IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

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| ATTORNEYS' TITLE GUARANTY FUND, INC.<br><br>Plaintiff,<br><br>v.<br><br>ILLINOIS DEPARTMENT OF FINANCIAL and PROFESSIONAL REGULATION; BRYAN A. SCHNEIDER, exclusively in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation; and FRANCISCO MENCHACA, exclusively in his official capacity as Director of the Division of Financial Institutions,<br><br>Defendants. | ) | Case No. |

2018CH08133
CALENDAR/ROOM 10
TIME 00:00
Injunction

**VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF**

The Plaintiff, Attorneys' Title Guaranty Fund, Inc. ("*ATG*"), by and through its attorneys, Krieg DeVault LLP, and as for its Verified Complaint for Injunctive and Other Relief against Defendants, Illinois Department of Financial and Professional Regulation (the "*Department*"), Bryan A. Schneider, exclusively in his capacity as Secretary of the Illinois Department of Financial and Professional Regulation ("*Schneider*") and Francisco Menchaca, exclusively in his capacity as Director of the Division of Financial Institutions ("*Menchaca*"), ATG states as follows:

DOROTHY BROWN CLERK
2018 JUN 28 PM 1:41
FILED

## I. INTRODUCTION

1. This is an action seeking injunctive and other relief relating to regulation of the title insurance industry and attorneys involved in the title insurance industry. More specifically, relating to a new DS-1 Form (the "*Form*") the Department seeks to implement in the regulation of the title insurance industry and attorneys in the title insurance industry. The Form has been

amended since the Department first notified the title insurance industry that it sought to amend the form. A copy of the most recent version of the Form is attached hereto as Exhibit A.

2. The Illinois Title Insurance Act (the "*Act*"), specifically section 18 ("*Section 18*"), permits the Department's Secretary to adopt a form that requires only two disclosures by title insurance business producers to consumers of residential title insurance:

a. "the financial interest of the producer of title business or associate referring the title business;"

b. "a disclosure of an estimate of those charges to be paid as described in Section 19."

*See 215 ILCS 155/18.*

3. Section 19 of the Act ("*Section 19*") describes the following charges:

a. "issuing a title insurance policy, including any service charge or administration fee for the issuance of a title insurance policy;

b. abstracting, searching and examining title;

c. preparing or issuing preliminary reports, property profiles, commitments, binders, or like product;

d. closing fees, escrow fees, settlement fees, and like charges."

*See 215 ILCS 155/19.*

4. On April 3, 2018, the Department issued a memorandum (the "*Memorandum*") announcing the Form had been revised, and that said revised Form would be effective April 4, 2018. A copy of the Memorandum is attached hereto as Exhibit B.

5. The Department also issued Instructions for Completing the Disclosure of Financial Interest Form (the "*Instructions*"). Instructions have been modified from time to time. A copy of the most recent version of the Instructions are attached hereto as Exhibit C.

6. The Memorandum alleged the Act enabled the Department to prepare the Form so

that a producer of title business discloses their financial interest to consumers involved in closings. *See* Ex. B.

7. The Memorandum made explicit that the most common examples of what it attempted to regulate were attorneys and real estate brokers having "financial interests" regarding title agencies. *See* Ex. B.

8. "Financial interest" is not defined in the Memorandum, but the Act defines "financial interest" as "any ownership interest, legal or beneficial, except ownership of publicly traded stock." *215 ILCS 155/3(6).*

9. "Financial interest" does not refer to a share of any title insurance premium, but rather the ownership interest in the title agent.

10. The Memorandum stated its hope was that "the revision will make it clearer to sellers and buyers the cost of title insurance and settlement services for a home sale." *See* Ex. B.

11. The Instructions are the Department's directives on how the Form should be used. *See* Ex. C.

12. Due to concerns raised by the title insurance industry, the Department delayed the implementation of the Form three times. It first delayed implementation of the Form until April 15, 2018. After further concerns were raised, the Department delayed implementation until May 15, 2018. After still more concerns and negotiation with the title insurance industry, the Department delayed implementation until July 1, 2018. July 1, 2018 remains the day for implementation.

13. As currently drafted, the Form exceeds the scope of the Act, imposes requirements which are beyond the Department's statutory authority, is ambiguous, confusing and is likely to mislead consumers, fails to address market conduct issues, does not complete the

Form's alleged purpose of assisting consumers, harms consumers, harms attorney-title agents and seeks to regulate attorneys acting in their capacity as attorneys.

14. Moreover, the Department did not follow the required rulemaking process for the Form so it cannot be implemented.

15. If the Form is implemented, it will affect ATG's ability to function as a title insurance underwriter and negatively impact the livelihood of approximately 2,300 of ATG's attorney-title agents throughout Illinois.

16. The Form would also harm consumers by hampering their access to attorney representation in real estate transactions and leading consumers to believe they may be breaking the law if they hire an attorney as part of their real estate transaction.

## II. PARTIES AND JURISDICTION

17. ATG is the only Illinois domiciled title insurance underwriter doing business in Illinois, including Chicago. It is a title insurance company with more than 2,300 lawyer agents throughout the state. It is the only bar related title insurance company in Illinois, founded and owned by Illinois lawyers. Since its beginning, its mission has been to afford consumers access to independent counsel in real estate transactions. Illinois lawyers performed title examinations and issued title opinions dating back to the mid 1800's. When title insurance was growing in popularity in the late 1950's, those title companies working directly with real estate brokers, began displacing lawyers, arguing that title insurance eliminated the need for lawyers. The lawyers of ATG responded by creating a title underwriter so lawyers' opinions could be backed by an insurance policy. ATG relies upon attorney title agents for its business. If attorney title agents are not allowed to operate, ATG could not function and would cease to exist.

