

## ABSTRACTERS, TITLE OPINIONS, AND TITLE INSURANCE - BACKGROUND MEMORANDUM

Section 2 of Senate Bill No. 2217 (attached as an [appendix](#)) directs a study of abstracters, title opinions, and title insurance, including a review of the orderly and efficient transfer of real property which provides adequate assurances of title. Section 1 of this bill, which provided for an increase in the fees an abstracter may charge or making and certifying an abstract, is discussed later in this memorandum.

### BACKGROUND

A person who is transferred title to an interest in real property located in the United States may acquire or receive a variety of types of assurances of the quality of that title. Among the assurances of title that are available to a person who acquires an interest in real property located in North Dakota are abstracts of title, attorney or title opinions, and title insurance. Under North Dakota Century Code (NDCC) Section 26.1-20-05, title insurance may not be issued unless the title evidence is received from an abstracter and an attorney examines the title evidence.

### Abstracts of Title

An abstract of title is a complete historical record of a certain parcel of real property which contains all transactions associated with that property. An abstract of title is organized in chronological order and notes all grants, conveyances, easements, wills, mortgages, tax liens, judgments, and lawsuits that affect that particular parcel. An abstracter searches the records and compiles an abstract of title. This information is held at the county level in the county recorder's office. To properly compile an abstract of title, an abstracter must perform a proper search of the public real estate records as they pertain to the real property that is described in the abstract and the abstracter must prepare appropriate summaries of every transfer or other transaction affecting the property in question during the span of time to which the requested abstract pertains. An abstract of title usually includes a certificate by the abstracter that refers to the periods of time covered by the abstract of title and the records that are the subject matter of the abstract.

In North Dakota, abstracters are regulated by NDCC Chapter 43-01. This chapter provides for a state abstracters' board of examiners. The board consists of three members who are appointed by the Governor to six-year terms. Section 43-01-09 provides that before a person may engage in the business of making and compiling abstracts of title, the person must obtain a certificate of authority issued by the board and must file a bond or abstracter's liability policy as required by the chapter. Section

43-01-15 provides for the authority and duty of an abstracter. This section provides:

The certificate of authority shall authorize the person, firm, corporation, or limited liability company named therein to engage in and carry on the business of an abstracter of real estate titles in the county in which the abstracter's place of business is located and for that purpose to have access during ordinary office hours to the offices of any county or of the state and to make such memoranda or notations from the records thereof as may be necessary for the purpose of making such abstracts of title. Any person, firm, corporation, or limited liability company holding a certificate shall furnish or continue an abstract of title to any tract of land in the county, when requested to do so, on payment of the fees provided in this chapter.

The fees that may be charged for making and certifying an abstract are contained in NDCC Section 43-01-18. The fees, which were increased by 2007 Senate Bill No. 2217, are discussed later in this memorandum. Section 43-01-23, which was enacted in 2005, provides that the board, through the issuance of a temporary certificate of authority and a certificate of registration, may authorize an individual or organization to operate in another county to operate in a county that does not have an abstracter. This section provides that the board may not charge an abstracter for the temporary certificate of authority. This section also provides that the board may require additional security than provided under Section 43-01-11.

### Title Opinions

Once the abstracter completes the abstract of title, it is forwarded on to an attorney who renders a title opinion as to whom the fee owner is as well as naming any other parties with a legal right to or interest in the property. Before issuing a title opinion, the attorney reviews and analyzes the contents of the abstract of title to determine and render an opinion on whether the liens of mortgages reported in the abstract have or have not been released, whether the enforcement of a particular lien is or is not barred by the applicable statute of limitations, whether an express easement has or has not been terminated, or other matters that may have a bearing regarding the current state of the title to the property. When the attorney has attached the title opinion to the abstract, the abstract of title qualifies as a certificate of title. Each time the property changes hands, the certificate

of title is updated with changes to the abstract and a new opinion.

North Dakota Century Code Section 26.1-20-05, which provides for the title evidence required before title insurance may be issued, provides that the abstract of title must be examined by a person admitted to the practice of law as provided by Chapter 27-11.

### **Title Insurance**

Title insurance is insurance against loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens. It is available in many countries but it is principally a product developed and sold in the United States. Title insurance has been available in the United States since before 1900, but has become more common since the 1920s with the advent of larger home mortgages. Title insurance is meant to protect an owner's or lender's financial interest in real property against loss due to title defects, liens, or other matters. The coverage provided by title insurance can be used to defend against a lawsuit attacking the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the dollar amount of insurance provided by the policy. Originally, title insurance was designed to protect attorneys rendering title opinions but eventually became available to anyone. Generally, title insurance is required by mortgage lenders for virtually all real estate transactions, including many long-term leases. This form of insurance is usually issued to the purchaser of the property or the lender.

Title insurance differs in several respects from other types of insurance. While most insurance is a contract where the insurer indemnifies or guarantees another party against a possible specific type of loss, such as an accident or death, at a future date, title insurance generally insures against losses caused by title problems that have their source in past events. This often results in the curing of title defects or the elimination of adverse interests from the title before a transaction takes place. Title insurance companies attempt to achieve this by searching public records to develop and document the chain of title and to detect known claims against or defects in the title to the subject property. If liens or encumbrances are found, the insurer may require that steps be taken to eliminate them, for example, obtaining a release of an old mortgage or deed of trust that has been paid off, or requiring the payoff, before issuing the title policy. In the alternative, it may "except" those items not eliminated from coverage. Title plants are sometimes maintained to index the public records geographically with the goal of increasing searching efficiency and reducing claims.

