Real Estate Closing, Title Examination and Title Insurance Policy Procedures and Customs in the United States by Region

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In this article, J. Bushnell Nielsen of Reinhart Boerner Van Deuren s.c. explores a variety of topics relating to real estate closings, title examinations and title insurance policies across the United States, from closing customs by region, title insurance policy issuance customs by region, and the covered risks and scope of a title insurance policy to state practices on closing of loans and issuance of title insurance policies, variations in practices concerning who issues title insurance policies, and the wide variety in title insurance rate filing systems and premium rates in different jurisdictions — and more!

This article explains the varying practices for real estate closings, title examinations and title insurance policies across the United States, identifying how those practices differ by region and state.

Closing Customs by Region

A loan must be closed in a location that is convenient for the borrower. Regional and national lenders do not have offices in every place where their borrowers are located. They often arrange for loans to be closed at the offices of local companies that are experienced in the closing and disbursement of loans. There is quite a variety of such people and companies, in part because of the ways in which state customs vary.

Certain Western states conduct escrow closings. Documents are signed in front of an escrow officer who works for an independent escrow company or a title company. In escrow states, the parties do not all sit together at the same table, and the escrow is "closed" when all of the conditions stated in the written escrow instructions have been fulfilled.

States that do not follow the escrow system are called table closing states. As the name implies, the parties all sit at the table together, and the loan is closed while the borrowers sit at the table with the loan officer or loan closer.

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Not all table closing states follow the same customs as to who serves as the loan closer. Some table closing states have declared that the closing of a mortgage loan is the practice of law. In those states, a loan closing must be performed by an attorney or under the direct supervision of an attorney. In other table closing states, the closing of a loan is not considered the practice of law, but it is still customary to have an attorney involved in that process, in a system known as the "approved attorney" model. The term "approved attorney" is used in many states, but the functions of an approved attorney vary considerably from state to state. In states that do not follow the escrow, attorney or approved attorney models, most loans are closed by title companies or independent closers. However, no two states are identical in their customs for loan closings.

In many states, the same person or company that closes the loan issues a title insurance policy to the lender. In attorney states, it is common (but not universal) for an attorney who closes loans to own a title agency or to be affiliated with one. In approved attorney states, the approved attorney works with a title company in the issuance of the policy, or is a title agent. In full service title company states, it is common for the company that closes the loan to issue the title insurance policy also. In escrow states, the loan closer is sometimes an independent escrow company that has no affiliation with a title company, but it is more common for one company to perform the escrow and the title services through two different departments.

Real estate laws and customs are intensely local and vary significantly from state to state. Each state began with the laws and customs of the nation or nations who first colonized it. Thus, California and other southwestern states have many Spanish customs, Louisiana follows French real estate law and the rest of the states follow mainly English real estate customs. Also, title insurance is regulated by the states and not the federal government, which multiplies the variances from state to state.

As a result, many terms used in the lending, loan closing and title businesses have different definitions in the various states; also, there are many tasks or functions that have a number of different labels from state to state. For example, the person who closes a loan may be termed the loan closer, settlement agent, closing agent, escrow officer or closing attorney. This article will refer to that person as the loan closer.

Most national banks orchestrate the loan closing and some part of the loan underwriting process through their closing departments. The closing department selects or approves the loan closer, prepares the loan documents, reviews title, appraisal and survey, approves the Closing Disclosure or Settlement Statement, and funds the loan. Most national banks also have post-closing departments, who take over after the loan is funded and closed. The post-closing department receives the closing "package" of documents from the loan closer, communicates with the borrower after closing, collects loan payments, verifies that the new mortgage has been recorded and that loan payoffs have been made and old liens have been released, and obtains title insurance policies (which are always issued after closing).

There are three essential documents in any mortgage loan closing: the promissory note, which is the borrower's promise to pay back the loan; the security instrument given by the borrower, which places a lien or security interest on the real estate that is the loan collateral; and the loan settlement statement. Every state has slight variances in the form of the promissory note. There are many differences in the security instrument, which may be called a mortgage, deed of trust, trust deed, deed to secure debt, security deed or a hypothecation. This article uses the term "mortgage" to refer to the security instrument.

Title Insurance Policy Issuance Customs by Region

One important part of a mortgage loan is the issuance of a title insurance policy. The policy insures the lien of the mortgage or lien given to the lender as security for the loan.

The process of issuing such a policy includes a review of real estate records to determine the true owner of the property and the liens and encumbrances that affect the parcel. Part of that process is known as a title examination. However, there are a number of ways in which a title examination is performed, and there are many terms connected to that process. People in the title insurance business break down the process into two functions: the title search and the title examination. A title search is a review of the relevant public records that affect the title to the parcel. A title examination is the review of the results of that title search to make the judgment call as to which people are the true owners of the parcel and which of the recorded instruments presently affect the title to the parcel.

The searching and examination of title is a complicated and arcane science. Many sets of records get searched other than real estate documents, from tax records to judgment lien indices to pending lawsuits to bankruptcy filings. In one state that is fairly typical, there are 26 different sets of public records that are searched and examined as part of the title examination.

Every state has adopted laws that allow persons to record (or file) documents affecting the title to real estate with a public custodian, so that they can be indexed and searched by the public. This recording system provides certainty as to land ownership and gives protection to lenders who lend money based on the security of real estate as collateral. This recording system has been lauded as the fundamental system that allows for orderly transfer of land and borrowing of money, as the engines of economic progress.[1]

However, there is no uniformity from state to state as to the offices designated to serve as the custodian for documents such as deeds and mortgages that are recorded (or filed) for the purpose of giving constructive notice. Real estate records may be filed in the office of the register of deeds, registrar of deeds, recorder, county clerk, clerk of courts, the Torrens officer, or the probate registrar. This article uses the term register of deeds to refer to the record custodian.

In some locales, the title search and examination process is broken down into many steps, performed by as many as four different people or companies. In other locales, one person performs the entire search and examination of title, from the review of the title indices and records to the issuance of the title insurance commitment and policy.

There are many different terms used for title searches and examinations, some of which are synonyms and others of which have more narrow or specialized meanings. A title search is variously known as a run sheet, search sheet, date-down, down-date, update, title run, proceedings run, abstract, letter report or title notes. A title examination is also sometimes called a title search, title opinion, opinion letter, or a write-up. One important factor that affects the nomenclature is whether the title examination is performed by a lay person or an attorney.

The result of all of this diversity of terms and practices is that the Closing Disclosure or Settlement Statement may show a variety of charges as title services.[2] There may be a charge for a title examination. However, it is not uncommon for the title examination fee to be called a title "search" or "opinion," due to local practice. Also, in some places, there are charges incurred for searches conducted in either public or private sets of real estate records, known as title "plants." A title plant fee is sometimes labeled as such, or can be called a "search" fee or "access" fee.

A title insurance commitment is the binder of insurance that is issued before the loan closes. A title insurance commitment also has these synonyms: preliminary title report or PTR, title binder, title report, commitment to insure, preliminary title or just preliminary. A title insurance policy is also often called a "final" policy, to distinguish it from the "preliminary" title report. Also, a policy is sometimes called a guaranty (that term is used frequently in Texas, for example). However, in a number of states, such as Ohio and California, a guaranty is not a title insurance policy, but a different form of title product that is sometimes ordered in lieu of a title insurance policy.

There is some uniformity as to the form of a title insurance policy, which is due to the fact that policy forms promulgated by the American Land Title Association are used in almost every state. Although Iowa officially bans the use of title insurance, policies are still issued in that state. Texas promulgates policy forms, but they are very similar to ALTA policy forms. However, non-standard title insurance products exist also.

Title Insurance Policies

The Covered Risks and Scope of a Title Insurance Policy

Title insurance has a very different history from that of other lines of insurance.[3] Title insurance is an American invention. The first title insurance company was formed in Philadelphia in 1876, after an 1868 decision of the Pennsylvania Supreme Court refused to find a lawyer liable for having given an incorrect opinion about title to real estate in Philadelphia, leaving the owner with no recourse.[4] The improvement offered by the insurance policy was the promise to pay for a title defect without regard for whether or not an attorney might be excused from having recognized the defect in giving a title opinion.

A title insurance policy indemnifies the insured in the event it suffers "actual monetary loss or damage" due to a defect in title.[5] The policy indemnifies the insured if title fails, or there is an encumbrance or lien on the title, and also if there is a lack of a right of access to the property or the title is unmarketable.[6]

The modern lender's title insurance policy also provides coverages about the mortgage whose lien is insured. That policy indemnifies the insured in the event the mortgage is not valid, does not have the priority as stated in the policy, or is not enforceable by foreclosure. If Schedule A of the policy recites an assignment of the mortgage, the policy also insures that the assignment is valid.[7]

The most unusual aspect of title insurance is that the policy provides coverage only against matters that first affected title before to the date of policy. As the author's book explains,

> The coverages in the title insurance policy are limited to matters which exist on the date of policy. Title defects arising after that date are not covered by the policy.[8]

This policy limitation is stated in the Covered Risks, and reinforced by Exclusion 3(d), for matters "attaching or created subsequent to Date of Policy." The insured does not pay any renewal premium. The insurer has no right to cancel policy coverage. The policy remains in effect as long as the insured has an interest in the property of the types as defined in the policy, which can be for decades. This has been the unique facet of the title insurance policy since it was first conceived.[9]

An abstract of title might also omit an encumbrance or lien. The holder of an abstract, however, effectively self-insures the risk of an inaccuracy in a title abstract.[10] Title insurance provides two significant benefits not found in an abstract of title or a Torrens certificate of title.[11] First, the insurer is contractually obligated to defend the insured's title in litigation.[12] Second, the insurer maintains claim reserves set aside to pay losses to insureds, and the policy provides the mechanism for evaluation and payment of indemnity claims. These advantages are so significant that title insurance has effectively replaced attorneys' title opinions since 1957, when Mr. Johnstone wrote his seminal article about title insurance.[13]

A fundamental premise of the title insurance policy is that it is a contract of indemnity. It is not a guaranty or warranty that title is as stated in the policy.[14] There are several aspects of this principle. First, the insurer does not contract to make title as stated in the policy. The insured's deed may be forged, in which case its title is void. It is often impossible to purchase the land from the rightful owner in such cases. In such cases, the insurer is not obligated to obtain title for the insured, but to indemnify the insured for its lack of good title.[15]

The second aspect of the indemnity contract principle is that the measure of loss is the amount of money or value lost by the insured due to the covered matter. In most jurisdictions, the policy is not treated as an information product.[16] The insurer does not have tort liability for "search negligence" in addition to the duty to indemnify the insured.[17] Rather, in the event of a covered claim, the amount payable by the insurer is measured as the insured's actual monetary loss caused by the covered title defect or encumbrance.[18] Loss does not include damages that might flow from the existence of the title defect or encumbrance beyond the amount payable under the method provided in the policy.

