



An Introduction to Title Insurance in Texas

Title Insurance Rates

The cost of title insurance is set by the Texas Department of Insurance, which regulates this industry pursuant to Title XI of the Texas Insurance Code (the "Texas Title Insurance Act"). The form of a title insurance policy and the various available amendments are prescribed. The basic premium for a \$100,000 policy is currently \$843 which is a one-time fee for coverage that lasts as long as the buyer has an insurable interest in the property. A formula applies for amounts higher than that. Hearings on rate increases occur biennially in even-numbered calendar years. Further information is contained in the Texas Title Insurance Basic Manual which can be found at www.tdi.state.tx.us/company/titleman.html.

It is customary in Texas for the seller to pay the cost of the owner's policy. However, this is negotiable. It is all a question of price.

Differences Between Title Companies

Since rates are regulated, there is nothing to gain from shopping title companies for the cheapest policy. Title companies do, however, vary in at least two significant respects: first, the level and quality of service they (or a particular closer) provide; and second, their willingness to "insure around" certain potential defects or insure non-standard transactions (wraparounds, trusts, and the like). Title companies are by nature conservative institutions that are averse to risk. If a company refuses to do a transaction, or sets out requirements that are difficult or impossible to satisfy – and this happens – then it may be necessary to shop title companies until one is found that is willing to do the more creative deals.

Note that some law offices enter into an arrangement with certain title underwriters to act as "fee attorneys," meaning that these attorneys can close transactions in their offices and issue title policies as an agent for the underwriter. While this may seem convenient, prominent real estate attorney Chuck Jacobus and others argue that it is a conflict of interest - that the lawyer's job is to advocate for the buyer or seller, not act as neutral escrow officer in order to collect insurance premiums and fees. The interests of buyers and sellers differ – sometimes immensely. Real estate documents can often be highly customized to favor one party or another. Trying to represent *everyone* usually means that *no one* gets adequate representation. While this office reviews and cures title issues, it does not act as agent for any particular title company.

Exclusions and Exceptions to Owner's Coverage

As with any insurance policy, there are exclusions and exceptions. The residential owner's policy expressly excludes such items as building and zoning ordinances; condemnation; title problems created by or undisclosed by the insured, or arising from



fraud by the insured; title problems that result in no actual loss; access issues; refusal of anyone to lend money; and physical condition of the land.

Exceptions are specific limitations on coverage. These include the so-called standard printed exceptions on Schedule B – restrictive covenants and deed restrictions; the survey exception (“discrepancies, conflicts, or shortages in area”) which can be deleted for a fee; homestead, community, and survivorship rights; the exception for riparian rights, water-rights, and tidelands; the tax exception, including rollback taxes; the mechanic’s lien exception; the exception for leases and subordinate liens; the rights of parties in possession; and, if there is no survey, easements and encroachments. The title company may also add “special exceptions” that it deems necessary after examining title to the property.

Note that title companies do not insure fraudulent conveyances or “preferential” transfers (i.e., transfers made to avoid payment of creditors that can subsequently be set aside by a judge). Excluded is “any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors’ rights laws, that the transaction vesting the Title as shown in Schedule A is (a) a fraudulent conveyance or fraudulent transfer; or (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.”

The Title Company’s Duty to Defend

If an unexpected title defect or lien appears, the title company must investigate and then:

1. commence legal proceedings to clear title;
2. indemnify the insured pursuant to the policy;
3. reinsure the title to the property at current value;
4. indemnify another insurer if another company does the reinsuring; or
5. cure the defect or obtain a release of the lien.

If the title company does not take one or more of the above actions, it can be sued by the insured for breach of contract. Note that the company’s duty to defend is contingent upon the insured providing timely written notice of the defect or lien. The duty to defend is not triggered by claims of money and the like that do not constitute a true cloud on the title.

Recovery under an owner’s policy is limited to the owner’s actual money loss or the amount of the policy, whichever is less. The insured must give the title company prompt notice and cooperate in furtherance of the claim. The old requirement that the policy itself be produced in order to recover has been eliminated. Payment must be made by the company within 30 days of determination of liability and the extent of the loss. If the title company settles a covered claim, it is subrogated to the rights of the insured as to



that claim (i.e., it assumes the insured's right of recovery).

Minerals

Title to minerals and mineral rights are generally under Schedule B of the policy. Title companies have traditionally taken the view that the job of determining title to minerals belongs not to title insurers but to landmen and oil and gas attorneys – although the title company will provide copies of mineral leases and conveyances if a buyer or the buyer's attorney wishes to review them prior to closing. Since the minerals in producing regions have usually long-since been conveyed away (especially in the typical urban residential setting) the sole concern of a homeowner is use of the surface of the land (the "surface estate") by a mineral-interest holder to gain access to the minerals. Optional endorsements are available which will protect against damage to the surface estate. The Texas T2-R already protects lenders against such surface damage. This is an evolving area currently under review by the Department of Insurance.

Community Property and Heirship Property

Texas is a community property state and, as such, all property acquired by either spouse during marriage is presumed to be community property. It is therefore common for the title company to either require joinder of a seller's spouse on a deed or, in the alternative, a marital status affidavit and/or a non-homestead affidavit.

If someone in the chain of title died without a will, you can also be sure that the title company will require a conveyance of some kind (usually a special warranty deed) from each and every heir and, if an heir is deceased, from the heirs of that heir. Alternatively, the title company may be satisfied with an affidavit of heirship, if there are no other heirs and the circumstances of family history can be sufficiently well established. It can get complicated and expensive to cure defects in heirship property.

Conclusion

Obtaining title insurance in Texas is customary and useful for many good reasons. However, a buyer is not required to obtain such a policy. Consult an experienced real estate attorney at the beginning of the process, *before* you sign anything (including the earnest money contract), and allow your attorney to guide you through closing.

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Information in this article is provided for general educational purposes only and is not offered as legal advice upon which anyone may rely. The law changes. Legal counsel relating to your individual needs and circumstances is advisable before taking any action that has legal consequences. Consult your tax advisor as well.