18. The Department is a Department of Illinois State Government. It is a regulatory body existing under the Illinois executive branch of government. The Department is responsible for regulating the title insurance industry.

19. Venue is proper in this Court pursuant to Section 2-101 of the Illinois Code of Civil Procedure.

## III. BACKGROUND

### A. ATTORNEYS' ROLE IN ILLINOIS REAL ESTATE TRANSACTIONS

20. In Illinois, attorneys perform title examinations and today ATG still issues policies based upon an attorney opinion.

21. Attorneys play a vital role in residential real estate transactions. They are in the unique position of being the only professional involved in the transaction advocating on consumers' behalf.

22. Attorneys serve a dual function in some residential real estate closings: attorney for the buyer or seller and title agent. Attorneys' dual role is advantageous for consumers, ethically proper and should be promoted as a matter of public policy.

23. In the role of attorney for the buyer or seller, the attorney, most notably and among other things, reviews, revises, negotiates and explains the terms of the real estate contract to the consumer. Also, attorneys negotiate and solve inspection issues, monitor mortgage contingencies prepare the deed to transfer title, powers of attorney, a statement of closing costs and state, county and municipal transfer tax forms.

24. As an attorney agent, the attorney performs many functions in real estate transactions. While no two transactions are identical and not every transaction involves every possible attorney action, a real estate transaction may include any or all of the following for an attorney agent: evaluate the title search to determine insurability of title, clear underwriting

objections, issue the policy on behalf of the title insurance company, issue the title commitment, conduct a title search, close the transaction, order a title search package, identify liens or encumbrances recorded against title, ensure the clearing of liens recorded against the title, verify the individual selling the property held title to the property, recommend waiver of exceptions to title, attend closings, review and explain legal documents to the consumer, maintain records, ensure exceptions to title are cleared so good title is transferred, obtain a release or payoff of a mortgage recorded against the property, ensure the payoff letter matches the lien, communicate with the lender throughout the process to incorporate any changes to the loan amount or identity of the lender, identify the information that should be included on endorsements to the title policy, become exposed to liability for exceptions deemed waived and comply with title company guidelines to ensure the attorney agent does not waive exceptions without proper clearance.

25. The Form without adjustments portrays the attorney as a party whom the consumer should eye warily. This Form will logically result in consumers eschewing counsel.

26. If the Form reduces the attorneys' role in real estate closings, consumers will be harmed.

27. If the Form reduces the attorneys' role in real estate closings, attorney agents will be harmed.

28. The Department should not issue a Form that harms consumer access to attorneys.

## B. PROBLEMS WITH THE FORM

29. There are multiple problems with the Form. This section explains some of the problems, but this is not an exhaustive listing of all problems with the Form. The Form is hereby incorporated by reference.

## 1. THE FORM MISREPRESENTS FEES ASSOCIATED WITH ATTORNEY TITLE AGENTS

30. The Form states: "WHEN THE PRODUCER/ASSOCIATE is also your title agent (attorney, broker or lender), you will be paying for the legal fee, commission or loan charges AND the title agent's fee." *See* Ex. A.

31. This statement is not true.

32. The agent fee is paid out of the title insurance and closing fees, it is not an additional charge to the consumer.

33. The consumer would not pay both an attorney's fee and title agent fee.

34. The consumer would pay an attorney's fee and title insurance and closing fees.

## 2. MISSTATEMENT OF THE LAW TO THE DETRIMENT OF ATTORNEY TITLE AGENTS

35. The Form also warns consumers that they could be fined or even criminally prosecuted if they accept discounted legal fees in exchange for allowing their attorney to refer title insurance business.

36. The Form provides the following statement, without explanation:

> **It is a violation of state and federal law to offer or accept free or discounted attorney fees, real estate broker commissions, lender charges, etc., for the referral of title business to a title agent, insurer or escrowee and may result in criminal prosecution and/or a fine for each offense. [215 ILCS 155/24 and 23; 12 USC § 2607(d)] (emphasis in the original).

*See* Ex. A, page 2.

37. The Form's citation to 215 ILCS 155/24 and 23; 12 USC § 2607(d) are misplaced.

38. The Form's citation to 215 ILCS 155/23-24 ("*Sections 23-24*") is misleading, misstates the law, may cause consumers to believe they are violating the law and disadvantages attorney agents.

39. The Form suggests that a consumer can be fined or criminally prosecuted for accepting a discounted legal fee for the referral of title business. This is not what Sections 23-24 state, nor does the consumer refer any title business.

40. Section 23 states, in full:

> Sec. 23. Violation; penalties. (a) Any violation of any of the provisions of this Act and, beginning January 1, 2013, any violation of any of the provisions of Article 3 of the Residential Real Property Disclosure Act shall constitute a business offense and shall subject the party violating the same to a penalty of $1000 for each offense. (b) Nothing contained in this Section shall affect the right of the Secretary to revoke or suspend a title insurance company's or independent escrowee's certificate of authority or a title insurance agent's registration under any other Section of this Act.

41. Section 24 states, in full:

> Sec. 24. Referral fee; penalty. Except as permitted by this Act or by federal law, regulations or opinion letters, no person shall pay or accept, directly or indirectly, any commission, discount, referral fee or other consideration as inducement or compensation for the referral of title business or for the referral of any escrow or other service from a title insurance company, independent escrowee or title insurance agent. Any violation of this Section 24 is a Class A misdemeanor.

