Attorney Owned Title Insurance Agencies: Legislative Sausage Making in 2014

By Michael J. Berey

The Fall 2017/Winter 2018 New York Real Property Law Journal (Volume 45, No. 3) included an article by my esteemed colleague in title, Marvin Bagwell, "May an Attorney Refer the Attorney's Real Estate Clients to a Title Agency Owned by the Attorney? The Battle for New York."[1] Mr. Bagwell's article explained differences in real estate and title insurance practices between upstate and downstate New York, summarized opinions that have been issued by the Ethics Committee of the New York State Bar Association dealing with attorney-owned title agencies, and concluded, as to New York, referencing the enactment of title insurance agent licensing legislation in 2014.

Legislation requiring the licensing of agents writing title insurance in New York, Part V of the 2014-2015 Executive Budget[2], enacted as Chapter 57 of the Laws of 2014 on March 31, 2014, included a new Insurance Law Section 2113 ("Title insurance agent commissions; disclosure").[3] Under Section 2113 (e), "[f]or the purposes of this chapter, an attorney or his or her law firm may represent a client in a matter and may also act as a title insurance agent in such matter subject to applicable law."[4] Mr. Bagwell's article states that "[n]o one is sure what 'applicable law' means. Does it mean the Ethics Opinions? However, they are not laws. Is the phrase a nullity because there are no applicable laws? We do not know."[5] This article sets forth for the record the intention of Section 2113(e) which I know from my having participated in a meeting in Albany in which agreement on the text of Section 2113(e) was reached.

This article is not intended to discuss the merits of or the authority of attorneys to issue title insurance policies as title agents for their clients. I leave that to those more experienced in the technical aspects of legal ethics, the legislature as it may deal with this issue in the future, and, perhaps the courts. My knowledge of legal ethics is, for the most part, endeavoring to doing the right thing.

A meeting was convened on the 2nd Floor, known generally as the "Executive Chamber," in the State Capitol on March 25, 2014, to resolve for the proposed agent licensing legislation the question of the authority of attorneys to write title for their clients as agents for title insurance companies licensed in New York. The stakeholders at the meeting were the Governor's Office, the New York State Bar Association and the New York State Land Title Association ("NYSLTA").

At the meeting for the Executive were George Haggerty, the Governor's Deputy Secretary for Financial Services and three members of the Governors' staff involved in the drafting of the legislation. Attending for the New York State Bar Association were Ronald Kennedy, its Director of Governmental Relations, Kevin Kirwin, its Deputy Director of Governmental Regulations, and Gerard Antetomaso, a highly respected real estate attorney based in Webster New York. At the meeting for the New York State Land Title Association were this author, who

was then the President of the Association, and Scott Wexler and Kate Corkery of Ostroff Associates, Inc., the Association's representative in Albany.

Not having previously been involved in what has been referred to me as the legislature sausage-making process, the experience was remarkable and it has therefore remained clear in my memory. To confirm what I recall, I have reviewed a memorandum I prepared the next morning, March 26, for the Executive Committee of the NYSLTA on the specifics of the meeting, a Memo in Support of the final legislation, referenced below, and other notes which I had imaged for my records.

Section 2113(e) was not included in the original agent licensing legislation. It was presented to NYSLTA at the meeting called by the Governor's Office as a means to bridge the gap between NYSLTA and NYSBA on the issue of attorneys writing title for their clients. The intention of Section 2113(e), as presented by the Governor's office, was to continue existing local practices as to the writing of title insurance in downstate and upstate New York, which local practices were well explained in Mr. Bagwell's article.

Not having known of the text of Section 2113(e) before the meeting, NYSLTA brought to the table the following proposed text: "An attorney or a law firm may represent a client in a matter and act as a title insurance agent for the issuance of a policy of title insurance in such matter as may be permitted by the Rules of Professional Conduct for attorneys of the New York Unified Court System". NYSLTA had in mind, particularly, Ethics Opinion 753, which states the following:

> A lawyer owning mortgage brokerage and title abstract business may not, even with informed consent, represent buyer or seller and act as mortgage broker in the same transaction or act as the title abstract company with respect to non-ministerial tasks but may where the client consents after full disclosure, act as an abstract company with respect to purely ministerial work. The lawyer...may not represent the lender in transaction in which the lawyer's title company acts in other than a ministerial capacity.[6]

In response to this request by NYSLTA, it was noted by Mr. Haggerty, and agreed by all in the meeting, that the reference to "subject to applicable law" in Section 2113 was "sufficiently broad" to meet NYSLTA's concern.[7] As the conversation was summarized in my Memorandum of March 26 to NYSLTA's Executive Committee, it was agreed that "within its scope are the Rules of Professional Conduct applicable to attorneys, contained in an appendix to the Judiciary Law[8] and the rulings of the Insurance Department, now part of the DFS." NYSLTA agreed to the language of Section 2113(e) based on that understanding.

