

Hall of the House of Representatives
87th General Assembly - Regular Session, 2009
Amendment Form

Subtitle of House Bill No. 2169

"TO AMEND THE ARKANSAS TITLE INSURANCE ACT, 23-103-401 ET SEQ. AND TO
AMEND THE LAWS AFFECTING TITLE INSURANCE AND TITLE INSURANCE AGENTS
AND COMPANIES."

Amendment No. 1 to House Bill No. 2169.

Amend House Bill No. 2169 as originally introduced:

Add Senator R. Thompson as a cosponsor of the bill

AND

Delete everything after the enacting clause and substitute the following:
"SECTION 1. Arkansas Code § 23-103-402 is amended to read as follows:
23-103-402. Definitions.

As used in this subchapter:

- (1) "Closing" means the process of executing documents in a transaction involving either personal or real property, including the transfer of title or creation of a lien on the title, or the collection and disbursement of funds in connection ~~therewith~~ with the transaction;
- (2) "Closing agent" means a person that facilitates a closing for a fee;
- (3) "Depositor" means the person providing funds or documents for delivery to a depository in connection with a transaction involving real property;
- (4) "Depository" means a title insurer, title insurance ~~agent~~ agency, or qualified financial institution receiving a deposit of funds or documents;
- (5) "Escrow" means the act or process of providing closing services or services pursuant to an escrow agreement by a title insurer or title insurance ~~agent~~ agency;
- (6) "Escrow account" means the demand deposit account maintained by a title insurer or title insurance ~~agent~~ agency at a qualified financial institution into which the title insurer or ~~agent~~ title insurance agency deposits and disburses ~~all~~ funds collected from any person that is or will be a party to a transaction involving real property;
- (7) ~~"Indemnity agreement" means an agreement by which funds or~~



~~other property are received by the title insurer or the title insurance agent as collateral to secure the obligation of a person to indemnify or protect a title insurer in exchange for agreeing to provide coverage in a title insurance policy;~~

~~(8)(7)~~ (7) "Person" means ~~any natural person,~~ an individual or any partnership, association, cooperative, corporation, firm, trust, limited liability company, or other legal entity;

~~(9)(8)~~ (8) "Qualified financial institution" means a bank, credit union, or savings and loan association regulated, supervised, or examined by ~~Federal~~ federal or state authorities having regulatory authority over banks and trust companies;

~~(10)(9)~~ (9) "Risks" means the danger or hazards of a loss by encumbrance, a defective or invalid title, or adverse claim to title covered under a title insurance policy;

(10) "Title insurance agency" means a person that has an agency contract under § 23-103-407 with a title insurer;

(11)(A) "Title insurance agent" means ~~a person~~ an individual affiliated with a title insurance agency that ~~who~~ is authorized on behalf of a title insurer to issue a title insurance report or title insurance policy and is:

(i) A resident of the State of Arkansas licensed under § 23-64-101 et seq.; or

(ii) A nonresident individual licensed under § 23-64-101 et seq. and employed by a resident licensee.

(B) "Title insurance agent" does not include:

(i) An individual employed by a ~~licensee who~~ title insurance agency that does not sell or negotiate title insurance but who performs marketing duties ~~directed to depository institutions or licensed real estate brokers and agents on behalf and under the direction of a licensee~~ under the supervision of a title insurance agent; or

(ii) An individual employed by a ~~resident licensee who~~ title insurance agency that is a closing agent and does not solicit, sell, or negotiate title insurance;

(12) "Title insurance business" means:

(A) Issuing or offering to issue as an insurer a title insurance policy or closing protection letter;

(B) Transacting or proposing to transact any of the following activities when conducted or performed in contemplation of or in conjunction with the issuance of a title insurance report or policy:

(i) Guaranteeing, warranting, or otherwise insuring the status of title, liens, encumbrances, or other matters of record;

(ii) Executing title insurance policies;

(iii) Effecting contracts of reinsurance;

(iv) Underwriting titles; or

(v) Collecting, disbursing, or receiving title insurance premiums; or

~~(vi) Recording closing documents; or~~

(C) Doing or proposing to do any business substantially equivalent to the matters described in this subdivision (12) in a manner designed to evade ~~the provisions of~~ this subchapter;