There are certain loss principles that apply to a lender's policy but not an owner's. To begin with, although ALTA has labeled a title insurance policy issued to a lender as a "Loan" policy, that name is a misnomer. The policy insures the lien of the mortgage; it does not insure any aspect of the loan, or that the borrower will repay the debt.[19] The policy also does not insure that the property is worth the amount of the debt.[20] Thus, if the insured receives full payment of the loan amount from the borrower or another source, the insurer does not owe any loss payment to the insured. Conversely, if the insured lender receives title to the insured parcel or the insurer delivers that title to the lender, no loss is payable to the lender if the property is worth less than the debt amount.[21]

In addition, while an insured owner need establish only that there is a defect in title to present a policy claim, an insured lender must establish three facts, which the industry terms the Three D's of loan policy coverage: that there is a defect in title, that the borrower has defaulted, and that there is some diminution in its security due to the existence of the defect in title.[22] Because the lender's interest in the property is as security for a loan, not every title defect or encumbrance causes a loss to the lender. Loss is payable to a lender insured only to the extent that a covered title defect causes the lender to recoup from the real estate less than the amount of its loan. The loss payable to an insured lender is the amount by which its security is impaired due to the defect in the title to the property that serves as security for its loan.[23] The same loss formula applies even if the covered risk is not a defect in title, such as a loss under a zoning endorsement, which by its nature concerns the use of property but not its title.[24]

Retrospective Coverage and Risk Elimination

Most lines of insurance are designed to protect the insured against identified perils that might cause loss during a stated coverage period. Insurance coverage is extended in time by the payment of renewal premiums. Premiums are set based on the fundamental premise that risk is spread across the entire pool of insureds, with the insurer predicting that it will pay losses to a certain percentage of its insureds who suffer loss due to a covered peril. For insurance other than title, premium amounts are based on empirical data about loss experience collected over many years, plus a prediction of the likelihood that a peril of large magnitude might occur during the future policy term.

There are no insurance "perils" in the world of title. There are no floods, fires, earthquakes, tornadoes or storms that sweep across the titles to many parcels. The title insurance policy does not protect against perils that might occur in the future. It does not protect against any future event. With tiny exceptions, coverage is provided only for title defects, liens or encumbrances that already existed on the policy date. There can be no spreading of risk amongst a pool of title insureds. The risks assumed in each policy are based solely on the defects, liens and encumbrances that affect the insured parcel or parcels. The title to every parcel of real estate is unique and different.

As a result, the title insurance industry does not employ any actuaries, and there are no actuarial firms retained as consultants to the title insurance industry. Title insurers report the types of losses they have suffered on the NAIC Form 9 using codes developed by the American Land Title Association. The ALTA Claims Codes merely identify classes of losses, broken down by the type of title issue and the source of the loss (such as a searching, posting or typing error). Statistical reports show that certain risks go up and down over time, such as mechanics' liens, which tend to increase when real estate crashes as it did between 2006 and 2008. However, the ALTA Claims Codes are not predictors of future claims experience.

Further, title insurance is issued based on the premise that the insurer will not consciously assume any risk of a title defect, lien or encumbrance, but rather that it will spend the vast majority of the premium dollars to eliminate—that is, exclude—coverage for all known title defects, liens and encumbrances. To accomplish this elimination of risk, the title insurer searches the public real estate, tax and lien records in order to determine which matters affect the title to the insured parcel. Each encumbrance is recited as a numbered paragraph in Schedule B of the policy, in what is termed by the industry a "special exception."[25] Special exceptions are really exclusions from coverage for encumbrances and liens that are specific to the insured parcel.[26] The insurer has no liability for the effect of an encumbrance on title if an exception for the instrument appears in Schedule B of the policy.[27]

The American Land Title Association and A.M. Best have long touted the fact that approximately 90 percent of title premiums are spent by title insurers and their agents on risk elimination—that is, the searching and examination of title.[28] Losses have historically represented between four percent and 12 percent of premiums earned.[29] Most but not all of the losses payable under a title insurance policy are based on title issues that might have been discovered in the public records. Other researchers and the NAIC have also noted that title insurers spend a greater percentage of the premium dollar on risk elimination than is true in any other line of insurance.[30] Boiler insurance is the only other line of insurance that is routinely noted in which the insurer spends any significant portion of the premium to eliminate risk, by the making of a boiler inspection before a policy is issued.[31]

Some commentators have criticized the risk elimination aspect of title insurance, suggesting that the low percentage of premiums paid on claims makes title insurance highly profitable.[32] However, these commentators ignore two important facts.

First, although title insurers do not tout the fact that buyers and lenders review the title insurance commitment to determine what defects, liens and encumbrances affect the title, it does serve that purpose. Such a title review would be frustrated if the commitment did not fully and accurately recite those matters that affect the title to be insured.

Second, the commentators ignore the fact that real estate is highly cyclical, and premiums earned in good years are needed to pay claims in bad years. Title insurance is purchased when a parcel of real estate is sold or mortgaged. In bad years, there are very few real estate sales or new mortgage loans.

During those same years, because real estate is distressed, foreclosures and lien disputes increase, which causes a sharp rise in claims. Thus, when the real estate market is good, premiums are high and claims are low; when the real estate market is bad, the amount of new premiums earned goes down but claims expenses increase exponentially, and title insurers lose money.

In addition, because title insurance policies generate only one premium but do not have stated policy terms, in bad years a title insurer receives many claims on policies issued in prior years, but receives no renewal premiums with which to pay those claims.

The Same Standard Title Insurance Policies Are In Use in Most States

In most states, all title insurers issue policies drafted by the American Land Title Association Forms Committee, with active involvement of various customer groups. ALTA policies are copyrighted by American Land Title Association and may be used only by its members.

Iowa law does not authorize the issuance of title insurance in that state. In Iowa, the state Finance Authority issues guarantees that closely mimic ALTA policies. An employee of the Iowa Finance Authority is permitted by ALTA to serve as a member of the ALTA Forms Committee.

New Mexico promulgates title insurance policy forms, but that state typically adopts ALTA policy forms verbatim or with small modifications.

Texas promulgates its own policy forms, although they are really ALTA policy forms with modifications. The standard loan policy in Texas is the T-2 Mortgagee Title Insurance Policy.

The Florida Insurance Department has also ordered certain modifications to the ALTA policy forms.

This unusual uniformity of policy forms in this line of insurance is a direct result of the process that led to the formation of the first title insurer, and the evolution of the product during the first half century of its existence.

After the first title insurer was formed in Philadelphia in 1876, the idea of title insurance spread rapidly across the country. However, title insurers were originally local companies formed by abstractors of title. By the beginning of the twentieth century, most major cities in the United States had at least one title insurer domiciled in that state. Each company issued a policy form that it had written. The terms of those policies varied greatly.

In the 1920s, five major life insurers[33] developed the first standardized loan title insurance policy form, which they required all title insurers to issue to their companies. This was known as the Life Insurance Company or LIC policy.[34] According to the national association of the title industry, then known as the American Title Association, "[s]oon others adopted it, not only life insurance companies but real estate mortgage companies . . ."[35] The spreading use of the LIC policy was the final impetus for the ATA to adopt a policy form in 1929 modeled after that form.[36] The ATA said that the LIC policy form was a bitter pill to the title insurers because "[i]t had not only been written for them, but worse yet, it had another's name!"[37]

The 1929 ATA policy was the first widely-used standardized policy, and became the foundation for all subsequent ALTA policy forms.[38] In the ATA's article announcing the adoption of the policy, it advised that the policy had already "been approved and accepted by several of the title insurance companies," and that it "will be presented to all life insurance companies lending money upon first mortgages and generally to all real estate mortgage companies."[39]

Beginning with the 1929 ATA policy, the custom has been for the ALTA, as the national trade association for the land title industry, to develop policy forms and to promulgate them. ALTA member title insurers use them in nearly all states.[40] This promotes consistency and efficiency for national lenders and buyers of loans.

The uniformity of the policy forms became even more important when a secondary market for mortgage loans came into being after World War II.[41] The purchasers of those loans, such as Federal National Mortgage Association (Fannie Mae), began to require title insurance as a means of standardizing their loan files and obtaining better protection for the investors in their government-sponsored entities.[42]

Each new or revised ALTA policy form goes through a lengthy vetting process with secondary market loan buyers such as Fannie Mae and Freddie Mac, life insurers, and the lawyers who represent lenders, including the American College of Real Estate Lawyers and the American College of Mortgage Attorneys.[43] This vetting process was in place even before the ATA adopted the 1929 policy.[44] For example, when the ALTA met to discuss revisions to the policy forms in 1960, the meeting was a joint meeting with the LIC Counsel Committee of the ALTA, and half of the people present worked for life insurers.[45] The 1987 ALTA policy forms, which were the first major rewrite since 1929, went through at least 16 drafts, with "input and different ideas from" members of the title industry and "various customer groups."[46]

Fannie Mae, Freddie Mac, the FHA and other governmental bodies involved in mortgage lending have specifically approved the ALTA Loan policy form. The variants on that policy form adopted in Texas, Florida and Iowa have also been vetted by the governmental mortgage lending agencies.