42. The Illinois Title Insurance Act defines "title insurance business" as:

(A) Issuing as insurer or offering to issue as insurer title insurance; and

(B) Transacting or proposing to transact one or more of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of title insurance;

(i) soliciting or negotiating the issuance of title insurance;

(ii) guaranteeing, warranting, or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases, and for all liens or charges affecting the same;

(iii) handling of escrows, settlements, or closings;

(iv) executing title insurance policies;

(v) effecting contracts of reinsurance;

(vi) abstracting, searching, or examining titles; or

(vii) issuing insured closing letters or closing protection letters;

(C) Guaranteeing, warranting, or insuring searches or examinations of title to real property or any interest in real property, with the exception of preparing an attorney's opinion of title; or

(D) Guaranteeing or warranting the status of title as to ownership of or liens on real property and personal property by any person other than the principals to the transaction; or

(E) Doing or proposing to do any business substantially equivalent to any of the activities listed in this subsection, provided that the preparation of an attorney's opinion of title pursuant to paragraph (1)(C) is not intended to be within the definition of "title insurance business" or "business of title insurance".

*See 215 ILCS 155/3(2).*

43. The Act defines "Refer" as "to place or cause to be placed, or to exercise any power or influence over the placing of title business, whether or not the consent or approval of any other person is sought or obtained with respect to the referral." *See 215 ILCS 155/3(7).*

44. Section 24 governs the relationship between agents and referral sources, not agents and consumers.

45. Consumers do not refer title business.

46. Placing this acknowledgement on the Form, and requiring consumers to sign the acknowledgment gives the misleading impression that the consumer may be violating Sections 23-24.

47. As a result, this would discourage the consumer from using attorney agents, which would be harmful to ATG's business model and attorney agents generally.

48. Attorney fees are strictly a matter between the client and lawyer. As such, it is unclear and impossible to determine how a consumer would know if they are receiving a discount on attorney fees or if a discount actually exists.

49. The Form's citation to 12 USC § 2607(d) ("*Section 2607*") is also misleading, misstates the law, may cause consumers to believe they are violating the law and disadvantages

attorney agents. The relevant portions of Section 2607 state:

> (a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges. 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.
>
> (c) Fees, salaries, compensation, or other payments. Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or...(4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred ... (B) such person is not required to use any particular provider of settlement services and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): ... or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

*12 U.S.C. § 2607 (emphasis added).*

50. Section 2607 governs the relationship between agents and referral sources, not agents and consumers.

51. Consumers do not refer title business.

52. Placing this acknowledgement on the Form, and having consumers sign said acknowledgment gives the misleading impression that the consumer may be violating Section 2607, if they accept discounted attorney fees.

53. This would be harmful to ATG's business model and attorney agents generally.

54. Further, it is unclear and impossible to determine how a consumer would know if

they are receiving a discount or if a discount actually exists.

55. Moreover, nowhere in Section 2607 does it state that a consumer cannot receive discounted attorney fees.

56. Further still, Section 2607 specifically allows for fee reimbursement to title agents for work actually performed, and specifically carves out an exemption for attorneys issuing title insurance as an "affiliated business."

### 3. THE FORM IS UNDULY VAGUE, AMBIGUOUS AND CONFUSING

57. Parts of the Form are also ambiguous and confusing, therefore, making it difficult to properly complete and in parts it does not provide the consumer with useful information.

58. For example, in the first paragraph of the Form the words "Producer," "Associate" and "Title Business" are used but not defined.

59. "Producer," "Associate" and "Title Business" may be referring to how those terms are defined in the Act, but it is unclear to whom it applies.

60. The Form was allegedly created for the benefit of consumers.

61. It is unlikely consumers will know the technical meaning of terms defined in the Act.

62. Another ambiguity is where the Form also requires the Producer/Associate to certify the Form was "timely provided."

63. "Timely provided" is undefined and ambiguous as it relates to title insurers.

64. Further, the Act does not contain a requirement for the disclosure to be provided to title insurers, let alone a time in which the disclosure must be provided to them.

65. Yet another ambiguity is where the Form states, "A SIGNIFICANT PORTION of title charges you pay go to the title agent." *See Form, page 1.*

66. However, "a significant portion" is not defined.

67. Title insurance rates are not regulated in Illinois. This language may lead consumers to believe that the Producer/Associate (including attorney agents) is being "over compensated."

68. The Form includes a request for estimated charges at the closing for the title insurance policy. However, it is unclear what type of policy is being discussed: the owners' policy, loan policy, endorsements to the policy or other charges.

## 4. PROBLEM WITH THE FORM'S INSTRUCTIONS

69. The Instructions that are supposed to give guidance regarding the Form demonstrate additional problems with the Form.

70. The Instructions are misleading and outside the scope of the department's authority in that they state the Form indicates the title insurer has confirmed the estimated agent fee and the agent's registration.

71. However, Section 18 of the Act only requires the Producer/Associate disclose its financial interest in the applicable title business and the Section 19 charges.

72. The Instructions seeks to have title insurers retain copies of completed Forms.

73. However, the Act does not require title insurers to retain copies of completed Forms.

74. Further, if the Form is being delivered to consumers and title insurers contemporaneously, it is impossible for Producers/Associates to provide title insurers with proof of receipt from consumers at the same time.

75. The Instructions exceed the Department's authority.

76. Finally, the Department, expects consumers to review and sign the Form even though the Form does not give them the intended guidance.

77. This is untenable and brings into question the true purpose of the Form and the

utility of same.

