

THIRD QUARTER 2005 • VOLUME 8, ISSUE 3

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Florida Bulletin and Memorandum
highlighting
Title Insurance Re-Issue Rates /
Class Action Litigation

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OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

HUD Continues with RESPA Reform

■ *Scott Pierce, Southeast Region Manager*

On August 25th in Washington, D.C., HUD completed the last of seven workshops held around the country to gain industry input on its new “RESPA Reform” that began after HUD’s failed 2004 efforts. During the process, HUD heard from all segments of the real estate/lending industry, including a number of title



insurance agents and underwriters. Although HUD would like to have a form of “packaging” in the new rule, it is evident from all seven workshops that the industry’s desire is for HUD to focus on reworking and rewriting the Good Faith Estimate (GFE). Some proposed that the GFE look more like a HUD-1, while others

suggested the opposite. HUD did disclose that the GFE form contained in the final 2004 rule was four pages long and had a “total tolerance” of 10% of all costs—not just 10% of each cost.

Many small business owners adamantly oppose any form of Section 8 exemption for lenders who “package.” The main concern is that a Section 8 exemption for lenders who package

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NOTICE:

The Financial Services Commission has released a “Notice of Proposed Rule Development” notifying all interested parties that there will be a Workshop on October 28, 2005 for the purpose of reviewing “title insurance rates and revise them if so warranted.” It will be held in:

Room 116,
Larson Building,
200 East Gaines Street,
Tallahassee, Florida,
beginning at 9:30 a.m.

Old Republic National Title Insurance Company and all of our agents will be represented by Scott Pierce and Jim Russick.



Flip Transactions and E&O Coverage

■ James C. Russick, Florida State Counsel

In this environment of rapidly escalating real property values, the practice of selling recently acquired property for an immediate profit has become a daily occurrence (otherwise known as land flips) – and it has become an increased threat to both Old Republic Title and to our agents.

The most recent development directly impacting agents is the response by Errors and Omissions carriers. It has come to our attention that carriers such as Lloyds of London have included an express exception to coverage for agents' failure to follow lender closing instructions that are designed to prohibit flip transactions.

Specifically, Lloyds' new policies except from coverage:

*"This policy does not apply to Loss in connection with any Claim:
Based upon or directly or indirectly arising out of or resulting from: (a) any transaction involving real property that occurs within six months after a sale, assignment, transfer or change in ownership involving such real property; or (b) any failure to comply with closing instructions relating to a prior sale, assignment, transfer or change in ownership involving the real property that is the subject of the closing."*



Old Republic Title, unlike some of our competitors, does not prohibit its agents from participating in flip transactions. It does, however, require that they be carried out legally by:

- (1) issuing commitments showing proper title vesting and satisfying requirements to insure;
- (2) preparing closing statements that accurately reflect sources of funds and disbursements; and
- (3) following the lender's closing instructions to the letter.

We understand this last requirement might be difficult. Often the package does not come

in until the last minute, so that the closing agent becomes overly burdened. However, the exposure to violation of the lender's closing instructions regarding flip transactions cannot be overstated.

We recommend that you allocate extra time when asked to close flip transactions. Read the closing instructions very carefully, charge accordingly, and ask for underwriting guidance if there are any questions regarding either the lender's or Old Republic's requirements on the handling of flip transactions. There is an increasing likelihood that you are handling these transactions with reduced coverage from your Errors and Omissions carrier.

Notice and Reminder to Agents

**This was recently published on the
Florida Real Estate
Commission Web Site
Florida Real Estate Commission**

DID YOU KNOW... Information Regarding
Referral Fees

Provided by the Florida Department of Financial
Services, Office of Insurance Regulation.

The Department of Financial Services (DFS), Office of Insurance Regulation, would like to take this opportunity to remind real estate professionals of the laws governing title insurance companies. The giving of an inducement, or a thing of value, in return for the referral of title insurance business is a violation of Section 626.9541(1)(h)3, Florida Statutes, and the rules of DFS. In particular, Rule 4-186.003(11)(c), Florida Administrative Code, states “any ongoing or standing offer of gifts, compensation or special services to the same person or customer on a continuing basis as an inducement to referring title insurance transactions is prohibited.” DFS will vigorously pursue alleged violations of these prohibitions by individuals and businesses under their jurisdiction.

It should be noted, however, that Section 626.9541(1)(m), Florida Statutes, provides that a licensed title insurer or its agent may give an article of merchandise for the purpose of advertising. Examples would include such items as a coffee mug or an umbrella with the insurer’s or agent’s name, logo, address, and telephone number. However, the value of the article may not exceed \$25. If you have questions or need additional information, you may contact Barbara A. Owens, Financial Examiner/Analyst Supervisor, Bureau of Agent and Agency Investigations/Title Section, at 850.413.2578.