(13) "Title insurance policy" means a contract, including any coverage, enhancements to coverage, or endorsements, insuring or indemnifying

owners of, or other persons lawfully interested in, personal or real property against loss or damage arising from any of the following conditions existing on, before, or subsequent to the policy date and not specifically excepted or excluded:

- (A) Defects in or liens or encumbrances on the insured title;
- (B) Unmarketability of the insured title;
- (C) Invalidity or unenforceability of liens or encumbrances on the insured title of the personal or real property;
- (D) Title being vested ~~otherwise~~ other than as stated in the policy;
- (E) Lack of a legal right of access to the land that is part of the insured title in a policy relating to real property;
- (F) Lack of priority of the lien of any insured mortgage over any statutory lien for services, labor, or materials as specifically described in the policy;
- (G) Invalidity or unenforceability of any assignment of an insured mortgage subject to certain conditions; or
- (H) The priority of any lien or encumbrance over the lien of an insured mortgage;

(14)(A) "Title insurance premium" means the funds paid to the title insurer and to ~~its~~ an appointed title insurance ~~agent~~ agency as consideration for the amount of liability assumed by a title insurer under a title insurance policy, including all amounts retained by the title insurance ~~agent~~ agency pursuant to the title insurance ~~agent's~~ agency's contract with the title insurer.

(B) "Title insurance premium" does not include charges for the performance of services related or incidental to title insurance or closings that are disclosed to the person charged, including without limitation:

- (i) Title search, abstracting, or examination of title;
- (ii) Obtaining a title opinion;
- (iii) Document preparation fees;
- (iv) Escrow or closing fees;
- (v) Notary fees;
- (vi) Attorney's fees;
- (vii) Fees incurred to cure defects in title;
- (viii) Tax report or tax certification fees;
- (ix) Title report fees;
- (x) Processing fees;
- (xi) Courier fees; and
- (xii) Fees incident to the issuance of a title insurance report or policy;

(15) "Title insurance report" means a preliminary report, commitment, or binder issued before the issuance of a title insurance policy containing the requirements, terms, conditions, exceptions, and any other matters incorporated by reference under which a title insurer is willing to issue a title insurance policy;

(16) "Title insurer" means a company authorized under the laws of this state to transact title insurance business; and

(17) "Underwrite" means the acceptance or rejection of risk on

behalf of the title insurer.

SECTION 2. Arkansas Code § 23-103-403 is amended to read as follows:
23-103-403. Requirement for license.

(a) ~~Other than a title insurer, only a person authorized as a~~ Only an appointed title insurance agent agency licensed under § 23-64-101 et seq. shall issue title insurance policies, reports, or otherwise transact the business of title insurance.

(b) All title insurance policies and reports covering an insurable interest in title to real property located in this state shall be signed by ~~an~~ a title insurance agent:

- (1) Properly appointed by a title insurer;
- (2) Affiliated with a title insurance agency; and
- (3) ~~licensed~~ Licensed in this state under this subchapter.

SECTION 3. Arkansas Code § 23-103-405 is amended to read as follows:
23-103-405. Title insurers – Limitation of authority – Powers.

(a)(1) ~~No~~ An insurer that transacts any class, type, or kind of insurance other than title insurance ~~shall be~~ is not eligible for the issuance or renewal of a license to transact title insurance business in this state.

(2) ~~No title~~ Title insurance shall not be transacted, underwritten, or issued by any insurer transacting or licensed to transact any other class, type, or kind of business.

(b) ~~No~~ A title insurer shall not engage in the business of guaranteeing payment of the principal or the interest on bonds or mortgages.

(c)(1) Notwithstanding subsection (a) of this section, a title insurer shall give notice of availability of closing protection to all parties to a transaction in which it is contemplated that title insurance may be issued.

(2) Upon written request by a party to a closing with a licensed ~~agent~~ agency with which ~~it~~ the title insurer has an ~~agent~~ agency contract, the insurer shall issue closing protection to the requesting party.

(3) The ~~settlement~~ closing protection shall conform to the terms of coverage and form of instrument as may be filed with the Insurance Commissioner and shall indemnify a person solely against loss of closing funds because of the following acts of a closing agent, title insurer's named employee, or title insurance ~~agent~~ agency:

(A) Theft or misappropriation of closing funds; or
(B) Failure to comply with written instructions from the proposed insured when agreed to by the closing agent, employee, or title insurance ~~agent~~ agency as it relates to the status of the title to the interest in land or to the validity, enforceability, and priority of the lien of a mortgage or deed of trust on the interest in land.