The Different Types of Title Insurance Companies

There are three types of title insurers. The companies with the greatest combined market share nationally are the four so-called national commercial title insurers. These companies are publicly-traded commercial title insurers. They write insurance through branch offices staffed by company employees and also through policy-issuing agents. Their agents are either abstractors and commercial title agencies or attorneys, depending on the jurisdiction.

The four national commercial title insurers presently operating are the Fidelity National Title Group composed of Chicago Title, Commonwealth Land Title, Fidelity National Title and Alamo Title (subsidiaries of Fidelity National Financial, Inc. (ticker symbol FNF)),[47] the First American Title family of companies (subsidiaries of First American Financial Corporation (ticker symbol FAF)), the Old Republic National Title Insurance family of companies (subsidiaries of Old Republic International Corporation (ticker symbol ORI)), and the Stewart Title family of companies (subsidiaries of Stewart Information Services Corporation (ticker symbol STC)). These four companies account for over 80 percent of the title insurance policies written each year.[48] All of the national commercial title insurers write insurance in all 50 states, and in other countries and U.S. protectorates also.

The second category of title insurers is the so-called regional commercial title insurers. These companies are mostly privately-owned corporations that operate in a single state or a region of the country. Most of these companies write insurance exclusively through policy-issuing agents. Most such agents are non-attorney abstractors and title companies. Representative regional commercial title insurers include Investors Title Insurance Company, North American Title Insurance Company and Alliant National Title Insurance Company, Inc.

The third category of title insurer is the so-called bar-related title insurer. These companies write insurance through attorney agents.[49] Some such companies refer to their agents as "members," although typically the insurer is not a mutual insurance company and its policy-issuing agents are not owners of the insurer. Most such companies operate in one or a few states only. In some states, the attorney-agent is considered to be providing legal services to the insurer.[50] Examples of bar-related title insurers are Connecticut Attorneys' Title Insurance Company, Attorneys' Title Guaranty Fund, Inc. (operating in Illinois and Wisconsin) and Attorneys' Title Insurance Fund, Inc. (operating in Florida as Attorneys' Title Fund Services, LLC or just The Fund, and whose members now write insurance on behalf of Old Republic Title).

In Iowa, the Iowa Finance Authority issues guarantees that are backed by the assets of the State of Iowa. The Iowa guarantee is very similar to an ALTA title insurance policy. Iowa guarantees are issued by Iowa-licensed attorneys who sign agency contracts with the Finance Authority.

State Practices on Closing of Loans and Issuance of Title Insurance Policies

Practices vary significantly from state to state as to how loans are closed and title insurance policies issued. There are regional patterns, but no two states operate exactly the same way. One major difference in customs that divides the states is whether real estate transactions are closed through escrow or at a closing table.

Escrow States

Several western states follow escrow concepts and procedures developed from Spanish law, because those practices were already in place when those states were brought into our nation. The so-called escrow states are California, Washington, Oregon, Texas, Nevada, New Mexico and Arizona. Also, when Hawaii became a state, it continued to follow the Spanish escrow system.

Escrows are used on occasion in other states, but closings are not conducted exclusively through escrow in those states. The escrow states practice what is termed a "pure escrow" system for real estate closings. In most pure escrow states, a title insurer's branch office or title agency has separate title and escrow departments.

The duties of an escrowee have long been fixed, and do not change. The doctrine of escrow was developed in Europe many centuries ago. The word "escrow" is derived from the Middle French word "escroue," meaning scroll, a reference to an instrument of conveyance. An escrowee has a duty of reasonable care toward its principals, which are the parties to the escrow.[51] The escrowee must exercise ordinary skill and diligence in performing its principals' written instructions.[52]

California has some regional variations in its escrow system.[53] In northern California, escrows are conducted by escrow offices owned or controlled by title insurers. In southern California, however, escrows have traditionally been conducted by independent escrow companies.[54] There have traditionally been a number of independent escrow companies in Southern California. Most such companies are small businesses with few assets and no effective oversight. During the past 20 years, there have been several well-publicized incidents in which employees or owners of escrow companies have stolen money deposited with them by lenders and buyers, leaving innocent parties without recourse.[55]

Lenders became less willing to trust loan money to independent escrow companies in southern California as a result of these thefts. Some escrow companies closed. Others were purchased by title insurers. Those that remain in business often do not handle the money for the escrow. Instead, the lender and borrower deliver the money to the title insurer that will issue the policy or policies for the transaction, so that it can be disbursed by the insurer, and the loan documents to the escrow company. This practice, known as a sub-escrow, gives the insurer control over the money so that it is properly applied and so that there are controls over the people handling the money. Here is a representative description of a disbursement sub-escrow provided by a title insurer to the public:

> Sub-escrow services are performed by the Company in support of a primary escrow holder in connection with the issuance of a policy of title insurance. Services are limited to the acceptance of documents and funds to pay off or release specified encumbrances, or to transfer funds from one party to another based upon instructions from the primary escrow holder, the lender, or some other lienholder or payor. Statewide, the subescrow fee for Sale Transactions shall be $125, and the subescrow fee for Loan and Refinance Transactions shall be $45.[56]

The escrowee identifies the sub-escrowee as such on the Closing Disclosure or Settlement Statement, by listing the sub-escrow fee that the title company will charge as a settlement charge. In California, title insurers and title agents have filed rates for sub-escrow fees, and laws mandate supervision of an underwritten title company's sub-escrow accounts.[57]

Table Closing States

The jurisdictions that do not conduct settlements under the pure escrow system are called "table closing" states. Table closings are conducted in the plains states, the Midwest, the Northeast, the Southeast and other southern states as far west as Texas. The "table closing" derives its name from the fact that the parties sit at the same table to conduct a closing, with the conveyance instruments and consideration passing at the closing table rather than through an escrow. In table closing states, some transactions are closed without a meeting between buyer, seller and lender at a single table, typically when the parties are not located in the same place. These are called by various names: remote closings, escrow closings, or "mail away" closings (the term used in Florida and Georgia). A remote closing is a form of escrow closing, because the conveyance instruments and money are delivered by the different parties to an escrowee under written instructions for their delivery on the happening of stated conditions.

The only party that regularly does not directly sit at a closing table is the lender. In table closing states, most loans are closed by a loan closer who is a title company employee, approved attorney or closing attorney. The lender typically gives written closing instructions to the loan closer.

The colonial states adopted most of their practices concerning real estate from the English common law. Under the customs derived from English, French and Dutch law, the parties to the real estate sale gather at one table and exchange the deed for the money, and sign all loan and other ancillary documents in each other's presence. A conveyance becomes effective on delivery of the deed or mortgage. The states that were formed from the Northwest Territory adopted English common law. The states purchased from France under the Louisiana Purchase also adopted the common law, except for the French Code state of Louisiana. All of those states are "table closing" states.

Most table closing states refer to the settlement agent as a closer rather than as an escrow officer. The role of the closer is to obey the instructions given by the parties, as in an escrow, but most such instructions are given orally. The escrowee takes instructions such as "record my deed" or "pay the money according to the closing statement." The closer's role is thus more limited and ministerial, because the parties deal directly with each other on almost all issues.

Variations in Practices Concerning Who Issues Title Insurance Policies

A second way in which the jurisdictions vary is in how a title insurance policy is issued, and by whom. The most important variant on this subject is the role of the attorney and what the jurisdiction deems to be the practice of law. There are almost as many variations on the issue as there are states. However, at one end of the spectrum, very few of the tasks concerning issuance of title insurance policies are considered the practice of law, while at the other end of the spectrum some states consider almost every aspect of the searching and examination of title and the issuance of the policy to be the practice of law.

Full-Service Title Company States

In a number of states, the state supreme court has not defined the practice of law to include the searching of real estate and title records, the examination of those records to produce a commitment or policy of title insurance, the clearance of title objections or the underwriting of the insurance risks. In those states, title insurance is issued by a branch office of a title insurance company or an insurance agent. In most such cases, the title search and examination is conducted by a non-attorney. In some states, this person is called an abstractor; in others, the most common job title is title examiner or title officer.

In many of these states, the state supreme court also has not defined the practice of law to include the closing of the transaction. In such states, a loan is typically closed by a non-lawyer, and the closer's job title is closing officer or escrow officer.

When neither title nor closing duties are considered the practice of law, it is common for a title insurance company's branch office or an independently-owned title agency to perform both the title and closing functions for a mortgage loan. If an all-inclusive title insurance rate filing system is in effect, there is no separate charge for a title examination, and no party other than the policy issuer searches or examines title.

States in which full-service title companies are common include Michigan, Ohio, Pennsylvania, Indiana, Missouri, Illinois, Wisconsin, Minnesota, North and South Dakota, Nebraska, Kansas, Colorado, Wyoming, Montana, Idaho and Utah.

In some locales, loans are closed by independent contractors hired by the lender, known as mobile closers or mobile notaries, most of whom are not attorneys. The mobile closer typically provides a signing service only, and does not disburse the loan money or record the mortgage. The title functions are handled by a title insurer or title agent.

Attorney States

Some state supreme courts have defined the practice of law to include some or all of the tasks involved in the issuance of a title insurance policy. Perhaps the most extreme example is South Carolina, in which the South Carolina Supreme Court has ruled that all of the following constitute the practice of law and may only be performed directly by an attorney licensed in that state: searching of real estate records, examination of a real estate title, issuance of a title opinion, clearance of title objections, disbursement of money to remove liens, closing of a real estate transaction, recording of real estate documents, and issuance of a title insurance commitment, policy or endorsement.

Other states that have classified tasks related to the issuance of a title insurance policy as being the practice of law include Georgia, Florida, Alabama, Mississippi, North Carolina, Tennessee, Arkansas, Oklahoma, Virginia, West Virginia, Maryland, New Jersey, New York, Massachusetts and New Hampshire. There is considerable variation between these states as to which tasks are considered the practice of law.