## 5. THE FORM'S REQUEST FOR ATTORNEY FEE INFORMATION IS IMPROPER, OUTSIDE THE DEPARTMENT'S AUTHORITY AND DOES NOT ASSIST CONSUMERS

78. The Form seeks to require attorney-agents to list their estimated attorney's fee.

79. However, it is unclear what attorney fees have to do with the Act, the Department or title insurance generally.

80. Forcing attorneys to place their fees on the Form may give the false impression that consumers are being overcharged if they use an attorney agent.

81. Forcing attorneys to place their fees on the Form is detrimental to attorney agents and ATG generally.

82. Sections 23-24 make no reference to attorney fees.

83. Section 2607 specifically allows for earned attorney fees.

84. The Department has no authority to regulate attorneys or attorney fees.

85. Only the Illinois Supreme Court can regulate Illinois attorneys and their fees.

86. The Illinois Supreme Court has set up a regulatory scheme for regulation of Illinois attorneys. That mechanism is the Attorney Registration and Disciplinary Commission ("*ARDC*").

87. Illinois Professional Rule of Conduct 1.5 provides guidance on attorney fees such as the reasonableness of the fee, the time and complexity of the matter, or the fees customarily charged in the community.

88. The Department cannot compel the disclosure of attorney fees.

89. The Department must submit to the Illinois Supreme Court's authority when it seeks information about attorney fees.

90. Attorney fees fall also within the protections of the attorney client privilege and

the attorney client fiduciary relationship.

91. The amount of the attorney's fees to be charged is based on an agreement, often an engagement letter, between the attorney and the client, which agreement should remain private, unless the attorney is required to disclose his fees to a court or the client grants permission to disclose the information.

92. Since the Form will be disclosed to other parties this private information between attorney and client will be disclosed to the public.

93. Attorneys would have to seek permission from their clients before they could disclose the applicable attorney fees.

94. It is unnecessary to disclose the attorney fees on the Form because an attorney already has an ethical obligation to disclose his or her fees or hourly rate to the client.

95. Adding attorney fees to the Form does not provide the consumer with information it does not already have.

96. It is unclear how attorney fee information on the Form helps the consumer understand the title insurance and closing costs and to be able to comparison shop.

97. Third parties who may be reviewing the information will get an inaccurate picture of the fees being charged.

98. The reasons for attorney fee variances from transaction to transaction can be because some transactions are more complex than others, some clients may receive discounts because of the volume of work they send to the attorney or because the number of years they have been a client of the firm and sometimes fees may be bundled together with other services that are being provided to the client, making it difficult to carve out the fees solely related to the closing.

99. The Form may interfere or hamper the practice of law and/or attorney client

relationships regarding the attorney fee to be charged.

100. To the extent that a lawyer engages in misconduct with respect to fees the lawyer would be subject to discipline by the ARDC or the Department when it relates to the lawyer's conduct as a title agent.

## 6. BEYOND ATTORNEY FEES, THE DEPARTMENT, VIA THE FORM, HAS ACTED OUTSIDE THE SCOPE OF ITS AUTHORITY

101. In addition to the items noted above there are several other parts of the Form where the Department has exceeded the scope of its statutory authority.

102. The Form seeks to have title insurers affirm agents are duly registered and to retain the Form for their records. However, neither is required under the Act.

103. The Department has a mechanism to ameliorate bad acts by title underwriters, agents and others outside of the Form: through its enforcement power.

104. The Form also requires the agent to disclose the share of its fee it will receive of the statutorily authorized services that are actually performed.

105. Again while the Act requires a producer of title insurance to disclose its "financial interest" it does not require it to refer to the share of the title insurance premium it receives or the share of any other portion of the other title or closing fees that it receives.

106. How fees are split between the agent and the insurer is undoubtedly of little consequence to the consumer.

107. The Form also requires real estate brokers and lenders to provide their estimated commissions, fees and charges if they are a producer or associate of title business.

108. However, nowhere in the Act, just as with attorneys, are real estate brokers and lenders required to disclose their fees.

## D. THE RULEMAKING PROCESS WAS NOT FOLLOWED IN THIS CASE AND INTERESTED PARTIES WERE NOT PROVIDED AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS

109. The Department failed to follow the standard rulemaking process before issuing the Form.

110. No formal commentary period or public hearings were held to allow ATG, its attorney agents or consumers to provide its input and comment on the Form.

111. The statute relevant to this situation is the Illinois Administrative Procedure Act, specifically 5 ILCS 100/1-70 (the "*Statute*"), which states in full:

> "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act, or (vi) guidance documents prepared by the Illinois Environmental Protection Agency under Section 39.5 or subsection(s) of Section 39 of the Environmental Protection Act. (emphasis added).

112. The Form is more than a "standardized form." It is a "statement of general applicability that implements, applies, interprets, or prescribes law or policy." *5 ILCS 100/1-70.*

113. The Department cannot interpret or prescribe law by placing said attempts within a form. This would circumvent the official rulemaking process via a technical, incomplete interpretation of the Statute.

114. Simply because the Department is allowed to prescribe standardized forms and to prepare a disclosure form under the Act, does not mean that it does not have to follow the rulemaking process for rules articulated in the Form.

115. There are several portions of the Form and the Instructions that fall within the definition of "rule" (in other words that implements, applies, interprets, or prescribes law or

policy) that should have been subject to the rulemaking process, or are generally goes outside the Department's authority. Said portions include, but are not limited to:

a. The Form

   i. Page 1

      1. The top portion of the Form's first page contains eight bullet point citations. Four of the citations cite to the Illinois Compiled Statutes. The citations to the Illinois Compiled Statutes is implementing, applying, interpreting or prescribing law or policy.