(4) The form and amount charged by a title insurer for closing protection coverage shall be filed with the commissioner at least twenty (20) days before the first use of closing protection coverage in the market.

(5) Except as provided in this section, a title insurer shall not provide any other coverage that purports to indemnify against improper acts or omissions of a person with regard to escrow or closing services.

SECTION 4. Arkansas Code § 23-103-406 is amended to read as follows:
23-103-406. Title insurance agents – Examination of records.

The Insurance Commissioner or title insurer ~~may~~ during normal business hours may examine, audit, and inspect any and all books, records, files, and escrow and operating accounts related to title insurance reports and policies maintained by a title insurance ~~agent~~ agency, its successor in interest, transferee, or receiver ~~as provided~~ under this subchapter.

SECTION 5. Arkansas Code § 23-103-407 is amended to read as follows:
23-103-407. ~~Underwriting Agency~~ contracts.

(a)(1) ~~No~~ A person acting in the capacity of a title insurance ~~agent~~ agency shall not place business with a title insurer, and ~~no~~ a title insurer shall not accept business from a title insurance ~~agent~~ agency, unless a written contract exists between the title insurer and title insurance ~~agent~~ agency.

(2) The written contract shall establish the responsibilities of the title insurer and title insurance ~~agent~~ agency and specify the division of the responsibilities if both share responsibility for a particular function.

(3) The written contract shall also contain:

- (A) The types of risks that may be undertaken;
- (B) The maximum authority or limits of liability;
- (C) The territorial limitations;
- (D) All terms of compensation for the title insurance ~~agent~~ agency;
- (E) Policies and funds remittance;
- (F) Termination provisions;
- (G)(i) The date by which all funds and policies due under the contract shall be accounted for to the title insurer.

(ii) The date shall be no later than sixty (60) days after:

- (a) Issuance of the policy;
- (b) The satisfaction of all requirements and condition of any report; or
- (c) The time specified in the contract if ~~sooner~~ less than sixty (60) days; and

(H) The time in which the title insurance ~~agent~~ agency has to report and forward to the title insurer all claims filed in writing with the title insurance ~~agent~~ agency by policyholders or other claimants.

(b) The contract shall not be assigned in whole or in part by the title insurance ~~agent~~ agency unless as part of a sale of a title insurance agency or its assets and approved in writing by the title insurer.

(c)(1) The title insurer may terminate the contract upon written notice to the title insurance ~~agent~~ agency under any of the following circumstances:

(A) Fraud, insolvency, appointment of a receiver or conservator, bankruptcy, cancellation of the title insurance ~~agent's~~ agency's license or permit to do business, or the commencement of legal proceedings by the state of the domicile of the title insurance ~~agent~~ agency, which if successful, would lead to the cancellation of the title insurance ~~agent's~~ agency's permit or license to do business;

(B) Material breach of any provision of the contract between the title insurer and the title insurance ~~agent~~ agency; or

(C) In accordance with any other termination provision of

the contract.

(2) Upon the effective date as set forth in the notice of termination from a title insurer, unless otherwise agreed to in writing by the title insurer, the title insurance ~~agent~~ agency shall immediately discontinue all title insurance business on behalf of that title insurer.

(3) ~~Nothing in this subsection shall~~ This subsection does not relieve the title insurance ~~agent~~ agency or the title insurer of any other contractual obligation.

SECTION 6. Arkansas Code § 23-103-408 is amended to read as follows:
23-103-408. Minimum search requirements.

(a) ~~No~~ A title insurance report or policy shall not be issued unless the ~~title insurer or~~ title insurance agency or title insurance agent has caused to be made a search of the title from the evidence prepared from a title plant or files of the county where the property is located or from the records of the clerk or the ex officio recorder of land records of the county that maintains records relating to real estate and any interest in the county.

(b) The search shall include a review of all matters affecting the title to the property or interest to be insured for a continuous period of not less than the immediately ~~preceding~~ preceding thirty (30) years.

(c) ~~No~~ A title insurance policy shall not be issued until the title insurer or title insurance agent has caused to be made a determination of insurability of title in accordance with the title insurer's underwriting practices.