It is very common in attorney-controlled states for a law firm to own a title insurance agency. So-called commercial title agencies or branch offices of title insurers typically contract with attorneys in private practice, or employ staff attorneys, to conduct those functions that are deemed the practice of law.

In the extreme states such as South Carolina and Massachusetts, however, there are few non-attorney title agencies.

Some state supreme courts have gone so far as to rule that the state insurance department has no authority to regulate or license attorney title agents. In Florida, for example, the state insurance department licenses and regulates only non-attorney title agents.[58]

Approved Attorney States

In some states that consider the searching or examination of title to be the practice of law, notably states in New England and several southern states, a hybrid known as the "approved attorney" system has developed over the past century. In those states, insurers appoint approved attorneys to examine abstracts or other title evidence produced by abstractors, and to write opinions about title that serve as the basis on which title insurance policies are written. In most states, the approved attorney is not a title agent.[59] The approved attorney's function varies somewhat from place to place.[60] The approved attorney's essential responsibility is to give opinions of title which the insurer uses to commit to insurance.[61] A description of the New York practice is illustrative:

> The approved attorney performs some of the work needed to write title insurance. The approved attorney is not compensated by the title insurance company and receives no portion of the premium for this work. The services per-

> formed by the approved attorney typically include examination of title, attendance at closing, collection and remittance of the title insurance premium, and certification of the title to the title insurance company.[62]

Thus, the approved attorney is "approved" by the insurer only in the sense that the insurer has agreed to accept his or her examination or opinion of title in issuing the policy.

The approved attorney often also attends the closing, and may be hired as the loan closer. In most approved attorney states, a title insurer issues a closing protection letter to the lender covering the closing acts of its approved attorney, even though the attorney does not write title insurance for the insurer.[63]

The 2015 Title Insurance Rating Bureau of Pennsylvania rate manual contains the following definition of an "approved attorney" in its § 1.4:

> "Approved Attorney" is an attorney admitted to practice in Pennsylvania who because of experience and knowledge of real estate law in Pennsylvania is approved by an Insurer and upon whose examination of title and report the Insurer or Agent may issue a policy of title insurance. Such Approved Attorney must take financial responsibility for the search, examination, closing, and the final certification of title to the Insurer or Agent in a real estate transaction. Such Approved Attorney may not also act as an employee of an Insurer, an Agent, or an employee or affiliate of an Agent in a transaction in which he or she acts as an Approved Attorney.

Similarly, the following is a reliable description of the North Carolina approved attorney system:

> **How can I work in North Carolina as a settlement agent, escrow agent, or abstracter?**
>
> North Carolina works under the "approved attorney system" wherein the authorized practice of law in the state has licensed attorneys, or paralegals under the direct supervision of a licensed attorney, conducting real estate closings. There are no abstracting or escrow companies, per se.
>
> **How can I be licensed to work as a title agent in North Carolina?**
>
> You may work as a title agent if you are a licensed attorney through the North Carolina State Bar or a licensed (non-attorney) title agent through the North Carolina Department of Insurance.[64]

This definition of approved attorney corresponds to North Carolina law, which states that a title insurance policy must be issued under the "direct supervision" of an attorney:

> **§ 58-26-1. Purpose of organization; formation; insuring closing services; premium rates; combined premiums for lenders' coverages.**
>
> (a) Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has obtained the opinion of an attorney, licensed to practice law in North Carolina and not an employee or agent of the company, who has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title.

The North Carolina State Bar has issued declarations that various title-related activities are the practice of law.[65]

In New Jersey, the state custom is split, with approved attorneys involved in the northern segment of the state, while title insurance is produced by non-attorney commercial title insurers or their agents in the southern part of the state.[66]

The Texas Supreme Court has ruled that an attorney must either draft or review all legal documents, including loan documents. Also, attorneys are typically involved in closings, either as title agents or as independent closing attorneys under Rule P-22 of the Basic Manual of Title Insurance.[67]

The Wide Variety in Title Insurance Rate Filing Systems and Premium Rates in Different Jurisdictions

In three states, the state insurance department sets the rates that will be charged by all title insurers. In most other states, title insurers do not all charge the same premium rates. In some states, title insurers file rates with the state insurance department, but are free to alter their rates at will. In some states, title insurers are not even required to file rates with the insurance department, and charge whatever rate they deem appropriate.

The various states impose quite different sets of regulations on title insurers as to how premium rates are set. Under the McCarran-Ferguson Act,[68] the federal government agreed that states have the exclusive authority to regulate the insurance industry.

Regulation of the title insurance business by state insurance departments is relatively loose, compared to other lines of insurance.[69] This is due in large part to the fact that title insurance does not have the most common characteristics of other lines of insurance, such as the pooling of risk and protection against identified perils. Also, title insurance is a small line of insurance, when measured by premium volume. It is generally lumped with certain other "specialty" casualty insurance products. Few insurance departments consider title to be a large enough line of insurance to warrant having even a single employee assigned to regulate the industry.

There are four general categories of rate systems used by the various states for title insurance are described below.

Promulgated Rate States

In three states, the state insurance department sets the rates to be charged by all insurers that write title insurance in that state. Three states promulgate title insurance rates, and mandate that all title insurers charge the state-promulgated rates.[70] In promulgated rate states, all title insurers are required to charge the premium rates set by the state. No discounting or variation from the promulgated rates is permitted.

In promulgated-rate states, it is time-consuming but possible to determine if the mandated premium rate was charged on a particular transaction. The most important factors are to work from the promulgated rates in effect at the time the loan was made, and to determine if a discounted rate was applied or was available. A similar analysis is possible although time-consuming in rating bureau states.

Rating Bureau States

In several other states, all or most title insurers who write insurance in the state file a joint premium manual through the auspices of a rating bureau. Those states' filing systems may allow an insurer to vary from the rating bureau filed rates, but generally all title insurers who are members of the rating bureau do not vary from the rates filed by the rating bureau.

At present, Delaware, New Jersey, New

York, North Carolina, Ohio, Pennsylvania and Oregon have rating bureaus in which title insurers who write insurance in those states are members.

Other states, such as Wisconsin, formerly had rating bureaus that have since been disbanded.

The Delaware Title Insurance Rating Bureau ("DTIRB") is licensed by the Delaware Department of Insurance.[71]

The New Jersey Land Title Insurance Rating Bureau ("NJLTIRB") files rate and form manuals with the New Jersey Department of Banking and Insurance on behalf of title insurers that write insurance in that state.[72]

The Title Insurance Rate Service Association, Inc. ("TIRSA") serves as the rate filing organization for title insurers in the State of New York.[73]

The North Carolina Title Insurance Rating Bureau ("NCTIRB") files a rate manual with the North Carolina Department of Insurance, with the most current manual having been filed effective March 1, 2012.[74]

The Ohio Title Insurance Rating Bureau, Inc. ("OTIRB") is licensed by the Ohio Department of Insurance as a rating bureau, and files rates that are used by all of its members.[75]

The Title Insurance Rating Bureau of Pennsylvania ("TIRBOP"), similarly, is licensed by the Pennsylvania Insurance Department, and files rates on behalf of its members.[76] Not all title insurers in Pennsylvania file rates through TIRBOP.[77]

In Oregon, all title insurers currently file rates through the Oregon Title Insurance Rating Organization ("OTIRO").

Filed Rate States Without Rating Bureaus

In the majority of states, each title insurer files a rate manual, and the rates filed by the different insurers differ one from the other. Also, in many such states, a title insurer is allowed to deviate from its filed rate. The amount of deviation depends on the state regulations and local custom, with little variation from filed rates in some states and an almost complete disregard for the filed rates in other states. An additional factor is that rating bureaus that operated in some states were later disbanded, and rating bureaus have recently been formed in other states. Thus, to calculate rates for policies issued ten or more years ago, one must first determine if the rating bureau existed at that time.

Filed-rate states have adopted different filing methods. The three basic categories are termed "prior approval," "file and use" and "use and file." The difference between the systems is in the amount of review, if any, that is conducted by the insurance department for the rates filed by the insurer.

In prior-approval rate systems, the insurance department conducts some form of review of the filed rates to determine that they are justified before they are approved. That review is typically based on an analysis of claims and other data supplied by the insurer to justify the filed rates.

In file-and-use states, little or no such review is conducted by the insurance department, and the insurer typically is permitted to begin using a rate as soon as it is filed with the department, or after a certain number of days have passed after the filing is made.

In use-and-file states, the insurer may begin using a rate even before it files the rate with the insurance department.

A majority of states have adopted file-and-use or use-and-file systems for title insurance, or exempt title insurers from rate filings altogether, although many of those states regulate other lines of insurance more heavily.[78]

States that require insurers to file rates also differ as to whether or not they allow the insurer to charge less than the filed rate, which is known as a downward deviation from the filed rate. Many states permit downward deviations, for a variety of reasons. Other states do not permit downward deviations from the filed rates. Some states have changed this rule in the past decade, to allow or disallow downward deviations.

In a state that permits a title insurer to make a downward deviation from the filed rate, the premium charged in the transaction is sometimes less than the applicable rate filed by that insurer. The reason for the downward deviation, and the amount of that deviation, is never reflected on the Closing Disclosure or Settlement Statement or the invoice issued by the title insurer or title agent.

In filed-rate states, title insurers do not all charge the same rates. To be accurate, an analysis of the premium charged for a particular transaction must be based on the rates filed by the insurer that issued the policy in the transaction and that were in effect as of the date of the loan closing. In addition, the comparison must be based on the applicable rate, which may be the basic or standard rate or a discounted rate such as a reissue rate or a refinance rate. It is typically very difficult to determine all of these factors even if one is able to locate the filed rates in effect at the time the loan closed.