      2. The bottom portion of page one of the Form states, "A Producer of Title Business/Associate must disclose its financial interest. This almost always involves the title agent, e.g. your attorney/law firm as title agent, your real estate broker referring to a title agency owned by the brokerage, your lender referring to a title agency owned by the lender, etc." This is an attempt to apply Sections 23 and 24, Section 2607 and the Act generally.

      3. The last section of page 1 of the Form requires the "Producer/Associate" to certify the disclosure was timely. This is an attempt to implement, apply, interpret or prescribe 215 ILCS 155/18(b), which the Form cites as the second to last bullet point in the top section of the Form.

   ii. Page 2

      1. The top portion of page 2 of the Form is dedicated to "Estimated Charges." This seeks to implement, apply, interpret or prescribe sections 18 and 19 of the Act.

      2. Page 2 also contains citations to Section 2607, Sections 23 and 24 and section 8100.2402(a) of the Illinois Administrative Code. This is an attempt to implement, apply, interpret or prescribe these sections of law.

b. The April 3, 2018 Memorandum

   i. The insurer must review and approve the disclosure, including accurately verifying the percentage the agent will receive for statutorily authorized services that the agent will perform, including an estimate of the fee. This is an attempt to implement, apply, interpret or prescribe law.

ii. The seller and buyer acknowledge the disclosure by signing the Form. This is an attempt to implement, apply, interpret or prescribe law.

iii. The online Form is fillable, which means the producer of title business can complete the Form, forward to the insurer for review and then, ultimately, forward to the seller and buyer. This is an attempt to implement, apply, interpret or prescribe policy.

iv. It is strongly recommended that the agent, insurer and escrowee each maintain a copy for their records. While the Act requires only one of these entities retain the disclosure, best practices would dictate maintaining a record as proof of authorization to issue the policy or close the transaction. This is an attempt to implement, apply, interpret or prescribe policy.

c. Instructions for Completing the Disclosure of Financial Interest Form

i. Page 1

1. Again, the top part of the Instructions cite to various Illinois statutes, which is an attempt to implement, apply, interpret or prescribe law.

2. The top portion of the Instructions also contains a bullet point noting "other consumer protection information is provided" a clear attempt to implement, apply, interpret or prescribe law and policy.

ii. Page 2

1. The top part of page 2 of the Instructions states, "The Department recommends that as a best practice, ALL title entities involved in the transaction retain proof of the sending and delivery/receipt of the Disclosure." This is an attempt to implement, apply, interpret or prescribe policy.

2. Under the "Estimated Charges" section the Instructions states, "Fill in the estimated charges for seller and buyer. The breakdown of charges is derived from the Act. [215 ILCS 155/19]." This is an attempt to implement, apply, interpret or prescribe Section 19.

3. The last part of page 2, "Recordkeeping" is an attempt to implement, apply, interpret or prescribe law and policy. It states, "The Act requires that the Disclosure be provided to the parties prior to the issuance of the title commitment and that it be maintained by the title insurer, agent or

> independent escrowee for a minimum of three years. The Department recommends that as a best practice that ALL title entities involved in the transaction, i.e. the insurer, agent/agency and escrowee, maintain a copy for their records. This ensures that the entities are properly authorized to complete the transaction. [215 ILCS 155/18(b)]."

116. The Form, particularly the sections listed above, attempts to implement, apply, interpret and/or prescribe law and/or policy.

117. The Department cannot avoid the rulemaking process by placing rules inside of a form that it creates.

118. The Form, in general, imposes a burden to make certain calculations regarding, title, fees and closing charges that will be received by the agent related to the transaction. Said charges may change from closing to closing and from company to company. It will provide no clear understanding to consumers and in fact, will clearly serve to confuse consumers.

119. The rulemaking process should have been followed and because said process was not followed, these portions of the Form cannot be enforced.

## V. CAUSES OF ACTION

### COUNT I

### PRELIMINARY AND PERMANENT INJUNCTION

120. ATG realleges and incorporates paragraphs 1 through 116 as and for paragraph 117 of this Count I.

121. Implementation of the Form will have a deleterious effect on ATG, its attorney agents and consumers.

122. The Form goes outside the scope of the Department's authority.

123. The Form attempts to regulate attorneys.

124. The Form is vague and ambiguous.

125. The Form harms the attorney client relationship and the attorney client fiduciary responsibilities.

126. The rulemaking process was not followed, therefore ATG, its attorney agents and consumers did not have the opportunity to comment and otherwise oppose the Form.

127. The Form has a harmful effect on ATG given that it is owned and operated by attorney title agents and that it relies on attorney title agents for its existence.

128. Without attorney title agents, ATG's business model could not operate.

129. Further, the disparate impact on attorney agents will harm ATG's ability to earn income.

130. ATG has a clear and protectable interest in its ability to operate as a title underwriter.

131. The Form has a harmful effect on attorney title agents given that the Form misrepresents the law and disparately treats attorney title agents.

132. Attorney agents have a clear and protectable interest in their occupation as attorney title agents.

133. The Form has a harmful effect on consumers given that the Form does not achieve its intended result, harms consumer access to attorneys, may cause consumers to believe they are in violation of the law and confuses consumers about the law and title insurance generally.

134. Consumers have a clear and protectable interest in access to attorneys and to not be misled about the law and title insurance by the Department.

135. ATG, its attorney agents and consumers have a substantial likelihood of success on the merits since the Department went outside its statutory authority and the Department did not follow the prescribed rulemaking process.

136. ATG, its attorney agents and consumers will suffer irreparable harm since the

Form will prevent ATG from functioning as an underwriter, will undermine ATG's business model, will interfere with attorney title agents ability to work in their chosen occupation, will harm consumer access to attorneys and will confuse consumers about the law and title insurance industry.

