estate agent recommends a title agent to a buyer or seller the real estate agent is representing in the transaction but has no AfBA or marketing agreement, then the disclosure would be provided by the title agent at the point in time the consumer contacts the title agent for title products. Stated differently, if a real estate professional – lender, real estate agent, attorney, developer – has no financial interest in the provider of title insurance, the real estate professional is not responsible for providing the disclosure. In such a situation, the title agent or title insurer would provide the disclosure.

We urge the Task Force to start a substantive discussion related to its charge by exposing our proposal for comment by interested parties. By such action, the Task Force will not only receive substantive comments on the overall concept, but also on a specific type of disclosure. Absent exposing a specific proposal for comment, the Task Force will simply continue a general discussion of issues that has gone on for years. Our final comment is that the proposed disclosure and discussion in this memo is consistent with the Best Practices and Guidelines for Consumer Information Disclosures adopted by the Market Regulation D Committee in 2012 and informed by decades of experience working with consumer information and disclosures.

Thank you for your consideration.
Consumer Alert from the STATE Department of Insurance
Title Insurance and Settlement Services
For Consumers Buying, Selling or Refinancing a Home or Land

Read and Sign This Notice Before You Choose Your Title/Closing Agent

The first time a professional involved with your purchase, sale or refinance mentions title insurance or closing to you, he or she should give you this notice.

You have the right to shop for and choose your provider of Title Insurance and Settlement Services.

A professional who recommends a title insurer, title agent or closing agent to you may make money to do this. The person making the recommendation must tell you if they will. This is called “an affiliated business arrangement” and you should get a separate notice about it.

Beware of statements like these:
“If you choose another title agent, your closing may be delayed.”
“Everyone charges the same price.”
“We will give you a discount on [something else] if you use our title agent.”

If you’re told any of these things or if you feel you aren’t being treated fairly, contact the STATE Department of Financial Services and the U.S. Consumer Financial Protection Bureau (CFPB)

State CFPB
Phone XXX XXX XXXX ZZZ ZZZ ZZZZ
E-Mail abc@xxx.xx.gov
Text XXX XXX XXXX
Twitter #xxxxx

What You’re Buying: Title Insurance and Settlement Services Include:
Title Search – Searching for information about who has the title to the property
Examination – Examining the title information for any problems with the title
Title Insurance – The title insurer’s promise to pay if there’s a problem with the title
Closing – Preparing documents related to the purchase or refinance and arranging for documents to be signed
Escrow – Accepting, holding and paying money for the purchase or refinance.

In STATE, the title insurance premium covers title search, examination and title insurance. A title agent, title insurer, attorney or other professional may charge a separate fee for closing and escrow. You have the right to shop around for all these services.

You can get a buyer’s guide to title insurance at [web site link]

Notice Provided By: Date
Notice Received By: Date
Via Email May 5, 2015

From:
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I am writing to express my regret that it is unlikely that I will be able to participate in the phone call tomorrow as I will be traveling. I also write to second many of the ideas expressed by Birny Birnbaum, Center for Economic Justice, in the proposal he sent to the Task Force. I especially support exploration of the development of a one-page disclosure to be provided to consumers the first time a person affiliated with a title agent or title insurer mentions title insurance to the consumer. I would like to add, however, that with years of experience we've learned that effective disclosures typically require consumer input -- consumer testing -- to confirm what experts think will work.

In addition, I would like to make a distinction between earlier work on what Birny refers to as the "information book" developed by the Title Shopping Tools Working Group and the one-page disclosure. To be effective in the marketplace, consumers need education AND information. By education, I mean background information specific to the purchase decision but not to the specific product/seller combination. For example, if I'm buying a car, one thing I need to know is what safety ratings are and how to use them. That's consumer education. I also need information, in this example about the specific make and model's safety ratings as well as the seller's practices.

I provide this background to make the point that there is very little effective consumer education available to consumers about title insurance -- what it is, how it works, what I should look for. As we developed the "shopping tool" I scoured the Internet and found little that I could recommend to consumers. If that's because there are so many state-by-state differences, then perhaps that's a key component of any consumer education efforts. Through practice, we have learned that the disclosure ("information") must include at least a few elements of consumer education. Those are present in the draft disclosure that Birny provided, including definitions of the different components of title insurance and settlement services, the definition of an affiliated business arrangement, and that a consumer should receive a separate notice if this is an affiliated business arrangement. However, the amount of consumer education that can be provided in a one-page disclosure is very limited.

It's my opinion that a disclosure will have greater impact if there is strong consumer education available about title insurance. As the Task Force moves forward to work on a disclosure, I urge it to also consider whether existing materials provide the consumer education background that consumers will need to effectively benefit from a disclosure.

Thank you.

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