SECTION 7. Arkansas Code § 23-103-410 is amended to read as follows:
23-103-410. Title insurance inventory maintenance.

(a) The title insurer and the title insurance ~~agent~~ agency shall each maintain an inventory of all numbered policy forms or policy numbers assigned to the title insurance ~~agent~~ agency by the title insurer.

(b) If title insurance policies are generated electronically by the title insurer, the title insurer shall maintain the inventory of policy numbers assigned to the title insurance agency.

SECTION 8. Arkansas Code § 23-103-411 is amended to read as follows:
23-103-411. Title insurer - Audit.

(a)(1) At least one (1) time each year, a title insurer shall conduct an on-site audit of the escrow and closing practices related to the issuance of title insurance policies and closing protection letters, escrow accounts, security arrangements, files, underwriting and claims practices, and policy inventory of the title insurance agencies that the title insurer has authorized to issue title insurance reports or policies on its behalf.

(2) If the title insurance ~~agent~~ agency fails to maintain separate escrow or trust accounts for each title insurer it represents, the title insurer shall verify that the funds related to closings in which the title insurer's policies are issued are reasonably ascertainable from the books of account and records of the title insurance ~~agent~~ agency.

(b)(1) The Insurance Commissioner may promulgate rules setting forth the standards of audit and the form of audit required.

(2) The commissioner may also require the title insurer to provide a copy of its audit reports to the commissioner.

(3) Any audits shall remain confidential unless introduced as evidence at a hearing or court proceeding involving the title insurance agency or agent.

SECTION 9. Arkansas Code § 23-103-412 is amended to read as follows:
23-103-412. Title insurer – Restrictions.

A title insurer shall not:

(1) Appoint any director, officer, controlling shareholder, or employee of a title insurance ~~agent~~ agency to serve on the title insurer's board of directors if the title insurance ~~agent~~ agency wrote five percent (5%) or more of the direct premiums of the title insurer written during the previous calendar year as shown on the title insurer's most recent annual statement on file with the Insurance Commissioner, unless the title insurer and the title insurance ~~agent~~ agency are under common control or ownership; or

(2) Jointly employ an individual who is employed with the title insurance ~~agent~~ agency unless the title insurer and the title insurance ~~agent~~ agency are under common control or ownership.

SECTION 10. Arkansas Code § 23-103-413 is amended to read as follows:
23-103-413. Policyholder rights and disclosure.

(a)(1) When a title insurance report includes an offer to issue an owner's title insurance policy covering the resale of owner-occupied residential property, the title insurance report shall be furnished to the purchaser or mortgagor or to the representative of the purchaser-mortgagor as soon as reasonably possible before closing.

(2) The title insurance report furnished to the purchaser-mortgagor shall incorporate the following statement on the first page in bold type:

"Please read the exceptions and the terms shown or referred to herein carefully. The exceptions are meant to provide you with notice of matters that are not covered under the terms of the title insurance policy and should be carefully considered.

This report is a written representation as to the condition of title for purposes of providing title insurance and lists all liens, defects, and encumbrances ~~affecting title to the land that are~~ filed of record within the last thirty (30) years that have not been released of record or that are not statutorily expired.

No title insurance agent or any other person other than a licensed Arkansas attorney may provide legal advice concerning the status of title to the property described in the title commitment."

(b)(1) When ~~an~~ an owner's title insurance policy has not been requested, a title insurer or a title insurance ~~agent~~ agency issuing a title insurance policy to a lender in conjunction with a mortgage loan involving real property made simultaneously with the purchase of all or part of the real property securing the loan shall give written notice on a form prescribed or approved by the Insurance Commissioner, to the purchaser-mortgagor at the closing.

(2) The notice required by subdivision (b)(1) of this section shall explain:

(A) That a title insurance policy for the lender involving real property is issued for the protection of the mortgage lender, and that

the policy does not provide title insurance protection to the purchaser-mortgagor as the owner of the real property being purchased;

(B) The coverage that a title insurance policy relating to real property insures and that risks exist for the purchaser-mortgagor of real property that could be insured through the purchase of an owner's title policy involving real property; and

(C) That the purchaser-mortgagor may obtain an owner's title insurance policy at a specified premium.