137. There is no adequate remedy at law.

138. Money damages cannot properly compensate ATG, its attorney agents or consumers.

WHEREFORE, the Plaintiff, Attorneys' Title Guaranty Fund, Inc., respectfully prays this Honorable Court for an order against Defendants, Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, exclusively in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation and Francisco Menchaca, exclusively in his official capacity as Director of the Division of Financial Institutions and in favor of Attorneys' Title Guaranty Fund, Inc. as follows:

A. Issuing a Preliminary and Permanent Injunction against Illinois Department of Financial and Professional Regulation to prohibit the implementation of the new DS-1 Form described in this Complaint and issuing an order to delete the new DS-1 Form from their website; and

B. Any further and/or alternative relief as this Court deems fair, just and equitable.

**COUNT II**

**DECLARATORY JUDGMENT**

139. ATG realleges and incorporates paragraphs 1 through 116 as and for paragraph 136 of this Count II.

140. 735 ILCS 5/2-701(a) provides in relevant part as follows: "The court may, in cases of actual controversy, make binding declarations of rights having the force of final judgments . . . at the instance of anyone interested in the controversy . . .." *735 ILCS 5/2-601(a).*

141. The parties to this action are adverse since they disagree as to whether the Form can be implemented.

142. Pursuant to 735 ILCS 5/2-7011(a), the parties are interested parties.

143. The Department has made unambiguous its intention to implement the Form.

144. ATG alleges that the Department does not have the ability to implement the Form.

145. The Form is outside of the scope of the Department's statutory authority.

146. The Form is ambiguous and vague.

147. The Form does not complete its stated purpose of helping consumers.

148. The Department, via the Form, is attempting to regulate attorneys.

149. The Form contains "rules" which required the Department to follow statutory rulemaking procedures. The Department did not follow the statutorily mandated rulemaking procedures.

150. The respective rights of the parties, as to whether the Department has a right to implement the Form, must be determined.

151. There is an actual controversy in that ATG and the Department disagree as to whether the Department has a right to implement the Form.

WHEREFORE, the Plaintiff, Attorneys' Title Guaranty Fund, Inc., respectfully prays this Honorable Court for an order against Defendants, Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, exclusively in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation and Francisco Menchaca, exclusively in his official capacity as Director of the Division of Financial Institutions and in favor of Attorneys' Title Guaranty Fund, Inc. as follows:

A. A declaration that Illinois Department of Financial and Professional Regulation improperly, exceeded its statutory authority and failed to follow the statutorily prescribed rulemaking process and therefore it does not have the ability to

implement its new DS-1 Form; and

B. For such further and/or alternative relief as this Court deems fair, just and equitable.

## COUNT III

## FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

152. ATG realleges and incorporates paragraphs 1 through 116 as and for paragraph 149 of this Count III.

153. Before the adoption of a rule, an agency shall take the actions required by the Illinois Administrative Procedure Act.

154. The general rulemaking provisions can be found at 5 ILCS 100/5-40.

155. The Illinois Administrative Procedure Act requires an agency take certain actions before a rule is implemented. Some of the required actions include providing different notices via statutorily prescribed mechanisms and for statutorily prescribed time periods, accept data, views, arguments or comments and hold public hearings.

156. In the situation at hand, the Department did not provide notice, did not accept or consider submissions of data, views, arguments or comments from interested parties and did not hold any public hearings, among other violations of the Illinois Administrative Procedure Act.

157. The Department did not comply with the Illinois Administrative Procedure Act before the enactment of the Form and the rules within the Form.

158. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule. *5 ILCS 100/5-35.*

159. The Form should not be implemented because the Department failed to comply with the procedural requirements in the Illinois Administrative Procedure Act.

WHEREFORE, the Plaintiff, Attorneys' Title Guaranty Fund, Inc., respectfully prays this Honorable Court for an order against Defendants, Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, exclusively in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation and Francisco Menchaca, exclusively in his official capacity as Director of the Division of Financial Institutions and in favor of Attorneys' Title Guaranty Fund, Inc. as follows:

A. An order prohibiting the Illinois Department of Financial and Professional Regulation from implementing its new DS-1 Form; and

B. For such further and/or alternative relief as this Court deems fair, just and equitable.

**COUNT IV**

**WRIT OF PROHIBITION**

160. ATG realleges and incorporates paragraphs 1 through 116 as and for paragraph 157 of this Count IV.

161. The Illinois Supreme Court is the only entity with jurisdiction to regulate attorneys.

162. Accordingly, the regulation of attorneys is judicial and/or quasi-judicial in nature.

163. The Department, either intentionally or unintentionally, crosses over into the regulation of attorneys via the Form.

164. This Court has authority to issue a writ of prohibition against the Department because this Court's jurisdiction is superior to the Department's jurisdiction.

165. The Department's attempt to regulate attorneys is outside the Department's jurisdiction, or at the very least is beyond the Department's legitimate authority.

166. ATG is without any remedy other than a writ of prohibition.

WHEREFORE, the Plaintiff, Attorneys' Title Guaranty Fund, Inc., respectfully prays this Honorable Court for an order against Defendants, Illinois Department of Financial and

Professional Regulation, Bryan A. Schneider, exclusively in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation and Francisco Menchaca, exclusively in his official capacity as Director of the Division of Financial Institutions and in favor of Attorneys' Title Guaranty Fund, Inc. as follows:

A. A writ of prohibition preventing the Illinois Department of Financial and Professional Regulation from implementing its new DS-1 Form; and

B. For such further and/or alternative relief as this Court deems fair, just and equitable.

Respectfully submitted,

**ATTORNEYS' TITLE GUARANTY FUND, INC.**

By: _____
One of its Attorneys

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STATE OF Illinois )
)
COUNTY OF Cook )

**VERIFICATION AFFIDAVIT**

I, August R. Butera, Senior Vice President and General Counsel of Attorneys' Title Guaranty Fund, Inc. being first duly sworn on oath, depose and state:

1. That I have read the foregoing Complaint. I am a representative of the Plaintiff and have knowledge concerning the facts alleged.