In the United States the American Land Title Association is a national trade association of title insurers. This association has created standard forms of title insurance policy "jackets" (standard terms and conditions) for owner, lender, and construction loan

policies. The association's forms are used in most states. The American Land Title Association does not issue title insurance but rather provides the policy forms that title insurers issue. The North Dakota Land Title Association is an affiliate of the national organization.

Title insurance in North Dakota is regulated by NDCC Chapter 26.1-20. Section 26.1-20-01 provides that every corporation organized for the purpose of insuring titles to real property in North Dakota is subject to this chapter and the rules adopted by the Insurance Commissioner. As previously mentioned, Section 26.1-20-05 provides that a title insurance company may not issue a title insurance policy unless the title evidence is received from the abstracter and an attorney licensed in this state has examined the title evidence.

## **RECENT LEGISLATION**

### **2007 Legislation**

#### **Senate Bill No. 2217**

Section 1 of Senate Bill No. 2217 increased the amounts of the fees an abstracter may charge for making and certifying an abstract:

- For each entry on an abstract or continuation of an entry on an abstract, the fee was increased from \$6 to \$10;
- For a complete certification, the fee was increased from \$75 to \$100;
- For a certification covering lands in excess of one quarter section, an additional fee of \$10;
- For a certification covering premises in more than one block in any subdivision in the same abstract of title, an additional fee of \$10; and
- For each name search for judgments, real estate taxes, bankruptcy proceedings, and tax liens, the fee was increased from \$3 to \$5.

Testimony in support of the abstracter fee increases indicated that with advances in technology, clients expect results faster and better than ever before. The testimony indicated that as a result of that demand, the costs of keeping up with that technology continue to rise. Other testimony in support of the fee increases noted that the last fee increase was approved in 2001. The testimony noted that the cost of living as well as the cost of operating a business has increased substantially since 2001 thus creating a need for the abstracter fees to keep pace with those increases. It was also noted that due to technical advances made in some of the county offices, searches are more complex and time-consuming than five years ago.

Testimony in opposition to the abstracter fee increases suggested that to increase the fee per entry by 67 percent and the fee per certification by 33 percent was irresponsible. According to the testimony, consumers should have a choice between abstracting and title insurance. It was noted that allowing fees to increase without asking the industry to modernize only perpetuates the present system.

As previously mentioned, Section 2 of Senate Bill No. 2217 directs a study of abstracters, title opinions, and title insurance. This bill was amended in the House to add this study.

#### **Senate Bill No. 2218**

Senate Bill No. 2218, which failed to pass the Senate, would have required a title insurance company to secure a certified abstract of title that has been examined by an attorney and which is current to the present transaction. Testimony in support of this bill indicated that the changes would clarify the original intent of NDCC Section 26.1-20-05. Testimony in opposition to the bill indicated that the bill takes a step backward by requiring an updated abstract before title insurance can be purchased.

#### **Senate Bill No. 2119**

Senate Bill No. 2119 updates the requirements for abstracters, including that an abstracter must have and maintain a complete tract index and all instruments of record in the office of the recorder in and for the county in which the abstracter is engaged in business.

### **2005 Legislation**

#### **House Bill No. 1483**

House Bill No. 1483, which failed to pass the House, would have removed the requirement that a title insurance company must obtain a certified abstract of title and a title opinion if the company had secured the information of the type necessary for that company to adequately determine the risk of insuring the title to real property. Testimony in support of this bill indicated that the change proposed in this bill would give consumers a choice between abstracting and title insurance. According to the testimony, the bill would remove the mandate of abstracts and title opinions and would allow the underwriters of title insurance companies to determine what information is necessary before issuing a title insurance policy. According to the testimony, North Dakota and Oklahoma are the only two states that still have a statutory requirement for abstracting before issuing title insurance. It was noted that in Montana and South Dakota, abstracting is rarely done and title

insurance is the preferred method of title review, and in Minnesota, consumers have a choice, but the preferred method is still abstracting.

Testimony in opposition to 2005 House Bill No. 1483 indicated that removing the abstract and title opinion requirements would likely result in costs to consumers for title insurance. It was noted that this increase would result from higher search and examination fees, as is the case in Minnesota, and from an increased number of claims due to more errors in updates and examinations.

#### **Senate Bill No. 2082**

Senate Bill No. 2082 allowed an abstracter, upon request, to omit zoning and subdivision ordinances from a surface or mineral abstract and to charge a per entry fee for each omitted zoning and subdivision ordinance. The bill also modified the Abstracters' Board of Examiners authority to take disciplinary actions and to deny an application for certification. The bill described the circumstances under which an abstracter may operate in another county.

### **SUGGESTED STUDY APPROACH**

The committee, in its study of abstracters, title opinions, and title insurance, may wish to approach this study as follows:

- Review current laws and practices with respect to the methods used in North Dakota to achieve adequate assurances of title;
- Receive information from interested parties, including the State Bar Association of North Dakota, the North Dakota Land Title Association, abstract and title companies, title insurance companies, credit service organizations, and real estate organizations regarding the current method of providing assurances of title and proposals for changes to the current method; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1