Viva La France

■ *Scott Pierce, Senior Vice President*

I just came back from being “on assignment” in Paris. While there, I had the opportunity to see Lance Armstrong as he captured his unprecedented **seventh** consecutive victory in the Tour de France. Lance is in the Yellow Jersey in the center of the photo. Hard to believe that he almost died of cancer less than ten years ago.

I also checked out the Paris real estate market (they have many of the same brokers there that we have here) and if my conversions from Euros to dollars are correct, a small one or two-bedroom “apartment” near the Arc De Triomphe would run about \$720,000, about the same as a new condo on Miami Beach. I do not know if they have title insurance in France, but in the event they do, I will be asking Corporate to expand the Southeast Region. I have heard that all of the underwriting staff and agency reps have already started taking French lessons in anticipation.





Florida's Housing Boom

■ *Scott Pierce, Southeast Region Manager*

I have just finished reading a *Regional Economic Review* prepared by Mark Vitner, Senior Economist for Wachovia, dated September 8th, and entitled ***How Sustainable Are The Forces Driving Florida's Latest Housing Boom?*** The 32-page report surveys the State's 15 major housing markets as to housing demand, construction permits, unemployment and population growth. Most of the 15 markets remain "exceptionally strong with demand still exceeding the available supply." The expectation is that overall sales will remain strong through the end of the decade, although not at the unbelievable pace that we have seen in recent years.

The report bases this on five fundamental factors driving the state's housing market:

1. The low mortgage rates.
2. Strong job growth and low unemployment as Florida led the nation in payroll employment growth the last two years.
3. Population growth, which has added 1.35 million residents in the last four years, 400,000 alone in 2004. Most of the gain, 87%, comes from in-migration and most of these new residents are working-age adults desiring to purchase homes.
4. Demographics are boosting demand in other ways as well with the Baby Boom generation buying second homes. In 2004, thirty-six percent of overall existing



home sales were for second homes, with two-thirds being for investment purposes and the remainder for vacation homes.

5. A strong demand from overseas buyers. The NAR estimates that international buyers accounted for 15% of Florida's total home sales in 2004.

Also interesting is a statement that "for all the talk about speculation being the primary driver behind the current Florida's building boom, the data does not seem to

support that contention." The only negatives in the report were comments regarding a possible oversupply of condos on Miami Beach.

The report concludes that "higher home prices will not snuff out Florida's housing boom" and that prices are still significantly lower in most of the Florida markets than they are in the Northeast where most of our in-migrants come from.

If you would like to see the report in total, it is located on the Wachovia website at <http://www.wachovia.com/ws/econ/view/0,,2672,00.pdf>

Mark-Ups and Overcharges – The Saga Continues

■ James C. Russick, Florida State Counsel

The last publication of *In the Title Corner* contained an article summarizing the current case law and industry exposure under Section 8 of the Real Estate Settlement Services Procedures Act (RESPA) relating to the marking-up of third party services by settlement service providers, such as title agents. It concluded that the practice of a title agent charging more for a service provided by a third party vendor and pocketing the difference was a dangerous one and was unauthorized by Old Republic Title, notwithstanding the fact that several different District Courts of Appeal have disagreed on this issue. We have recently been presented with another case in support of our position.

On August 4, 2005, the United States Court of Appeals for the Third Circuit decided the case of *Santiago vs. GMAC Mortgage Group, Inc.*, ___ F. 3d ___, 2005 WL 1840031. In this case, the plaintiff, Santiago, alleged that when he refinanced his property with GMAC, he was overcharged by the lender for services the lender performed and was charged a mark-up by the lender for third party services. Specifically, Santiago accused the defendant lender of charging more than the actual cost for a tax service fee (\$85) and a flood certification fee (\$20). Additionally, Santiago was charged a \$250 funding fee by GMAC. The plaintiff alleged that the real value for the funding fee was \$20. In spite of the fact that all these fees were fully disclosed to the plaintiff in the beginning by GMAC, plaintiff brought suit on behalf of himself and the class of all others similarly situated alleging that both the “mark-ups” and the overcharges violated Section 8(b) of RESPA.

Section 8(b) of RESPA states that “no person shall give, and no person shall accept any portion, split or

percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”

The trial court dismissed the complaint after a finding that Section 8(b) of RESPA was intended to prohibit kickbacks and referral fees and did not include a cause of action for the conduct alleged by Santiago. The District Court of Appeals reversed and remanded, finding that marked-up charges for fees provided by third party vendors by a settlement service provider violated Section 8(b). Interestingly, the Court also held that overcharging for services did not violate RESPA.

To put this case in practical perspective for closing agents: (1) It bolsters the Old Republic Title prohibition against mark-ups where the closing agent has not added clearly discernable value that is distinguishable from the agent’s regular closing fee; (2) Likewise, the case supports a closing agent charging an increased closing or examination fee. Note, however, that this would not authorize charging a premium in excess of that allowed by the Promulgated Rule, nor would it justify an attorney charging an unethically high fee.