2. That, if called as a witness in the above-captioned cause, I could testify competently to the facts stated in the foregoing Complaint.

3. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in the foregoing Complaint are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

Further affiant sayeth not.

ARButera

Title: Sr V.P & General Counsel

Subscribed and Sworn to
before me this 28th day
of June, 2018.

OFFICIAL SEAL
LORENE L GALLAGHER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/06/18

Lorene L Gallagher
Notary Public

DS-1 Form
Revised 6-2018

**Illinois Department of Financial and Professional Regulation**
**Division of Financial Institutions**

# DISCLOSURE OF FINANCIAL INTEREST

**[By a Producer of Title Business or Associate – 215 ILCS 155/18(b)]**

Property Address: _____ Date: _____

Seller(s): _____ Buyer(s): _____

## BE A KNOWLEDGEABLE CONSUMER
## *PLEASE READ*

- ***A PRODUCER OR ASSOCIATE OF TITLE BUSINESS***, (attorney, broker or lender), must disclose its financial interest (ownership) in a Title Agent, Insurer, Independent Escrowee. [215 ILCS 155/18(b)]
- ***YOUR ATTORNEY, BROKER OR LENDER CANNOT*** force you to use an agent, insurer or escrowee of their choosing. ***YOU HAVE THE RIGHT*** to choose the title agent, insurer or escrowee. [215 ILCS 155/18.1]
- ***YOUR TITLE AGENT AND THE INSURER HAVE A CONTRACT*** that details what the agent will be paid. The insurer's agent(s) must also be duly registered with the Department [215 ILCS 155/16(a)].
- ***A SIGNIFICANT PORTION*** of title charges you pay go to the title agent.
- ***WHEN THE PRODUCER/ASSOCIATE*** is also your title agent (attorney, broker or lender), you will be paying for the legal fee, commission or loan charges AND the title agent's fee. (See Estimated Charges below).
- ***YOU ARE PAYING THESE FEES*** so consider shopping around before signing this form.
- ***THIS FORM MUST BE PROVIDED*** to you before the title commitment is issued, not at the end of the transaction. [215 ILCS 155/18(b)]
- ***DIRECT ANY QUESTIONS*** to your attorney, broker or lender.

## DISCLOSURE OF ASSOCIATED BUSINESS

A Producer of Title Business/Associate must disclose its financial interest. This almost always involves the title agent, e.g. your attorney/law firm as title agent, your real estate broker referring to a title agency owned by the brokerage, your lender referring to a title agency owned by the lender, etc.

**The financial interest of the Producer/Associate is with the following:**

Title Agent/Service Agent/Agency/Escrowee: _____

**The Producer/Associate certifies that this disclosure was timely provided to: 1) Seller(s) and Buyer(s) or their representatives, and 2) the title insurer (for purposes of authorizing policy issuance/services, affirming the agent(s) are duly registered and for retaining this disclosure for its records).**

Signature of Producer/Associate Representative:_____ Date: _____

Title Insurance Company (Insurer) issuing the policy will be: _____

***EXHIBIT A***

# ESTIMATED CHARGES

Fees charged at your closing include: 1) title insurance policy, service charges or administration fee; 2) abstracting, searching and examining title; 3) preparing or issuing preliminary reports, property profiles, commitments, binders or like product; 4) closing fees, escrow fees, settlement fees and like charges. [215 ILCS 155/19]

| | ESTIMATED SELLER CHARGES | ESTIMATED BUYER CHARGES |
|---|---|---|
| 1. Title policy, servicing, or admin. | $ _____ | $ _____ |
| 2. Abstracting, searching, examining | $ _____ | $ _____ |
| 3. Preliminary report, commitment, etc. | $ _____ | $ _____ |
| 4. Closing, escrow, settlement, etc. | $ _____ | $ _____ |
| **Total estimated title charges** | $ _____ | $ _____ |
| **Estimated title agent fee*** | $ _____ | $ _____ |
| **Estimated fee of the referring producer of title business (choose only the one applicable fee) **** | | |
| Attorney's fee, | $ _____ | $ _____ |
| Broker's commission/other fees | $ _____ | $ _____ |
| Lender's charge(s) | $ _____ | $ _____ |

*Under the agreement between the title agent and the insurer, the agent will receive a certain amount of money for statutorily authorized services that must actually be performed and, other than such compensation, the exchange of a thing of value as inducement or compensation to obtain title business is prohibited under state and federal law. [12 USC §2607; 215 ILCS 155/24; and 8100.2402(a)].

**It is a violation of state and federal law to offer or accept free or discounted attorney fees, real estate broker commissions, lender charges, etc., for the referral of title business to a title agent, insurer or escrowee and may result in criminal prosecution and/or fine for each offense. [215 ILCS 155/24 and 23; 12 USC §2607(d)]

# ACKNOWLEDGEMENT

I/We have read this disclosure and understand that the Producer/Associate (see Disclosure of Associated Business section above): 1) is referring me/us to purchase title services from the above title insurer/service provider(s); and 2) will receive money or other benefit for the work provided, which is a direct result of this referral.

