

Condell Private Letter

Confidential Commentary, News, and Opinion for Land Title Executives

After Much Abuse, Title Insurance Finally Has Its Day -- and Almost Blows It Robo-Radian-Style Indemnities Tempt the Industry

There was just one question. Would title companies take advantage of a once-in-a-lifetime opportunity to prove how crucial and critical they were to the nation's real estate marketplace, indeed its entire economy? Would the people who have insisted from the beginning of time that legal interests in real estate be perfect and impregnable continue to do so? Or would they back down and be something less? Would robo-style loan originations and foreclosures be followed by robo-style, Radian-style title insurance?

How would this happen? Title companies could accept indemnities from lenders protecting them against loss if they would insure new owners and lenders coming out of sheriffs' and trustees' sales regardless of how screwed up the foreclosure was. One major title insurer said yes to one large bank on this. In a PR release it bragged about it. Other big insurers have talked with other big banks about this.

Then, the major title underwriters got together and talked, a major departure for them. These talks ended as they should have: It's every company's responsibility to make sure its title policies coming out of foreclosures are armor plate.

The main problems hadn't attracted much attention. Robo signing was bad enough, but a foreclosing lender must produce the actual note and mortgage and all assignments. In these times of multiple loan sales, securitizations, and outsourced mortgage servicing, foreclosing lenders cannot prove they are the payee or the last endorsee. They cannot produce the actual note, a critical element of the proceedings. Promissory notes are negotiable instruments, like checks or twenty dollar bills. A photocopy of a note is not a note. Lenders also cannot produce the mortgage document and show an unbroken chain of assignments. Yes, MERS is a big part of the problem.

These are not trivial matters. Lenders have been getting away with 'lost note' affidavits claiming the note cannot be found. One legal expert in Florida examined a group of foreclosure files in that state and could not find a single one in which there was an unbroken chain of assignments of the note ending with the foreclosing lender. Not one.

In the robo age, these problems were minor. Lenders could claim, and courts would accept, that borrowers haven't made payments for months or are long gone and foreclosures need to move ahead so properties can be returned to the marketplace. Courts have been accepting these arguments. Robo decrees of foreclosure followed.

And title companies have been writing policies coming through these foreclosures. Those policies are out there and will have to be defended. Now the robo-foreclosing era is over. Now the game has changed.

First, the major underwriters need to butt out. This is a problem for experts, the professionals in local title offices who actually do the work. They take title cases one by one. They and only they know the local law, the rules of court, the judges. They examine dockets, pleadings, evidence, findings, decrees. They know what their judges are likely to do. They determine whether borrowers have moved out or are possible plaintiffs. They know whether local lawyers would like to jump in on behalf of foreclosed borrowers. They alone can judge how local courts will react to media pressure, to random challenges to closed foreclosures, to motions to reopen. No matter what the underwriters at headquarters say, if the local professional isn't comfortable there should be no policy.

As for lenders and their servicers, they need to produce the note and mortgage and prove they are the legal owners of both. No less. The documents exist. So do the assignments in one form or another. The securitizers put the original docs in a pool in the hands of a trustee who ordered them handed to a custodian. Custodians, usually big banks, store documents and coordinate with servicers. The documents are there, they just have to be retrieved. Yes it's expensive, but title companies need to insist on this even if the judge does not.

It may be one of those rare times when title people must talk turkey to judges. Alone or with competitors. Courts need to be told, "If we look at one of your foreclosures and feel there are grounds for its being reopened, we're going to stop. We're going to stop because when we write a title insurance policy we are guaranteeing this will not happen."

Indemnities are not the answer. First, it's hard to imagine one that would cover all the claim possibilities. Second, the banks won't honor them. Big banks will say anything and sign anything in today's environment They'll have to be sued. The major title insurers seem to have figured this out. Third, they are not title insurance; they're a Radian-style imitation, accepted only when they're not needed, when the risk is defined, when bases are covered, every flaw either eliminated or accounted for. Not for wide open risks.

The upside of all this? The *New York Times* and the title industry's other critics have never believed title insurance had any value or that title people actually did any useful work. Now they're learning. The title industry needs to make the most of this. ♣

We are on this earth to make sure property titles are perfect. Every parcel, every estate, every interest is unique. We examine them, one at a time, closely and carefully. The work is arduous, complex, and demanding but we are specialists, experts. It is our business. After making certain titles are perfect we insure them. That is the process. That is what we do.