In a world where regulators and litigators continually examine our practices, we must emphasize the need to follow the rules and regulations and charge for services actually rendered without seeking additional income by “padding” the fees of others or supporting the proliferation of “junk fees.”



COMMENTS:

We invite your feedback and welcome your suggestions regarding “*In The Title Corner*” and the publication of future articles. Address correspondence to:

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Better Late Than Never—The After-Acquired Title Doctrine

■ By Jeannie F. Murphy, Florida State Counsel

An issue which arises with surprising frequency is the effect of a deed from a grantor who actually acquired or perfected title to the real property *after* he had already conveyed it to a third party. For example, B conveys title to C by warranty deed. At the time of the conveyance, B does not own the fee title to the property, but later acquires good title from A. The question arises as to whether A's subsequent conveyance to B gives C good title to the property or whether corrective action is required.

Many agents are surprised to learn that, generally, C's title would be automatically perfected without corrective action. In Florida, the doctrine of "estoppel by deed" or "after-acquired title" operates to vest title immediately in the grantee of the warranty deed when the grantor subsequently obtains good title in himself. The doctrine is only applicable to deeds where a grantor covenants to convey fee simple title to the property, such as by a warranty deed, special warranty deed, or deed of bargain and sale. The doctrine does **not** apply to quit claim deeds, since a quit claim deed merely conveys whatever interest the grantor has in the property, if any.

The same doctrine applies to mortgages that are recorded before the mortgagor obtains fee title to the property. Title Standard 9.4 of the Uniform Title Standards states that a mortgage with warranties of

title from a mortgagor who does not then have fee simple title to the property, but who subsequently acquires title, is valid, except to the extent that the recording act protects intervening rights of third parties.

Caution must always be exercised with respect to the rights of third parties. Although the doctrine of after-acquired title is automatic and confirms the validity of the deed or mortgage, the prior deed to the grantee may be considered outside of the chain of title, since it appears before the grantor acquired title. Under the recording act, an intervening purchaser or mortgagee from the grantor or mortgagor who subsequently obtained title **may** be protected unless the intervening purchaser or mortgagee had notice of the prior attempted conveyance or encumbrance. Therefore, the original grantee or mortgagee should re-record the instrument after the grantor acquires title, to bring the deed or mortgage within the chain of title.

A significant exception to the after-acquired title doctrine applies to attempted



conveyances of homestead property without spousal joinder. Even though the property may subsequently become non-homestead, an attempted conveyance of homestead without spousal joinder is generally considered void *ab initio*, and the after-acquired title doctrine cannot be applied to vest good title in the grantee. Nevertheless, even though a prior attempted conveyance of homestead without spousal joinder should not be relied upon, neither should it be ignored, and either a deed must be obtained from the prior grantee or title quieted.

Mortgages of homestead property without spousal joinder, on the other hand, are subject to the after-acquired title doctrine, and the mortgage will attach to any interest of the mortgagor if the property becomes non-homestead and the mortgagor still holds title.

HUD Continues with RESPA Reform continued from page 1—

mortgage costs requires that vendors who want to be a part of the package, such as a title insurance agent, lower their fees. In essence, vendors pay to participate in the package by lowering their fee, while the savings generated by the decrease in costs may, or may not, be fully passed on to the consumer.

There was also continued disagreement on how the Yield Spread Premium (YSP) is to be disclosed to the consumer. A representative of the National Association of Mortgage Brokers (NAMB) said the NAMB recommends that the YSP be eliminated.

Interestingly, HUD also disclosed the 2004 contemplated five-page Mortgage Package Offer (MPO) form that was to include title insurance and closing fees as well as a summary of the terms of the loan and other lender-required closing costs. In 2004, HUD would also have permitted a separate package called a Settlement Service Package (SSP), which anyone could have offered and that would have included title services, recording fees and other lender-required settlement services. An owner's policy would have been provided at a separate charge.

At this final workshop, HUD Secretary Alphonso Jackson stressed that the industry's input and consensus are necessary in the "final step" toward making reform a reality. He also assured everyone that HUD did not have a secret drawer in which an already written rule lies drafted and waiting to be proposed. The next step will be

rulemaking and distribution of a proposed rule for comments.

While it is difficult to tell when HUD may take the next step, it is clear that they are focused on a more transparent process that protects consumers from junk fees

and surprises at the closing table, and assists them in shopping for the best overall cost structure.

As always, we will keep you updated as the process continues to develop.

