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The Trusted Adviser

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Illinois Senate Bill 1317: A Step in the Right Direction



Throughout our history, ATG has been at the forefront of advocating for the long-term interests of the real estate lawyer. We have battled our competitors and advocated in the courts, in the legislature, with the regulators, and in the media to ensure consumers' right to counsel in the largest financial transaction of their lives. I do not believe it is hubristic to say that without ATG, lawyers would be out of the real estate business.

In recent years we have been public with our constituency that the market conduct of a few is detrimental to the long-term interests of the real estate lawyer and the consumers we serve. These are the three most striking examples we have cited in support of the need for self-correcting behavior:

- non-transparent pricing;
- imposing hidden fees that are passed on to consumers; and
- companies with captive agencies requiring lawyers (to whom clients are referred) to agree to use their captive title agency.

In recent years we have also asked the real property bar to support the need for change or run the risk that it would be the lawyers who would take the blame for the market conduct. That is exactly what happened. Many of you attended the 2018 Illinois Department of Financial and Professional Regulation (IDFPR) presentations on its proposed Regulatory Guidance and Proposed DS-1 Disclosures. You heard some representatives of IDFPR and some title company personnel lay the blame at the doorsteps of the lawyers. In response to the IDFPR's actions, ATG filed for and obtained a TRO to enjoin IDFPR from implementing a disclosure that was, in its original form, unabashedly punitive to the practicing lawyer.

Last year, a bill was introduced in the Illinois Legislature that would prohibit lawyers from providing title services when also representing a client. We defeated that bill, but the message was loudly delivered: Lawyers and their clients are at risk.

Lawyers, albeit easy scapegoats, are not the source of market dysfunction. Rather, lawyers reflect the "race to the bottom" mentality of some players in the industry who will seemingly do just about anything to capture business.

Senate Bill 1317 (D-Harmon) proposes significant revisions to the Illinois Title Insurance Act. We believe the bill goes a long way toward serving the long-term interests of consumers of title insurance and settlement services and preserving the lawyer's role in the real estate transaction. The bill was drafted by a committee of the Illinois Land Title Association. We support many of the bill's provisions, but it requires amendments in order to secure our support.

Positive Aspects of the Bill as Drafted

The bill provides a framework that would allow the IDFPR to regulate rates through the establishment of a Rating Bureau. A Rating Bureau is a system where a third party, in conjunction with title insurers, reviews historical data and sets rates based upon the historical costs of providing title insurance, including the costs incurred by agents in providing the same. Some form of rate regulation is the norm in most states. Rate-setting statutes are intended to provide clarity and rationality in title insurance rates. The new rates would be set at an 80/20 split. Examples of other attorney states that have rate-setting statutes include Connecticut, which sets underwriter agent splits at 60/40, and Florida, which sets splits at 70/30.

In recent days, one title agency known for its "Monday Morning Memo," claims the bill has negative implications for real estate lawyers as title agents. We disagree. We believe the bill will help ensure the valuable role lawyers play in the Illinois real estate settlement service process long into the future. ATG is the only title company owned by its member attorneys. It is fundamental to our mission that we advocate for and protect the long-term interests of our members.

Today's model is simply not sustainable on any level. We think it is undeniable that rate reform will help ensure the continued ability of lawyers to be in this business into the future. In our 55-year history, member attorneys have earned more than one billion dollars in title fees through ATG. More importantly, this additional source of revenue

has helped you continue to represent consumers in real estate transactions. Consumers are the real winners in having an advocate at the closing table.

The current method for pricing title insurance in Illinois has been the subject of considerable criticism by regulators. The absence of any form of rate regulation and the IDFPR's inability to control pricing has wrongly cast a dark shadow over the fine work done by attorneys providing title and settlement service in Illinois. The haphazard pricing offered by many underwriters has created an environment of questionable practices that both regulators and consumers incorrectly blame on lawyer agents. Unfortunately, in the court of public opinion, perception often becomes reality, and if lawyers continue to be blamed (as we witnessed in the IDFPR's proposed DS-1 Disclosure) lawyers will come out as villains, be pushed aside by underwriters, and targeted by regulators.

While ATG, through litigation and legislative efforts, has led the fight to protect lawyers and the consumers they serve, we fear that absent meaningful change, lawyers will continue to be blamed for abuses in the industry. Title insurance rate regulation could be part of that meaningful change; it would bring clarity and stability to the landscape and allow lawyers to continue the great work that ATG was created to facilitate and continues to champion.

Prohibited Acts: Illegal Steering

Contrary to a myth recently spread by the previously mentioned "Monday Morning Memo" title insurance agency, the bill would not hinder the ability of real estate agents to refer business to competent real estate lawyers. It would however, codify that it is illegal for a referral source to require that a lawyer use the real estate brokerage captive agency in exchange for the referral of a consumer. The bill would restore the critical independence of lawyers to work with their clients to select the title insurance company that provides the best service for their client's individual needs. The bill would level the playing field, allowing lawyers to compete on service and to use their best judgment in selecting the title insurer that best suits the client's needs.

Proposed Amendments from ATG

This bill is not perfect and we can't support it in it's current form. However, ATG has offered amendments, which, if accepted, would allow us to support the bill and which we would ask you to support as well.

These are the most substantive:

- *Title Agent Licensing:* As drafted, the bill puts 100% of the onus on the title agent to register as an agent. We believe this provision places an undue and unrealistic burden on both the agent and the IDFPR. More importantly, we believe it is a fundamental principle of agency law that the principal appoints the agent. For this reason, we propose placing the burden on the underwriter to aggregate and submit agent applications.
- *Errors and Omissions:* We propose reducing the amount of required coverage to \$100,000 per claim, \$250,000 in the aggregate, and no deductible requirement.
- *Reciprocal Trading:* We propose clear language prohibiting the types of reciprocal trading we see with some captive agencies.

See [the full text of the bill](#) and the attached file below for our proposed amendments.

We ask that you carefully consider the important positive impacts this legislation would have on the long term preservation of the lawyer's role in Illinois real estate transactions. You will hear from us soon on whether we will ask for your help in opposing or supporting this legislation.

Peter J. Birnbaum

ATG President and Chief Executive Officer

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Attachment(s):

 [ATG Proposed Changes to 215 ILCS 155 and SB 1317 04-18-19.pdf](#)

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