Seller: _____ Buyer: _____

Seller: _____ Buyer: _____

MEMORANDUM

To: All title insurance companies, title insurance agents, independent escrowees and citizens of Illinois

From: Illinois Department of Financial and Professional Regulation, Division of Financial Institutions

Date: April 3, 2018

Re: Revision of the Disclosure of Financial Interest form (DS-1)

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The Department of Financial and Professional Regulation, Division of Financial Institutions announces that the Disclosure of Financial Interest form, also known as the DS-1 form, has been revised.

**This revised disclosure form is effective at 12:01 am, April 4, 2018, and the current form will no longer be used.**

The Title Insurance Act (Act) authorizes the Department to prepare the disclosure form so that a producer of title business (usually the attorneys, real estate brokers or lenders in transactions) discloses their financial interest to any home seller and buyer involved in the closing process. This includes the title insurer, independent escrowee or title agent/agency involved in the closing.

The most common examples of this include an attorney having a financial interest in being the title agent, or a real estate broker having a financial interest in a title agency owned by the broker's parent company.

It is hoped the revision will make it clearer to sellers and buyers the cost of title insurance and settlement services for a home sale.

**Insurers, agent and escrowees should know the following:**

- The names of all title insurance providers must be disclosed;
- The insurer must review and approve the disclosure, including accurately verifying the percentage the agent will receive for statutorily authorized services that the agent will perform, including an estimate of the fee;

***EXHIBIT B***

- Estimated charges include seller and buyer charges, the estimated agent fee and the seller's (or buyer's) attorney's fee;

- The seller and buyer acknowledge the disclosure by signing the form;

- The online form is fillable, which means the producer of title business can complete the form, forward to the insurer for review and then, ultimately, forward to the seller and buyer; and

- It is strongly recommended that the agent, insurer and escrowee each maintain a copy for their records. While the Act requires only one of these entities retain the disclosure, best practices would dictate maintaining a record as proof of authorization to issue the policy or close the transaction.

**Consumers should know the following:**

- Under the Act, sellers and buyers have the right to choose the title agent, insurer and escrowee, not the attorney, broker or lender.

- If the attorney acts as a title agent, the seller or buyer will be paying for both the attorney and agent's fee.

- Title fees can vary, so it is advantageous to shop around.

- The disclosure form must be provided at the beginning of the transaction process, i.e. before the title commitment is issued.

- If a seller or buyer has any questions, they should direct them to their attorney or title insurer.

The revised disclosure form and the instructions for completing it are available online at:

https://www.idfpr.com/Forms/F2350.pdf (form) and
https://www.idfpr.com/Forms/F2352.pdf (instructions).

# INSTRUCTIONS FOR COMPLETING THE DISCLOSURE OF FINANCIAL INTEREST FORM (DS-1)

## PURPOSE

This form is required under the Title Insurance Act (Act) and has been updated to inform the parties purchasing title insurance products and services, i.e. sellers and buyers, that:

- the parties have a right to choose who provides title insurance products and services [215 ILCS 155/18.1 and 12 USC §2608(a)];
- other consumer protection information is provided;
- the producers of title business or associate of producers of title business have disclosed the title insurers, title agents or independent escrowee to the seller(s) and buyer(s) [215 ILCS 155/18(b)];
- the costs of the title products and services are disclosed [215 ILCS 155/19]; and
- the insurer has confirmed the estimated agent fee and that the agent is registered [215 ILCS 55/16(a)].

## GENERAL INFORMATION

Except for the signatures for sellers and buyers, the blanks are fillable by clicking on the blank and typing in the required information.

## HEADING

Fill in the property address that is the subject of the transaction, the date the disclosure is being made and the names of the seller(s) and buyer(s).

## BE A KNOWLEDGEABLE CONSUMER

This is information for the seller(s) and buyer(s), i.e. nothing to fill in.

## DISCLOSURE OF ASSOCIATED BUSINESS

Fill in the name of the Title Service Agent/Agency/Escrowee to which the party is being referred.

Fill in the name of the Title Insurance Company (Insurer) issuing the policy.

Signature of the representative of the Producer/Associate and the date are required and can be completed digitally or as follows: /s/John Smith. **The signed disclosure shall be forwarded to the parties and the title insurance company prior to the issuance of the title commitment.**



***EXHIBIT C***

PLEASE NOTE: The Disclosure shall be sent electronically, by U.S. mail, or personal delivery to the seller(s) or buyer(s). In situations where the Owner's Policy and Mortgage Policy are provided by separate Producers, two disclosures are required. The Department recommends that as a best practice, ALL title entities involved in the transaction retain proof of the sending and delivery/receipt of the Disclosure. (See RECORDKEEPING below).

ESTIMATED CHARGES

Fill in the estimated charges for seller and buyer. The breakdown of charges is derived from the Act. [215 ILCS 155/19]

Fill in the estimated title agent fee.

Fill in the attorney's fee, broker's commission or lender's charges. Because there is only one referring entity, make only one entry.

PLEASE NOTE

In situations where the Owner's Policy and Mortgage Policy are provided by separate Producers, two disclosures are required.

ACKNOWLEDGEMENT

This portion is not fillable. Disclosures signed by the seller(s) and buyer(s) should be returned to the producer/associate. However, a producer/associate will not be liable for failure of a seller or buyer to timely sign or return this form.

RECORDKEEPING

**The Act requires that the Disclosure be provided to the parties, prior to the issuance of the title commitment and that it be maintained by the title insurer, agent or independent escrowee for a minimum of three years. The Department recommends that as a best practice that ALL title entities involved in the transaction, i.e. the insurer, agent/agency and escrowee, maintain a copy for their records. This ensures that the entities are properly authorized to complete the transaction. [215 ILCS 155/18(b)]**