



America's Mortgage Banking Attorneys®

## Points to Consider When Selecting Your Title Vendor

*An educational white paper prepared for clients by the attorneys and staff of USFN®*

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Recently servicers have been receiving heavy marketing information intent on selling a “national title product”. Prior to making important decisions concerning your default servicing needs and requirements, the following is a listing of many of the points that should be considered and understood with regard to the provision of title insurance.

### ■ The Value of an Insured Product

Real Estate Title is basically broken down into two different components. These are work product and insurance.

1. The **Work Product** component consists of a number of items, including but not limited to the following:

**(A) Title Search-** An accurate, all-county-in-state search capability via search vendors that can provide accurate searches, copies of all necessary recorded documents, and within a turnaround time meeting the standards set by the foreclosure counsel and its clients. Most foreclosure counsel will continually monitor the performance of the search vendors to gauge their accuracy and timeliness, and changes are made as needed.

**(B) Abstract and Examination-** Once an accurate and timely search is received, many additional steps take place. The search is abstracted and examined. By this process, title curative issues are identified and forwarded to the proper parties for resolution; identification of the proper and necessary parties to the foreclosure proceeding is made; a determination is made if there are deceased parties to the proceeding, the identification of missing Assignments of Record that must be obtained is made; a review of tax search results and verification of delinquent or sold taxes is conducted; review and research on any building violations of record is done and forwarded to proper parties to resolve.

**(C) Title curative-** It is estimated that over one-third of all newly created loans have a title defect which is unknown to the servicer/lender. When files are sent to foreclosure counsel, these problems surface for the first time in most situations. Most foreclosure counsel have established a title curative department within their offices because there are so many title issues currently existing that must be handled properly. Many title curative problems are routinely handled by foreclosure counsel without charge or bother to the servicer. If a title claim is needed, foreclosure counsel are well able to help in the process as needed and required.

2. The **Insurance** component provides a reduction in risk to the servicer and investor.

**(A) A Title Commitment** has an insurance factor built into it that a title search does not have. Normally, a title search provider limits its liability as to errors to a minimum limit, i.e., \$100 to \$2,000. A Title Commitment monetary coverage, however, is normally in the amount of the original loan balance. The issuer of a Title Commitment can be forced to issue a Title Policy if one is needed at some time in the future.

**(B)** While the Title Commitment is not in itself a Title Insurance Policy, upon payment of the title premium, the Commitment can be converted into a **Title Policy**. A Title Commitment also includes all of the work product items mentioned above. The charge for a Title Commitment includes both the work product and the ability to force insurance if needed.

## ■ Risks to the Servicer and Investor

**An unproven national title service provider has with it many new risks that are not now held by the servicer or investor, but that will be forced upon the servicer. These include but are not limited to the following items:**

Any new and unproven vendor service has at the minimum, the risk of the unknown. This is particularly important and significant in the area of title insurance in default servicing. One must ask:

- Who really knows what the vendor will provide?
- What will be the true timeliness of delivery of the product?
- What will be the accuracy and reliability of the product?

Ask also,

- What will be the unknown liabilities that may be forced upon the servicer from various parties, including borrowers, Judges, REO title companies, REO purchasers, third party sale bidders, class action attorneys, State Title Insurance Regulators, or other unknown parties?

Consider that almost every state in the country has a Title Insurance Act, and that such legislation normally contains a number of “PROHIBITED ACTIVITIES”. Any title service vendor should provide written assurances that their activity does not violate any state legislation as to violations of the state title insurance regulations. Any assurances should be reviewed by in-house legal counsel for accuracy and merit.

Currently, the risks to the servicer are, for the most part, well defined. Over the years, servicers, investors, and foreclosure counsel have established a protocol, procedure, and understanding of the risks that each will assume in the area of title insurance, and its many related areas. While there is still a need for more discussion on many matters, much has already been agreed upon between the parties.

## ■ Loss of Accountability

Should a servicer require their counsel to use a title company's product, rather than allow them to control and order their own title, attorneys become third party beneficiaries to the title product. In other words, the client pays for the consideration for the title. The attorney is being directed to use it by the client and cannot order his/her own title. As part of that consideration, if a title company chooses to limit its liability for any errors to a certain amount, for example, to a maximum of \$2,000 the servicer should recognize that the attorney using the title may have no malpractice liability for errors in the foreclosure caused by a faulty title search.