Published Rate States

In the final category of states, title insurers are not required to even file premium rates with the state insurance department. About ten jurisdictions do not require title insurers to file rates with the insurance department at all, even though those same jurisdictions do require insurers in other lines to file their rates.[79] In the so-called published-rate states, a title insurer publishes its rates in some fashion, and charges those rates to its customers. The title insurer may change its published rates at any time, without prior notice. In those states, it is common for an insurer to set a special rate for a certain transaction or customer, which is different from its published rates. Thus, in published-rate states, even if the rate actually charged in a transaction is not the same as that title insurer's published rates at the time of the transaction, the variance between the rates does not establish that the insurer charged something other than its "standard" rate at that time for that type of transaction.

Georgia and Indiana have recently adopted laws mandating the filing of rates for title insurance, converting the state from a published-rate to a filed-rate state.

In published-rate states, the only way to determine what a particular insurer stated it would charge for a policy is to view the rates it had published as of the date the policy was issued. In published-rate states, the insurer is free to change its rates at will, and to give a special rate to a customer for almost any reason, including to match a competitor's price.

In published-rate states, an accurate premium can be calculated only by identifying which title insurer issued the policy and locating the rates published by that insurer at that time, and then determining if a filed discounted rate was applied and was available, or if a non-filed rate deviation was used. It is typically very difficult to determine all of these factors. It is very difficult to obtain the then-current published rates for an insurer years after the loan closed.

States With Different Rate Zones

In some states, there are different rates in two or more zones *within* the state.

In Arizona, most if not all title insurers file special rates in Maricopa, Pima, Pinal and Santa Cruz counties, and a different rate schedule for all other counties in the state.

In Michigan, there is a different rate filed by each title insurer for the several counties in the area of Grand Rapids, known as the "Kent County Area" rate schedule.

In Nevada, all or most title insurers file rates for two different zones, with Zone 1 being Clark, Lincoln and Nye counties and Zone 2 being all other counties.

New York rates are filed by TIRSA using two zones; Zone 2 is comprised of 18 counties and boroughs in the New York City area, and Zone 1 is the balance of the state.

In Tennessee, some title insurers file one set of rates for Shelby County, another for Hamilton, Knox and Davidson counties, and a third set of rates for all other counties. Other title insurers have separate rates for Shelby, Hamilton, Knox, Davidson, Rutherford and Williamson counties.

In the State of Washington, there is one rate for the Spokane area and another for the balance of the state.

In Pennsylvania, the TIRBOP manual contains two very different sets of premium rates, one for policies issued by title insurers or agents and the other for policies issued by approved attorneys. In order to determine if the correct rate was charged on a Pennsylvania title insurance policy, one must know if the policy was issued by a title insurer, title agent or approved attorney.

In states having more than one set of regional premium rates, one cannot accurately calculate the title insurance premium without considering the region in which the property is located. Rates can vary dramatically in the different regions or zones within a state. See the discussion of the Tennessee rating zones below.

Most Title Insurance Premiums Are Graduated by Policy Amount at Intervals of $500 or $1,000 of Coverage

Title insurance premiums are always calculated based on the amount of the policy. The typical premium structure begins with a stated dollar amount for a minimum policy amount, which is typically $10,000. Above the base amount, additional premium is charged in increments of policy coverage amount.

In most states, the rate increases by a certain amount per thousand of insurance coverage. In Texas, the rate increases at $500 increments of insurance. In a few states, refinance loan policy rates are stated in larger increments.

Also, the rate is graduated based on the amount of the policy, rather than being a fixed dollar amount for every increment of insurance coverage. The premium rate per increment of coverage declines as the policy amount increases. For example, in Pennsylvania, premium for a "non-sale" policy begins with a base rate of $450 for a policy of $30,000, with increases up to $45,000 at $5.25 per thousand, then at $4.75 per thousand from $45,001 to $100,000, then at $4.25 per thousand from $100,001 to $500,000, and so on, with the lowest premium ($1.25 per thousand) charged for all insurance in excess of $30,000,000.

Thus, a person can determine whether or not the premium charged by a title insurer corresponded with the promulgated, filed or published rate only by calculating the rate for the exact amount of the insurance policy.

Title Insurance Rate Discounts on Loan Policies

In every jurisdiction, there is more than one premium rate that may apply. Every jurisdiction sets a "basic" or "standard" insurance rate. In addition, there are many types of discounted rates offered by title insurers, depending on the jurisdiction and the insurer. The three discounted rates that are most commonly associated with refinance loans are called the refinance rate, the reissue rate and the substitution rate.

Not every refinance loan qualifies for a discounted rate, however. The determination as to whether or not a discounted rate applies can be very subtle. It is typically not possible for a lender to know if such a discounted rate should apply. For example, it is common for a rate manual to say that a refinance rate is available only if the title insurer or agent is provided with evidence that a title insurance policy was issued to insure the mortgage granted for the prior loan to be paid off. This requirement flows from the fundamental premise of discounted rates, which is that a lower rate is paid when another title insurance policy has been issued on the same parcel in the past. The reissue or refinance rate discount emanates from rate filings that granted "abstract surrender" credits. That "credit" or discount was given to an insured when he or she turned in the existing title abstract and converted to title insurance.[80] A lender typically does not know if the title insurer or agent has received evidence of a prior policy. Thus, the lender has no way to know that a reissue, refinance or substitution rate discount could or should have been offered if it was not granted by the title company.

Also, some title companies state on the Closing Disclosure or Settlement Statement that such a discounted rate has been applied, and others do not so state even when the discounted rate is given. A lender often would only know *if* such a discounted rate was given if it were qualified to and did perform the calculation of the premium. However, that calculation is impossible to perform in most states unless the lender also knows both the present balance of the loan being paid off and the date on which that loan was made, because the amount of the discount depends on those facts also.

In addition, the formula used to determine the amount of the premium discount also is not uniform from state to state or company to company. Graduated discount rates are far more common than flat discounts.

In many states, the discount amount is reduced for every year that has elapsed since the earlier policy was issued. In Florida, the reissue discount still applies only for the first three years after the prior policy has been issued, but a separate refinance loan discount applies for ten years, and is graduated depending on the age of the prior policy.[81]

Similarly, in Texas, a 40 percent discount from the basic rate applies to that portion of the policy amount that equals the balance of the old mortgage loan if the new loan is made within two years of the date of the prior mortgagee (loan) title insurance policy, with the discount amount reduced by five percent per year of aging of the loan until no discount applies if the prior loan was made more than seven years earlier.[82] Thus, in order to accurately calculate the amount of the discount, if one applies, a person must know the date of the policy issued on the loan that is being refinanced.

All-Inclusive Rates Versus Split Title Insurance Premium Rates

Another way in which title insurance premiums vary from state to state is that some state insurance departments mandate the filing of what are termed "all-inclusive" rates, while others mandate or permit the filing of rates with two components: search and exam and risk. As is explained above, this issue is unique to title insurance and emanates from the fact that a title insurer seeks to eliminate risk by searching and examining title, and excluding matters that affect title, rather than assuming risks or perils. States that permit rate filings breaking premiums into search-and-exam and risk portions acknowledge that the larger share of the premium dollar is spent by the insurer in eliminating risk by a diligent search and examination of recorded real estate records, while the "risk" portion of the premium is relatively small. When an independent agent issues a policy, the agency contract sometimes states that the agent receives all or most of the search-and-exam component of the premium, while the insurer receives all or most of the "risk" portion of the premium, in recognition that the agent performs the search and examination functions and the insurer assumes the insurance risks in the policy.

Another aspect of the search-and-examination component of the title insurance premium is that most rate filings acknowledge that a title insurer may and does charge an additional fee when the issuance of the policy will require a search of real estate records for more than one parcel or chain of deeds. Some rate filings include provisions for additional charges when the insurer is required to search and examine title to more than one chain of title in order to issue the policy. In some states, these additional charges are treated as insurance premiums.[83] In other states, the additional charge is termed a "work charge" and is not treated as an insurance premium.[84]

Title Insurance Premium Rates Vary Widely From State to State

Governmental agencies, scholars and customers have acknowledged for decades that the premium rates for title insurance policies vary widely from state to state. The federal government has commissioned study after study to try to decipher the reasons for this variation. Each study has identified a number of factors, and made recommendations intended to decrease the price disparity. For example, the United States Government Accountability Office conducted a study of title insurance rates and published a report in April of 2007 that made this statement about the variation, state by state, in title insurance premium rates:

> Premiums across states are difficult to compare, but they appeared to vary significantly.[85]

Other studies have come to the same conclusion.[86] A 2012 study (based on data from 2001) put the range of "average" title insurance policy charges as being from $700 to $2,190.[87] A 2008 study estimated that the national "average" charge for an FHA loan title insurance policy was $1,200.[88]

The various studies, especially those performed for the government, all present a certain theory to explain why title charges vary from state to state. One study, paid for by the federal government, suggested that the "disparity" in title insurance premiums from state to state was due to lax and differing regulation of the industry by state regulators, justifying the conclusion that the federal government should take over the subject.[89] Another researcher discussed three proposed by earlier researchers blaming price differences on the relative dominance of customers who demand referral fees that supposedly increase the cost of insurance, which the researcher put under the labels of "reverse competition" and "cartel pricing."[90] That researcher also purported to have discovered that "[t]itle charges show other signs of price discrimination related to race and education; homebuyers in tracts with more minorities and fewer college graduates pay more."[91] However, this hypothesis was based solely on the fact that certain states and cities have higher title examination and attorney fees but lower average income levels, as if there was a causal relationship between the two.

The most important factor is that, as with other lines of insurance, premiums are based on the policy amount. A policy in a larger amount costs more money. All loans and transactions are at different prices. No "average" cost can be derived by blending together the premium costs from many transactions at widely different amounts. One researcher noted title insurers charge a higher premium for a policy with a higher policy amount.[92] The same researcher blithely stated that "the cost of providing title services has at most a weak relation to loan amount or property value (because payouts on policies are so rare) . . ." This is simply incorrect.