I requested that this legislative intention be recorded in a memorandum of support to the agent licensing Bill. We were advised that this could not be done, presumably because the usual form of a Memo of Support had already been posted on the State Assembly website[9]; in any event, the

Memo of Support it included only a limited outline of the Executive Budget. Documents dealing with the Budget Bill had already been prepared and, it is reasonable to presume, issued.[10]

On March 29, NYSLTA issued a Memorandum in Support of the legislation which this author has been advised was delivered to the Governor's office, to State legislative leadership, and to other Members of the legislature the same day. It affirmed the Association's support for the agent licensing legislation, noting that

> NYSLTA supports the provision which recognizes and accommodates the custom and practice of abstractors and attorney/agents in the western and northern parts of the State, while preserving the requirement that attorneys remain subject to all applicable laws, including but not limited to the Rules and Regulations of the Department of Financial Services as set forth in its Opinion[s] and Circular Letters, the New York Code of Professional Responsibility, and the Ethics Opinions of the New York State Bar Association.[11]

The Executive Budget, including Part V, was passed by both houses of the legislature, and signed into law by the Governor, on March 31, 2014.

At the meeting on March 25, NYSBA proposed the following alternative text: "Nothing in this section shall be deemed to prohibit an attorney or his or her law firm from representing a client in a matter and acting as a title insurance agent in such matter or be deemed to prohibit payment by the client (i) for actual services rendered by an attorney for the purposes of representing his or her client and (ii) to an attorney in his or her capacity as a title agent". The response to NYSBA's proposal from the Governor's representatives was clear, and I remember it well; Section 2113(e) as drafted was "all that it was going to get".

In summary, the legislation, to employ an overused colloquialism, "kicked the can down the road", not disrupting existing downstate and upstate practices for the issuance of title insurance policies, and effectively incorporating into the legislation by its reference to "applicable law" the Rules of Professional Conduct, applicable ethics opinions, and rulings of the State's insurance regulator.

Michael J. Berey, a Senior Underwriting Counsel for the First American Title Insurance Company, was formerly a Senior Vice-President for the Company and its Chief Underwriting Counsel for New York State.

[1] Marvin Bagwell, *May an Attorney Refer the Attorney's Real Estate Clients to a Title Agency Owned by the Attorney? The Battle for New York*, N.Y. REAL PROP. L. J., Vol. 45, No. 3, 13 (2017/2018).
[2] New York State Senate Bill 6357-D, New York State Assembly Bill 8557-D.
[3] N.Y. INS. LAW § 2113 (McKinney 2014).
[4] N.Y. INS. LAW § 2113(e) (McKinney 2014).
[5] Bagwell, *supra* note 1, at 22.
[6] NYSBA Comm. on Prof'l Ethics, Formal Op. 753 (2002).
[7] N.Y. INS. LAW § 2113 (McKinney 2014).
[8] The Rules of Professional are not in an Appendix to the Judiciary Law as was the case with the Code of Professional Regulations which was superseded in 2009. The Rules of Professional Conduct are codified at 22 NYCRR Section 1200.
[9] New York State Assembly Memorandum in Support of Legislation, NEW YORK STATE ASSEMBLY, http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08557&term=2013&Memo=Y.
[10] 2014-15 Archive, NEW YORK STATE DIVISION OF THE BUDGET, https://www.budget.ny.gov/pubs/archive/fy1415archive/1415archive.html.
[11] Title Insurance Agent Licensing Memorandum in Support, NEW YORK STATE LAND TITLE ASSOCIATION, INC., http://nyslta.org/sites/default/files/Memorandum%20in%20Support_3-29-2014%20to%20post.pdf.

Published in the NYSBA N.Y. Real Property Law Journal Spring 2018, Vol. 46, No. 1