Where the attorney controls the title, their firm retains liability. When the attorney chooses their title vendor, they can ensure certain limits of liability are in place, or they will not do business with them. Many attorneys consider that prosecuting a foreclosure without a Title Commitment or insured title product that the attorney has comfort in, is malpractice, and will not proceed without an insured, accurate Title Commitment indicating the Necessary Parties to the suit.

Additionally, most attorneys that work with title providers continually monitor the timeline and performance of the title vendors they use. Changes are made when a title vendor is either slow to provide the title product needed by the attorney, or where the title product may be inaccurate. Most firms have spent years developing a sound group of title product providers. Often, the more expensive title provider is the best solution. It is totally unclear what method and companies a national title provider might use and what controls would be in place to provide for a quality product in a timely manner. One might assume a national title provider will seek the least expensive title provider, which is a recipe for disaster in many cases. It is clear that a national title provider will have little or no control over the actual title product provided, as it apparently will be relying upon a third party company to locate and coordinate the ordering, delivery and accuracy of the title product.

## ■ Indemnities Are Not Always the Answer

While a national title company may advise a servicer it will indemnify or correct title issues at REO, it is unreasonable to expect that this scheme will actually work in all situations. Many REO purchasers will not accept a title indemnification over a title issue and will insist upon "clear title" at closing. When an attorney is able to control the selection of the title company and the title curative process, the odds of "clear title" at the conclusion of the foreclosure is much greater.

When the attorney controls the title, the attorney should be responsible for curing title issues during the foreclosure process. If the attorney is told to use a third party-provided title product, and the product is faulty, the client is left with less

than adequate options. Either the title company will take upon itself the efforts necessary to clear title and the all too well known inherent delays caused thereby, or the attorney will be asked to intervene, which normally is well past the time that effective intervention is needed. The attorney will also seek to charge for services rendered. Currently, when in control of the title, many attorneys handle routine title curative actions without cost or at nominal rates to the lender and at the appropriate time, i.e., commencement of the foreclosure process.

### ■ **Inability to Provide Necessary Services by a National Title Provider**

When a national title company provides title, it is unable to provide the necessary ancillary services often required in certain states. For example, national title companies have stated, “document recordings” are not part of their title services. In many states, the foreclosure action is commenced by the filing of a Notice of Pendency and the Summons and Complaint. An updated title search is often done simultaneously with the commencement of the action. Filing of the Complaint occurs immediately upon determination that no other liens have appeared of record between the time the title was first completed and the time the action is filed. National title service providers will not provide this service. In many cases, title with a national title company will not be current to the day of recording and will not include the proper filings and recordation.

Additionally, many firms have entered into working arrangements with co-counsel throughout a particular state, whereby the co-counsel handles the title search component as well as the handling of the case at the local county level. This might include the recording and filing of documents at the appropriate county courthouse, attendance at hearing, title search updates, timely response to scheduling matters for hearing, recording of necessary documents, and other crucial steps in the well handling of a file. By introducing an outside title vendor into the picture, unforeseen issues and delays can and should be expected.

### ■ **Loss of Expertise of Attorney-Chosen Vendor**

Title vendors that attorney firms use are trained to be a second set of “eyes” for them. They will compare legal descriptions, and do additional investigation immediately upon seeing that there has been a death of a borrower. In many jurisdictions this requires searching probate court records, building code records, water and sewer records, etc. Many of these liens are first listed in a book that is not of public record yet, but in fact are considered liens when referenced in the book. The national title companies are not familiar with the nuances of certain counties. Critical liens, which are “super” liens in many cases and supersede the mortgage being foreclosed, might be missed in the title search. These types of lien searches are ordered prior to sale to determine the status of the property. Will the client be willing to pay for them?

## ■ **Elimination of Bundled Services that Benefit the Client**

The title vendors used by many law firms will bundle their services. These title vendors will record assignments of mortgage, file affidavits, update title when necessary, and record all the sheriff or referee deeds. If law firms are required to use the title from a national company, separate contracts for the services mentioned above will be required, which will result in time delays and more importantly, additional costs for the clients. Are the clients prepared to assume these costs additional expenses?