Another factor that greatly affects the total cost of title services is whether or not some of the work must be done by an attorney. One researcher noted that "[a] large fraction (nearly 25 percent) of the variance in how much borrowers are charged for title services relates to the state in which the borrower lives."[93] The researcher did not identify the actual reasons why title premiums, title examination fees and attorneys' fees in real estate transactions vary from state to state, however.

Also, in most states, there are no reliable statistics that would allow a person to determine with any reasonable certainty what the "average" price of a title insurance policy is. Studies that have sought to compile "average" prices for title insurance have done so based mostly on small data samples that were not gathered in a systematic way for the purpose of obtaining a true "average" price.[94] State insurance departments do not collect much data from title insurers, and some commissioners have little or no authority to collect such data.[95] Some studies have acknowledged that there are significant variations dictated by state law, and particularly the role of the attorney in title and closing functions, as mandated by the state supreme court.[96]

In the author's view, the most important reasons for these differences have not even been noted or considered in the various government-sponsored studies. One very important factor is losses. The three largest sources of loss for title insurers are forgery and fraud that cause title to fail, mechanic's liens filed after the policy date for which the policy provides coverage, and escrow theft. Some states have huge losses in one or more of these three categories, while other states have low losses of these types. States with high losses from forgery, mechanic's liens and escrow theft also have higher title insurance premiums. Those states include California, New York, Florida, Nevada, Illinois, Michigan and Missouri.

Most studies of title insurance have also ignored the fact that real estate is highly cyclical, and that title insurance claim expenses are typically highest in the same years that premiums earned are lower. Three studies conducted in 2006 and 2007 ignored the cyclicality of real estate and thus title insurance, and pronounced the industry claims history as being "stable" or consistent.[97] The decade following those studies has proven that title insurance losses are anything but stable, with five major title insurers having ceased operations altogether,[98] and others having merged or simply lost money for years on end.

Loss cycles are one factor in the greater issue of the cyclicality of the real estate market, which also affects revenue. The 2006 Florida report did acknowledge that "title insurers are impacted by the economic cycle and the robustness of the housing market . . ."[99] However, it studied losses for only the preceding ten years, which were part of the longest sustained real estate boom of recent decades.[100] The market crashed the following year.

A 2010 report on the title insurance business by A.M. Best explained that most title insurers posted net losses in 2008, and that the two states with the sharpest decline in direct premiums written in the year 2009 were Florida, which was down by 35 percent, and Texas, which was down by 20 percent.[101]

A 2013 study by A.M. Best showed that the combined operating costs and losses incurred by title insurers exceeded income for the years 2007, 2008, 2009, 2010 and 2011, before receding to a composite ratio of 96 percent in 2012, whereas in the years just before the real estate bubble burst, title insurers had combined expenses and losses of between 91 percent and 99 percent of income.[102]

Perhaps the most important variable claim loss factor is escrow theft. The theft of money from a title company or attorney escrow account can cause a loss under a policy, or under a closing protection letter, and in three states the title insurer is strictly liable by statute for such thefts.

Florida has seen huge escrow theft losses.[103] This is largely due to two factors: attorney closers and easy access to the Caribbean. Florida has experienced a greatly disproportionate number of incidents in which attorneys have stolen closing money and then fled the country by boat. Most are never seen again, and no money is ever recovered. Florida also is one of only three states that make the title insurer fully and automatically liable to repay people whose escrowed money is stolen by a title agent.[104] This greatly compounds the insurer's liability.

The startling fact about escrow theft losses is that, in most states, the title insurer covers those losses without having any corresponding premium, charge or loss reserve.[105] Further, escrow theft is not tracked as a category of loss on the NAIC Form 9 form that title insurers submit each year, and the ALTA Claim Codes do not even identify such a loss as a claim code.

The NAIC has studied escrow theft at length, but has done nothing to date to protect insureds or insurers from the risk.[106] Title insurers have recently acted resolutely to change the practice of assuming escrow theft risk without receipt of any corresponding premiums that can be pooled to pay the associated losses. Title insurers have sought and obtained laws in about half of the states that allow them to charge for the issuance of closing protection letters.[107]

A third factor is mechanic's liens, which have been recognized for decades as being the largest or second-largest source of losses to title insurers.[108] These losses vary widely from state to state.

Mechanic lien losses are largely dependent on two factors that are outside of the control of any title insurer: the degree to which state law allows a lender to obtain priority for its mortgage over mechanic's liens that might later be filed by an unpaid contractor or supplier, and the proclivity in the state for a boom-and-bust real estate development cycle.

Michigan and Wisconsin have notable protections by law giving a lender priority over mechanic's liens.

Missouri, Illinois and Idaho have laws designed to give the construction lender little or no priority over mechanic's liens. The loss experience on this subject in the various states correlates strongly to the statutory framework.

The second factor is a boom-or-bust real estate development cycle. Several states are notable for their history of explosive development, followed by huge busts: Florida, California, Texas, Arizona and Nevada. Those five states have suffered huge mechanic's lien losses from 2006 to the present, as well as in earlier real estate bust periods.

Forgery is the third cause of large losses suffered by title insurers. This risk also varies widely from state to state. The risk of a forged deed or mortgage is fundamental to title insurance policy coverage. Forgery is often noted as the number one "true" title risk—that is, a risk that cannot in most cases be eliminated by a review of real estate records. When a deed or mortgage has been forged, it is void, and the loss payable is the lesser of policy limits or the value of the real estate. This is known as a total loss. Total losses on title insurance policies are extremely rare, and are considered cataclysmic.

Certain states have a history of large forgery patterns. Those states include California, New Jersey and Florida. Those three states have suffered high losses. Researchers often note the low claims history in Iowa. Title people have long recognized that Iowa sees almost no forged deeds or other fraud because of the state's demographics: farmers live there, most Iowans have lived in the same town for several generations, there is little transience, and most cities are small.

Another factor is whether a state permits the insured to sue both under the policy's terms and in tort, for what is termed "abstractor liability." States that allow abstractor liability claims create higher loss payments on otherwise comparable claims, which leads to increases in premiums.[109]

The final major factor in the cost of title insurance that is related to claims experience is the relative cost of litigation from state to state. Title insurers pay about two-thirds of their claim expenses to defend insureds in litigation. States in which attorneys charge higher rates, and in which litigation takes longer and is more expensive, have higher claim losses, which in turn increases title insurance premiums. California, Florida, New York, New Jersey, Georgia, Texas and Illinois are expensive states for litigation.

There are other important factors that lead to variations in the cost of title insurance but that are not related to claim losses, and which have never been systematically studied by researchers.

One such factor is the effect of promulgated or fixed policy rates versus free competition. The studies admit that promulgated rate states have higher premiums than those states that allow free competition in rates, particularly the scheduled-rate states.

Another factor that affects the cost of title insurance is that some states have adopted laws that require title insurers to conduct a title search and examination for a minimum length of time, and some states also require a title insurer to maintain a title plant for every county in which it issues policies.[110] States that require a title insurer to spend more labor and expense in searching and examining title increase the cost of issuing policies.

NOTES:

[1]See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, New York, NY (2000). Mr. de Soto is a Peruvian economist, and the president of the Institute for Liberty and Democracy.

[2]See the discussion of title charges in the TRID regulations, *Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z)*, at 12 CFR § 1026.37(f).

[3]See J. Bushnell Nielsen, *Title and Escrow Claims Guide*, 2018 Edition, American Land Title Association (hereafter, *Nielsen*), § 9.1.3.4, *Insurer As Drafter Rule As Applied To Title Insurance*, pp. 9-15 to 9-17.

[4]*Watson v. Muirhead*, 57 Pa. 161, 1868 WL 7160 (1868). See a discussion of *Watson* and the genesis of title insurance in Joyce D. Palomar, *Title Insurance Law*, § 1:3; and in Benjamin J. Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 11.

[5]See *Nielsen*, § 9.1.1, *Nature Of Assurances Provided.*

[6]See Benjamin J. Henley, *Report of Chairman, Committee on Title Insurance Standard Forms*, in *Title News*, January, 1961, at pp. 133–134.

[7]See *Nielsen*, § 9.10, *Loan Policy Coverages.*

[8]See *Nielsen*, § 11.5, *Post-Policy Matters*, p. 11-81.

[9]See Benjamin J. Healey, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 11.

[10]See Benjamin J. Healey, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 15 (". . . under [the abstract] system the lender is a self-insurer and I assume that the risk is taken into consideration as his cost of doing business.").

[11]See Quintin Johnstone, *Title Insurance*, 66 Yale

L.J. 492, 513–516 (1957), for a comparison of title insurance to attorneys' opinions and the Torrens system, including an explanation of the Torrens concept.

[12]See *Nielsen*, § 4.1, *Policy Provisions Regarding The Duty To Defend.*

[13]Quintin Johnstone, *Title Insurance*, 66 Yale Law Journal 492 (1957).

[14]*Nielsen*, § 9.1.2, *Policy Of Indemnity Not Guaranty.*

[15]See *Nielsen*, § 3.2.3.2, *Owner's Complete Failure Of Title*, and § 9.2, *Defects In The Vesting Of Title.*

[16]See *Nielsen*, § 15.7, *Misrepresentation Of Title.*

[17]See *Nielsen*, § 15.12, *State-By-State Review Of Abstractor Liability Law.*

[18]*Nielsen*, § 3.2.3, *Determining Amount Of Loss On An Owner's Policy.*

[19]Id.

[20]Id.

[21]*Nielsen*, § 3.7, *Obtaining Title For Insured.*

[22]*Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy.*

[23]*Nielsen*, § 3.2.4.1, *Loan Policy Loss Equation.*

[24]See J. Bushnell Nielsen, *Zoning Endorsement Coverage Interpreted*, in *The Title Insurance Law Newsletter*, May, 2013, p. 8, analyzing *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.*, 706 F.3d 622 (5th Cir. (La.) 2013).