A Friendly Reminder

DID YOU KNOW that the Department of Financial Services **requires** that every licensed title insurance agent shall, on a monthly basis, report their escrow reconciliation(s) and bank statements, together with the appropriate supporting documentation to each title insurer that appointed the agent during the reconciliation period? Did you also know that it's Old Republic's policy that the Corporate Agent's escrow reconciliation be submitted to the Tampa office by the **20th** of each month? The escrow reconciliations consist of: The Reconciliation Sheet; Bank Statement; Outstanding Checklist; Outstanding Deposit Report; Trial Balance Report; Void Checklist; Voucher Report (if Prime Time System); and Sweep Account (if applicable). Be sure to reconcile the escrow account to the trial balance report. If the totals do not match, your escrow account is **NOT** balanced! You must investigate the cause for the difference and rectify the error.

Please send the bank statements, along with the reconciliations for all escrow accounts, to:

Old Republic National Title Insurance Company

ATTN: AUDITING DEPARTMENT
100 South Ashley Drive, Suite 700
Tampa, 33602-5300

THANK YOU!!



Ask Your Underwriter

■ Linda M. Hernandez, Florida State Underwriter

Question: How old a survey can we accept for purposes of deleting the survey exception and issuing a Florida Form 9 Endorsement?

Answer: As long as the lender does not require a new survey and you are dealing with residential property (1-4 family) where the amount of insurance is \$1 million or less, and the insured lands are platted, then you may delete the survey exception on either an Owner's or Mortgagee Policy, or both (see ORT Bulletin #01-02). You must, however: (1) retain for your file either a policy (original or copy) providing survey coverage to the current owner or one of his lenders; or (2) obtain a survey (original or copy), regardless of age and to whom it was certified, as long as it was certified to someone in your chain of title. In either instance, you must: (A) obtain an Affidavit from the current owner, similar in form and content to the one attached to ORT Bulletin 01-02; and (B) make exception for survey-

related matters from the prior policy or revealed by the survey. Remember, that your examination of the title must not disclose any matters not shown on the old survey or title policy relied upon, i.e. easements, rights-of-way, etc.

Question: How do you figure the amount of premium to charge for the Florida Form 9 Endorsement on a simultaneous second mortgage?

Answer: The premium due for the Form 9 on a second simultaneous mortgage is calculated as follows:

Owner's Premium (OP) + Simultaneous Charge on Second Mtg. (SIM on 2nd) x 10%= Form 9 Premium

In other words, you calculate the premium just as you would for a first mortgage Form 9!



Old Republic National
Title Insurance Co.
100 S. Ashley Drive, Suite 700
Tampa, Florida 33602



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FLORIDA BULLETIN 05-02

TO: ALL AGENTS AND TITLE PLANT OPERATIONS
FROM: UNDERWRITING DEPARTMENT
DATE: July 29, 2005
RE: TITLE INSURANCE RE-ISSUE RATES / CLASS-ACTION LITIGATION

As the attached July 26, 2005 directive from Daniel Wold, General Counsel of Old Republic National Title Insurance Company, indicates, Old Republic's national policy on re-issue rates is clear and strong. In Florida, we **require** that our agents charge re-issue rates under the "legally appropriate circumstances" defined in Rule 690-186.003(2)(b) of the Florida Administrative Code:

Provided a previous owner's policy was issued insuring the seller or the mortgagor in the current transaction and that both the reissuing agent and the reissuing Underwriter retain for their respective files copies of the prior owner's policy, the reissue premium rates in paragraph (a) shall apply to:

- (1) Policies on real property which is unimproved except for roads, bridges, drainage facilities, and utilities if the current owner's title has been insured prior to the application for a new policy;**
- (2) Policies issued with an effective date of less than 3 years after the effective date of the policy insuring the seller or mortgagor in the current transaction; or**
- (3) Mortgage policies issued on refinancing of property insured by an original owner's policy which insured the title of the current mortgagor.**

If you have any questions about whether or not re-issue rates apply to your particular circumstances, please do not hesitate to call our Underwriting Department immediately for assistance.

MEMORANDUM

TO: All Agents (Nationwide)

FROM: Daniel Wold, General Counsel
Old Republic National Title Insurance Company

DATE: July 26, 2005

RE: Title Insurance Re-Issue Rates/Class-Action Litigation

As many of you have recently learned, a number of class-action lawsuits have recently been filed against title insurers over the issue of whether proper re-issue rates were charged under applicable and legally appropriate circumstances.

Old Republic's policy has always been to advise its agents to charge re-issue rates where legally appropriate and applicable. Even though each state's laws and regulations vary, Old Republic cannot condone deviation from the accurate application of our rates. We believe it is critical that you consult your appropriate counsel and verify that you are complying with the rules and regulations applicable to re-issue rates in your state. Procedures should also be reviewed from time to time, to ascertain that correct re-issue rates are charged. Equally important is maintaining files and records to evidence compliance. Class-action suits, whether meritorious or not, are very costly and time consuming to defend. A small investment in foresight now may avoid costly litigation in the future.