## ■ **Alteration of Important Relationships**

Requiring national title will alter current relationships with title vendors, some of which have taken years to develop. These relationships go beyond the preparation of title. In an established relationship, vendors will retrieve documents quickly when asked. They will promptly answer a question the attorney may have about the title they provide. (Who does the law firm call if there is question on a national title product? How long will the attorney firm have to wait for a response?) They will work with difficult county clerk's offices on difficult or complex issues that need to be examined or explained, in an effort to get our actions filed as soon as possible. They act as a resource that a law firm has come to rely upon for advice on how certain counties operate, and what is acceptable or unacceptable to the local Clerk of the Court or a Judge. It is the title vendors who assist the law firm in the day to day processing our foreclosure actions. Taking title away from the foreclosure attorney will negatively impact these relationships, and ultimately affect the performance of foreclosure counsel.

## ■ **Timelines Will Suffer**

It is absolutely clear that with the infusion of a national title service provider into the delivery of title products and services, there will be an adverse impact upon timelines. This has been proven on a number of occasions and will be evident in the future, promises notwithstanding. It is impossible for any one company to effectively control and manage the delivery of title products and services on a national basis. The delivery of title services and products is based upon local expertise, and has never been achieved in the past and currently does not exist on a national level. Even the best systems can only deliver in approximately 40% of the counties located throughout the country. Losing control of the local title process will result in the law firm not filing first legal as promptly as when the law firm controls title. This failure will result in curtailments and timeline delays. Without the control of the local individual state-managed law firm, the delivery of the necessary title product and services will be delayed.

Many law firms have experienced attempts by title companies to provide a nationally coordinated delivery of title products and services in the past. Past experiences with these efforts have been marginal at best, and in most cases, a complete failure. Even the best attempts show that there is at least a 10 to 15 day

delay over what the law firm can currently provide. Adding a middleman always delays the process or increases the expense to the servicer/investor.

### ■ **Responsibility Before the Court**

In judicial states, foreclosures require appearances before a Judge. It is very important for a law firm to be able to earn and retain the respect and trust of the Judges hearing foreclosure cases. Accurate title is fundamental to a proper foreclosure. If the title product is not accurate, and incorrect parties are named or not named in the proceedings, the Judge will not look favorably upon the law firm prosecuting the action, or on the law firm's client, i.e., the servicer or investor. It is very important for the Court to respect the foreclosing party and its counsel to ensure timely court processing of the foreclosure file.

### ■ **Promised Cost Savings**

What is the ultimate benefit to the servicer/investor to allow a national title company to handle the delivery of the necessary title product and services? The currently promised benefit to the servicer/investor that would justify moving the title services to a national title provider seems to be a promised reduction in the overall expense the servicer/investor now pays for title products and services. The age-old adage, "You get what you pay for" seems appropriate at the moment. Everyone would like to see the cost of any product they need to purchase, revert to what was paid 40 or 50 years ago. But is this a reality of today's market place?

One might ask the question of a national title company, "How many title claims have you paid on issues involving *your* files?" "How long does it take to handle *your* title claims to resolution?"

If there is a concern in the current system of having a law firm control the management of the title product and related services, then perhaps it is best to take those concerns to the law firm directly. Why would a servicer/investor take away control of the single most important document an attorney needs to effectively handle a mortgage foreclosure and what savings would really be realized?

### ■ **Prohibited Title Company Practices**

Many states have legislation that prohibits certain practices by title insurance agents and companies. These Acts have a long list of prohibited practices, including but not limited to the giving of anything of value to obtain the title work. While this may not directly impact a servicer or investor at the moment, it certainly impacts the activities of any title company providing title services. One should be familiar with these provisions since, if the title provider is subject to suit or sanctions, it is not unreasonable to believe that the company receiving the services, etc. might also be subject to suit or sanctions. Recent suits have been filed in some jurisdictions raising this issue. Should a servicer or investor be doing business with a title provider that is currently or may be in the future subject to

these types of lawsuits? If selecting a national title, it is suggested that written assurances and legal opinions should be received in advance, clarifying these matters and providing assurances that the title provider is not subject to these types of actions.

We invite your questions, comments and thoughtful consideration of these points, and encourage each of our clients to ask these important questions and make careful decisions when selecting a title vendor.