[25]See *Nielsen*, Chapter 12, unnumbered preamble.

[26]See *Nielsen*, § 12.7, *Special Exceptions.*

[27]*Nielsen*, § 12.7.1, *Adequacy Of Notice Given By Exception*, at p. 12-65.

[28]See A.M. Best Special Report, *Market Review: Title*, December 13, 2010, pp. 4-6, 14; A.M. Best, *Title & Mortgage Industry Fundamentals*, 2014, p. 1; and Robert Bozarth, *Lawyers Notes: Customers ask about title insurance forms and policies*, in *Lawyers Title News*, Fall, 1995, p. 16.

[29]See A.M. Best Special Report, *Market Review: Title*, December 13, 2010, p. 14.

[30]A.M. Best, *Title & Mortgage Industry Fundamentals*, 2014, p. 1.

[31]A.M. Best, *Title & Mortgage Industry Fundamentals*, 2014, p. 1; *An Analysis of Florida's Title Insurance Market: Three Studies that Provide a Comprehensive, Multi-Faceted Review of the Florida Title Insurance Industry*, July 2006, The Florida Office of Insurance Regulation, p. 21 (hereafter, "2006 Florida Title Insurance Market Study").

[32]*What Explains Variation in Title Charges? a study of five large markets*, published by The Urban Institute in 2012 and paid for by the U.S. Department of Housing and Urban Development under funding Order Number C-CHI-01027CHI-T0001, p. 3; United States Government Accountability Office Report to the Ranking Member, Committee on Financial Services, House of Representatives, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, published in April of 2007 as GAO-07-401.

[33]The five companies were Metropolitan Life Insurance Company, New York Life Insurance Company, Prudential Insurance Company of America, Equitable Life Assurance Society of America and John Hancock Mutual Life Insurance Company. See *The American Title Association Standard Loan Policy of Title Insurance*, 8 *Title News*, July, 1929, p. 6.

[34]See James P. McAndrews, *History of Title Insurance and ALTA Forms*, ABA GPSolo eReport Volume 1 No. 8, reprinted from The Commercial Real Estate Practice Manual With Forms; Jones & Messall, *Mechanic's Lien Title Insurance Coverage*, 16 Real Estate L. J. 291 (1988); Ness, *Insurance—Judicial Construction of the Lender's Policy of Title Insurance*, 49 N.C.L. Rev. 157 (1970); Dzien and Turner, *Not All Insurance Policies Are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L. J. 1123 (Summer 1998) (hereafter, *Dzien and Turner*); Jeremy Yohe, *The Juice Behind the Squeeze*, ALTA Title News, December, 2009, p. 10 (hereafter, *Yohe*); Benjamin J. Healey, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at p. 11; and *Nielsen*, § 9.1.3.2, *Adhesion Contract And Ambiguity Against Drafter Rules.*

[35]*The American Title Association Standard Loan Policy of Title Insurance*, 8 Title News, July, 1929, p. 6.

[36]See *The American Title Association Standard Loan Policy of Title Insurance*, American Title Association *Title News*, July, 1929, p. 5; *Dzien and Turner*; *Yohe*, p. 10; Benjamin J. Healey, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, in *Title News*, Volume XXXV, Number 5, May, 1956, at pp. 11-12.

[37]Id.

[38]See *Nielsen*, § 9.1.3.4, *Sophisticated Policyholder Exception.*

[39]*The American Title Association Standard Loan Policy of Title Insurance*, 8 *Title News*, July, 1929, p. 5. The life insurers suggested changes that were made, and then approved the policy form. Id. at p. 6.

[40]At least two state insurance departments, in Texas and New Mexico, promulgate their own forms. The Iowa statutes permit the use of state-issued guarantees rather than title insurance policies.

[41]A good history of the emergence of the secondary market is provided in Peter M. Carrozzo, *Marketing the American Mortgage: The Emergency Home Finance Act of 1970, Standardization and the Secondary Market Revolution*, 39 Real Property, Probate and Trust Journal 765 (2005).

[42]Joyce D. Palomar, *Title Insurance Law*, § 1:3, pp. 8-10.

[43]See *Yohe* at p. 15.

[44]See *The American Title Association Standard Loan Policy of Title Insurance*, 8 *Title News*, July, 1929, p. 5, which stated that the "wishes and requirement of those using [title insurance] have always been given a great deal of consideration by the title companies and to such an extent that there were a varied and multitudinous lot of forms in circulation, and differences in practice," before 1929, which actually hampered the association's goal of developing a uniform policy form.

[45]See Benjamin J. Henley, *Report of Chairman, Committee on Title Insurance Standard Forms*, in *Title News*, January, 1961, at p. 130-131.

[46]Russ Jordan, *ALTA finalizes policy revisions*, in *Lawyers Title News*, July-August, 1987, at p. 22.

[47]The Fidelity title group also formerly included Lawyers Title, Ticor Title, Transnation Title and several other companies that have been merged into the surviving insurers.

[48]See *2015 Title Premiums Market Share: Company Summary*, in *Title News*, May 2016, Volume 96, Number 5, p. 28. A somewhat outdated description of title insurer market shares is found in United States Government Accountability Office Report to the Ranking Member, Committee on Financial Services, House of Representatives, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, published in April of 2007 as GAO-07-401, pp. 11-12.

[49]See Bohan, *'Bar Funds' and Their Attorney Members*, in *Attorneys' Role in Title Insurance*, A.B.A. Real Property, Probate and Trust Law Section (1990), at F.

[50]In a case of first impression, a Connecticut court held that a bar-related title insurer was not liable for alleged negligence in the supervision of its attorney agent members, in part because of its member rules and also based on public policy. *DeGirolomo v. Papa*, 49 Conn. L. Rptr. 208, 2010 WL 654388 (Conn. Super. Ct. 2010) (unpublished). Florida has held that attorney agents are exempt from licensure and regulation by the Department of Insurance, because they fall under the state supreme court's jurisdiction. See *State, Dept. of Ins. v. Keys Title and Abstract Co., Inc.*, 741 So. 2d 599 (Fla. 1st DCA 1999). However, Minnesota attorney agents *are not* exempt from licensure by the state Department of Commerce. *Wayne B. Holstad, PLC v. Commissioner, Dept. of Commerce*, 2014 WL 802318 (Minn. Ct. App. 2014) (unpublished).

[51]See *Nielsen*, § 13.4, *Duty Of Care And Parties To Whom Owed*; also, Robert J. Kratovil, *Real Estate Law (5th Ed.)*, Chapter 13, § 233.

[52]*Id.*; also see 30A C.J.S. Escrows § 10.

[53]See *Nielsen*, § 13.1, *Types Of Escrows And Their Purposes.*

[54]See §§ 4.2.2 of the report of Mr. Birny Birnbaum describing the practices in northern and southern California, found at www.insurance.ca.gov/0400-news/0200-studies-reports/upload/CATitleCompetitionReport0512Public.pdf (last visited March 20, 2016). See also the Department of Business Oversight Frequently Asked Questions page concerning independent escrow companies regulated by that department, found at: http://www.dbo.ca.gov/Licensees/Escrow_Law/FAQs.asp#13 (last visited March 20, 2016).

[55]See Mark Sabbatini, *Embezzlement Suspects Surrender: Escrow: Santa Clarita couple plead not guilty*, in the LA Times, found at http://articles.latimes.com/1995-03-24/local/me-46734_1_kathy-wiener (last visited March 20, 2016). Also, *Notice to Potential Claimants of The Escrow Source* by the California Department of Business Oversight, found at http://www.dbo.ca.gov/Actions/EL/Escrow_Source/Default.asp (last visited March 20, 2016).

[56]Stewart Title of California—Northern California Escrow Fees.

[57]See Cal. Ins. Code § 12389.6.

[58]Id.

[59]See discussion of the difference between a title agent and an approved examining attorney in *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 542 S.W.2d 436 (Tex. Civ. App. Fort Worth 1976), writ granted, (Mar. 9, 1977) and aff'd in part, rev'd in part on other grounds, 552 S.W.2d 425 (Tex. 1977).

[60]See, generally, Travaskis, *The Role of the Lawyer as an Agent or Approved Attorney*, in *Title Insurance: The Lawyer's Expanding Role*, A.B.A. Real Property, Probate and Trust Law Section (1985), at p. 299. The Connecticut legislature adopted a law in 1996 saying that "[n]o person may act as a title agent unless he is a commissioner of the Superior Court in good standing [an attorney], except any individual who held a valid title insurance license on or before June 12, 1984." The insurance commissioner ruled that pre-1984 corporate or partnership agents must conduct their title agent functions through attorneys or grandfathered individual agents. The circuit court found, in *Connecticut Attorneys Title Ins. Co. v. Connecticut Ins. Dept.*, 2000 WL 279052 (Conn. Super. Ct. 2000) (unpublished), that it did not have subject matter jurisdiction to accept an appeal of the ruling.

[61]*Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

[62]McDonald, *Attorneys Writing Title Insurance: The Ethical Concerns, Perils and Pitfalls*, in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, at p. 91.

[63]See *Nielsen*, § 14.1, *Nature Of The Letter's Assurances.*

[64]Description provided by the North Carolina Land Title Association website, found at http://www.nclta.org/content/frequently-asked-questions.

[65]See http://www.ncbar.gov/public/upl.asp.

[66]See *Real Estate Laws & Customs by State*, published by Fidelity National Title Services.

[67]Rule P-22 states in part: "No payment shall be made by a Title Insurance Company, Title Insurance Agent, Escrow Officer or any employee or agent of any of them, to any Person who is not its bona-fide employee for furnishing title evidence, examination of a title and/or closing a transaction unless: Such Person is (i) a Title Insurance Company as defined in Article 9.02, Insurance Code, and qualified to do business in the State of Texas, (ii) a Title Insurance Agent as defined in Article 9.02, Insurance Code, and licensed to do business in the State of Texas by the Texas Department of Insurance, or (iii) an attorney at law duly licensed by the Supreme Court of Texas to practice law in the State of Texas, to the extent not inconsistent with Article 9.34, Texas Insurance Code, or (iv) any Person legally authorized to perform such services . . ."