(3) A copy of the notice signed by the purchaser-mortgagor shall be retained in the closing file for at least five (5) years after the effective date of the lender's title insurance policy.

SECTION 11. Arkansas Code § 23-103-414 is amended to read as follows:
23-103-414. Record retention requirements.

(a) The title insurer and the title insurance ~~agent~~ agency shall maintain sufficient records of their affairs, including evidence of underwriting title, determination of insurability, and records of their escrow operations and escrow accounts.

(b) The Insurance Commissioner may prescribe the specific records and documents to be kept and the length of time for which the records shall be maintained.

SECTION 12. Arkansas Code § 23-103-416 is amended to read as follows:
23-103-416. Penalties – Liabilities.

(a) If the Insurance Commissioner determines that a title insurer, title insurance agency, title insurance agent, or any other person has violated this subchapter or any rule or order promulgated under this subchapter, the commissioner may order:

(1)(A) Payment of a monetary penalty not to exceed one thousand dollars (\$1,000) for each act or violation and not to exceed an aggregate penalty of ten thousand dollars (\$10,000) unless the title insurer, title insurance agency, title insurance agent, or other person knew or reasonably should have known that the title insurer, title insurance agency, title insurance agent, or other person was in violation of this subchapter.

(B) If the title insurer, title insurance agency, title insurance agent, or other person knew or reasonably should have known that the title insurer, title insurance agency, title insurance agent, or other person was in violation of this subchapter, the penalty shall not exceed five thousand dollars (\$5,000) for each act or violation and not exceed an aggregate penalty of fifty thousand dollars (\$50,000) in any six-month period; or

(2) Suspension or revocation of the title insurer's, title insurance agency's, title insurance agent's, or other person's license, if the title insurer, title insurance agency, title insurance agent, or other person knew or reasonably should have known that the title insurer, title insurance agency, title insurance agent, or other person was in violation of this subchapter.

(b) If an order of rehabilitation or liquidation of the title insurer or of conservation of assets of the title insurer has been entered and the receiver appointed under the order determines that the title insurance agency or title insurance agent or any other person has not complied with this subchapter or any rule or order promulgated under this subchapter and the

title insurer suffered any resulting loss or damage, the receiver ~~shall~~ may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the title insurer and its policyholders and creditors.

(c) ~~Nothing contained in this section shall~~ This section does not affect the right of the commissioner to impose any other penalties provided under § 23-64-101 et seq.

SECTION 13. Arkansas Code Title 23, Chapter 103, Subchapter 4 is amended to add an additional section to read as follows:

23-103-417. Access to public records.

(a) A title insurance agent, a title insurance agency, and a person affiliated with a title insurance agency shall:

(1) Have free access to the instruments of record affecting real property filed in any city, county, or state office; and

(2) Be permitted to:

(A) Occupy reasonable space, use equipment, and make memoranda, notations, and copies of instruments of record during the business hours of the city, county, or state office; and

(B) Compile, post, copy, and maintain books, records, and indices.

(b)(1) A title insurance agent, a title insurance agency, and a person affiliated with a title insurance agency has the right of access to any instrument filed of record in a city, county, or state office no later than the close of business of the first business day following the day the instrument was filed.

(2) A fee shall not be charged for providing access to the instrument.

(c) As used in this section, "access" means possession of an instrument sufficient to mechanically reproduce the instrument in the office where the instrument is filed.

(d)(1) A person entitled to access under this section that is denied access may petition immediately to a circuit court of competent jurisdiction.

(2) Upon written complaint of a person or an interested party denied a right provided by this section, the circuit court having jurisdiction shall hear the complaint within seven (7) days of the date the complaint is filed.

(3)(A) In an action or appeal of an action to enforce the rights granted by this section the court shall assess against a losing party reasonable attorney's fees and other litigation expenses reasonably incurred by a party that has substantially prevailed unless the court finds that the position of the losing party was substantially justified or that other circumstances make an award of attorney's fees and other litigation expenses unjust.

(B) Expenses shall not be assessed against the State of Arkansas or any of its agencies or departments.

(C) If at trial a defendant has substantially prevailed in the action, the court may assess attorney's fees and litigation expenses against a plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes.

The Amendment was read _____
By: Representative R. Green
DLP/LHA - 03-23-2009 15:49
DLP324 _____ Chief Clerk