June 19, 2017

DFS Comment Letter Regarding Title Insurance Proposed Regulations

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Available at: https://works.bepress.com/david_reiss/104/
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By Email

Re: Title Insurance Proposed Rules

Dear Ms. Buxbaum and Mr. Zuckerman:

I write and teach about real estate and am the Academic Director of the Center for Urban Business Entrepreneurship. I write in my individual capacity to comment on the rules recently proposed by the New York State Department of Financial Services (the Department) relating to title insurance.

Title insurance is unique among insurance products because it provides coverage for unknown past acts. Other insurance products provide coverage for future events. Title insurance also requires just a single premium payment whereas other insurance products generally have premiums that are paid at regular intervals to keep the insurance in effect.

Premiums for title insurance in New York State are jointly filed with the Department by the Title Insurance Rate Service Association (TIRSA) on behalf of the dominant title insurers. This joint filing ensures that title insurers do not compete on price. In states where such a procedure is not followed, title insurance rates are generally much lower.

Instead of competing on price, insurers compete on service. “Service” has been interpreted widely to include all sorts of gifts — fancy meals, hard-to-get tickets, even vacations. The real customers of title companies are the industry’s repeat players — often real estate lawyers and lenders who recommend the title company — and they get these goodies. The people paying for title insurance — owners and borrowers — ultimately pay for these “marketing” costs without getting the benefit of them. These expenses are a component of the filings that TIRSA submits to the Department to justify the premiums charged by TIRSA’s members. As a result of this rate-setting method, New York State policyholders pay among the highest premiums in the country.
The Department has proposed two new regulations for the title insurance industry. The first proposed regulation (various amendments to Title 11 of the Official Compilation of Codes, Rules, and Regulations of the State of New York) is intended to get rid of these marketing costs (or kickbacks, if you prefer). This proposed regulation makes explicit that those costs cannot be passed on to the party ultimately paying for the title insurance. The second proposed regulation (a new Part 228 of Title 11 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Insurance Regulation 208)) is intended to ensure that title insurance affiliates function independently from each other.

While these proposed regulations are a step in the right direction, they amount to half-measures because the dominant title insurance companies are not competing on price and therefore will continue to seek to compete by other means, as described above or in ever increasingly creative ways. Proposed Part 228, for instance, will do very little to keep title insurance premiums low as it does not matter whether affiliated companies act independently, so long as all the insurers are allowed to file their joint rate schedule. No insurer will vary from that schedule whether or not they operate independently from their affiliates.

Instead of adopting these half-measures and calling it a day, the Department should undertake a more thorough review of title insurance regulation with the goal of increasing price competition. Other jurisdictions have been able to balance price competition with competing public policy concerns. New York State can do so as well.

Title insurance premiums are way higher than the amounts that title insurers pay out to satisfy claims. In recent years, total premiums have been in the range of ten billion dollars a year while payouts have been measured in the single percentage points of those total premiums. If the Department were able to find the balance between safety and soundness concerns and price competition, consumers of title insurance could see savings measured in the hundreds of millions of dollars a year.

The Department should explore the following alternative approach:

- Prohibiting insurers from filing a joint rate schedule;
- Requiring each insurer to file its own rate schedule;
- Requiring that each insurer’s rate schedule be posted online;
- Allowing insurers to discount from their filed rate schedule so that they could better compete on price;
- Promulgating conservative safety and soundness standards to protect against insurers discounting themselves into bankruptcy to the detriment of their policyholders; and
- Prohibiting insurers from providing any benefits or gifts to real estate lawyers or other parties who can steer policyholders toward particular insurers.

If these proposals were adopted, policyholders would see massive reductions in their premiums.

Some have argued that New York State’s title insurance regulatory regime promotes the safety and soundness of the title insurers to the benefit of title insurance policyholders. That may be true, but the cost in unnecessarily high premiums is not worth the trade-off.
Increased competition is not always in the public interest but it certainly is in the case of New York State’s highly concentrated title insurance industry. The Department should seek to create a regulatory regime that best balances increased price competition with adequate safety and soundness regulation. New Yorkers will greatly benefit from such reform.

Sincerely yours,

David J. Reiss