[68]15 U.S.C. §§ 1011 to 1015.

[69]See *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410, 1992-1 Trade Cas. (CCH) ¶ 69847 (1992), which held that some states conduct little or no supervision over title insurers, particularly as to their premium rates.

[70]Those states are Texas, Florida and New Mexico. See the National Association of Insurance Commissioners' Compendium of State Laws on Insurance Topics, *Rate Filing Methods for Property/Casualty Insurance, Workers' Compensation, Title*, compiled as of November of 2005 (the "NAIC Rate Filing Method Summary").

[71]See the Delaware Department of Insurance Forms and Rates Bulletin No. 27.

[72]See the discussion of NJLTIRB at the website maintained by Chicago Title's New Jersey operations, found at http://www.titleinsurancenj.com/pages/re-info-for-attorneys.aspx?vtype=2&article=273.

[73]The Title Insurance Rate Manual for New York State, Fourth Reprint, Fifth Revision, became effective August 1, 2015. The TIRSA website is found at http://www.tirsa.org/.

[74]See the North Carolina Title Services website for a description of the NCTIRB rate manual, at http://www.nctitle.com/index.php/current-rate-info.

[75]See the Hoover's report on OTIRB at http://www.hoovers.com/company-information/cs/company-profile.The_Ohio_Title_Insurance_Rating_Bureau_Inc.7a5c4cb0450ce0e9.html.

[76]See the TIRBOP website, at http://patitleratingbureau.org/.

[77]Penn Attorneys Title Insurance Company and Conestoga Title Insurance Company are not TIRBOP members and file rates independently of TIRBOP.

[78]A 2008 Florida report listed 18 states as being file-and-use, four as use-and-file, and nine as exempting title insurers altogether from the filing of rates, while only 17 states had adopted prior approval systems and three (Florida, New Mexico and Texas) had promulgated rates. See Florida Office of Program Policy Analysis & Government Accountability Report No. 08-53, entitled *Florida's Current Regulatory Framework Creates Challenges for State's Title Insurance Regulation*, from September of 2008. States such as Georgia, Missouri and Indiana have changed their title insurance rate filing systems since the time of that study.

[79]See the NAIC Rate Filing Method Summary, which recites that, as of November of 2005, there was no rate filing requirement in the states of Arkansas, the District of Columbia, Georgia, Hawaii, Illinois, Indiana, Mississippi, Virginia and West Virginia. Georgia changed its law in 2009 to require title insurers to file rates and to charge only the filed rate. Indiana adopted a similar law in 2013.

[80]See the discussion of the abstract surrender credit and its genesis at Robert Franco, *A Real Abstract of Title*, posted to the Source of Title Blog on April 30, 2010, found at http://www.sourceoftitle.com/blog_node.aspx?uniq=606.

[81]The Stewart Title Florida rate manual describes the Florida refinance loan discount as follows, based on the age of the prior policy: "3 years or under 30% of the original rates, from 3 years to 4 years 40% of the original rates, from 4 years to 5 years 50% of the original rates, from 5 years to 10 years 60% of the original rates, over 10 years 100% of the original rates." Stewart Title *Florida Promulgated Rate Guide*, Effective January 1, 2013.

[82]See R-8 of the Texas Basic Manual of Title Insurance.

[83]See Texas Rate Manual Section R-9, *Additional Chains of Title.*

[84]See § 2.3 of the 2015 Manual filed by the Title Insurance Rating Bureau of Pennsylvania, which says: "Insurer may impose additional Charges in especially difficult title matters. Insurer may impose additional Charges for examination of title which may involve multiple chains of title, land under water, coal, oil, gas or mineral searches, railroad property searches, land in beds of streets, rights-of-way, driveways, foreclosures, tax sales, proceedings under federal bankruptcy or state insolvency related statutes, or which involve other unusual difficulties or unusual expenditures. There shall be a reasonable relationship between the services performed, expenses incurred and the amount charged by the Insurer or Agent."

[85]United States Government Accountability Office Report to the Ranking Member, Committee on Financial Services, House of Representatives, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, published in April of 2007 as GAO-07-401, p. 11.

[86]See United States Government Accountability Office Report to the Ranking Member, Committee on

Financial Services, House of Representatives, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, published in April of 2007 as GAO-07-401; *What Explains Variation in Title Charges? a study of five large markets*, published by The Urban Institute in 2012 and paid for by the U.S. Department of Housing and Urban Development under funding Order Number C-CHI-01027CHI-T0001; and Beibei Zou, Sudip Singh and David Eaton, *Who Should Regulate Insurance: An Evaluation of Title Insurance Price Disparity in the U.S.*

[87] *What Explains Variation in Title Charges? a study of five large markets*, published by The Urban Institute in 2012 and paid for by the U.S. Department of Housing and Urban Development under funding Order Number C-CHI-01027CHI-T0001, gave this summary finding: "Title insurance premiums vary considerably across metropolitan areas, from an average of $700 in Des Moines, Iowa, to $2,190 in New York City. Housing market institutions and regulations explain some, but not all, of this variation. The other charges vary as well. This report attempts to explain the remaining variation in title costs within five housing markets. Local regulations and house prices are substantially associated with costs. Characteristics of the home purchase that make title search more challenging are modestly associated with costs in some markets, but not in others."

[88] Susan Woodward, *A Study of Closing Costs for FHA Mortgages*, report prepared in 2008 for the U.S. Department of Housing and Urban Development by The Urban Institute.

[89] Beibei Zou, Sudip Singh and David Eaton, *Who Should Regulate Insurance: An Evaluation of Title Insurance Price Disparity in the U.S.*

[90] See Susan Woodward, *A Study of Closing Costs for FHA Mortgages*, report prepared in 2008 for the U.S. Department of Housing and Urban Development by The Urban Institute, pp. 87–88.

[91] Id.

[92] Id. at p. 89.

[93] Id.

[94] See U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *What Explains Variation in Title Charges? A Study of Five Large Markets*, June, 2012, p. 14.

[95] See the NAIC Title Insurance Task Force *Survey of State Insurance Laws Regarding Title Data and Title Matters*, November, 2015.

[96] U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *What Explains Variation in Title Charges? A Study of Five Large Markets*, June, 2012, pp. 27–28.

[97] See United States Government Accountability Office Report to the Ranking Member, Committee on Financial Services, House of Representatives, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, published in April of 2007 as GAO-07-401, p. 35; also, *An Analysis of Florida's Title Insurance Market: Three Studies that Provide a Comprehensive, Multi-Faceted Review of the Florida Title Insurance Industry*, July 2006, The Florida Office of Insurance Regulation, p. 57 and Figure 3; also, Birny Birnbaum, *An Analysis of Competition in the California Title Insurance and Escrow Industry*, Report to the California Insurance Commissioner, December, 2005, pp. 76-79.

[98] On November 26, 2008, LandAmerica Financial Group, Inc., the parent company of Commonwealth Land Title, the world's oldest title insurer, and its sister company, Lawyers Title, filed for bankruptcy. A regulator effectively ordered the sale of the companies to Fidelity National Title so that policies would not become void, and so that more than 10,000 pending claims would be paid. Guaranty Title and Trust Company, domiciled in Ohio, was liquidated in 2008, and its policies cancelled by court order. New Jersey Title Insurance Company, established in 1888, ceased operations in 2011. Ninety-year-old Southern Title Insurance Company shut down in September, 2011. Attorneys' Title Insurance Fund of Florida ceased to write insurance in August of 2009 due to losses that had devoured most of the company's reserves and working capital.

[99] *An Analysis of Florida's Title Insurance Market: Three Studies that Provide a Comprehensive, Multi-Faceted Review of the Florida Title Insurance Industry*, July 2006, The Florida Office of Insurance Regulation, p. 57.

[100] Id. at pp. 56-57.

[101] 2009 A.M. Best Special Report, *U.S. Title Industry 2009 Financial Overview*, issued October 15, 2010, p. 2.

[102] A.M. Best Special Report, *U.S. Title Industry 2012 Financial Review*, issued October 7, 2013, p. 2.

[103] See A.M. Best Special Report, *Title*, December 13, 2010, pp. 7, 12, 14-15.

[104] See *Nielsen*, § 14.1, *Nature Of The Letter's Assurances*, and § 17.2, *Escrow And Other Functions Outside Scope Of Agency.*

[105] See *Nielsen*, § 14.1, *Nature Of The Letter's Assurances*, p. 14-5.

[106] See the NAIC Title Insurance Task Force *Survey of State Insurance Laws Regarding Title Data and Title Matters*, November, 2015.

[107] See *Nielsen*, § 14.1, *Nature Of The Letter's Assurances*, at pp. 14-10 through 14-12.

[108] See Stewart Title *Virtual Underwriter* § 12.12.16, *Title Insurance Considerations In Regard to Mechanics' Liens Coverage*, which states: "Title insurance coverage of mechanics' lien claims hazardous. Mechanics' lien coverage is a contract of indemnity insuring the lender against loss or damage due to the lack of priority of its mortgage lien over mechanics' liens. This kind of coverage has become a source of enormous loss for title in-

surance companies. Extreme care must be exercised when deleting the mechanics' lien exception from any title insurance policy." Also, California Land Title Association Mechanics' Liens Work Set # 2, CLTA Education Committee seminar outline, June, 2005. This risk is captured by title insurers for Form 9 reporting using ALTA Claim Code B(1)(a).

[109]See *Nielsen*, § 15.12, *State-By-State Review Of Abstractor Liability Law.*

[110]See the chart in NAIC Title Insurance Task Force *Survey of State Insurance Laws Regarding Title Data and Title Matters*, November, 2015, at p. 28.