

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

Act 1190 of the Regular Session

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

As Engrossed: H3/25/09

A Bill

HOUSE BILL 2169

5 By: Representative R. Green
6 By: *Senator R. Thompson*
7

For An Act To Be Entitled

10 AN ACT TO AMEND THE ARKANSAS TITLE INSURANCE ACT,
11 § 23-103-401 ET SEQ.; TO AMEND THE LAWS AFFECTING
12 TITLE INSURANCE AGENTS AND COMPANIES; AND FOR
13 OTHER PURPOSES.
14

Subtitle

15 TO AMEND THE ARKANSAS TITLE INSURANCE
16 ACT, § 23-103-401 ET SEQ. AND TO AMEND
17 THE LAWS AFFECTING TITLE INSURANCE AND
18 TITLE INSURANCE AGENTS AND COMPANIES.
19
20
21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

24 *SECTION 1. Arkansas Code § 23-103-402 is amended to read as follows:*
25 *23-103-402. Definitions.*

26 *As used in this subchapter:*

27 (1) *"Closing" means the process of executing documents in a*
28 *transaction involving either personal or real property, including the*
29 *transfer of title or creation of a lien on the title, or the collection and*
30 *disbursement of funds in connection ~~therewith~~ with the transaction;*

31 (2) *"Closing agent" means a person that facilitates a closing*
32 *for a fee;*

33 (3) *"Depositor" means the person providing funds or documents*
34 *for delivery to a depository in connection with a transaction involving real*
35 *property;*



1 (4) "Depository" means a title insurer, title insurance ~~agent~~
2 agency, or qualified financial institution receiving a deposit of funds or
3 documents;

4 (5) "Escrow" means the act or process of providing closing
5 services or services pursuant to an escrow agreement by a title insurer or
6 title insurance ~~agent~~ agency;

7 (6) "Escrow account" means the demand deposit account maintained
8 by a title insurer or title insurance ~~agent~~ agency at a qualified financial
9 institution into which the title insurer or ~~agent~~ title insurance agency
10 deposits and disburses ~~all~~ funds collected from any person that is or will be
11 a party to a transaction involving real property;

12 ~~(7) "Indemnity agreement" means an agreement by which funds or~~
13 ~~other property are received by the title insurer or the title insurance agent~~
14 ~~as collateral to secure the obligation of a person to indemnify or protect a~~
15 ~~title insurer in exchange for agreeing to provide coverage in a title~~
16 ~~insurance policy;~~

17 ~~(8)~~(7) "Person" means ~~any natural person,~~ an individual or any
18 partnership, association, cooperative, corporation, firm, trust, limited
19 liability company, or other legal entity;

20 ~~(9)~~(8) "Qualified financial institution" means a bank, credit
21 union, or savings and loan association regulated, supervised, or examined by
22 ~~Federal~~ federal or state authorities having regulatory authority over banks
23 and trust companies;

24 ~~(10)~~(9) "Risks" means the danger or hazards of a loss by
25 encumbrance, a defective or invalid title, or adverse claim to title covered
26 under a title insurance policy;

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

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

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

35 (ii) A nonresident individual licensed under § 23-
36 64-101 et seq. and employed by a resident licensee.

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

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

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

10 (12) "Title insurance business" means:

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

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

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

18 (ii) Executing title insurance policies;

19 (iii) Effecting contracts of reinsurance;

20 (iv) Underwriting titles; or

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

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

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

27 (13) "Title insurance policy" means a contract, including any
28 coverage, enhancements to coverage, or endorsements, insuring or indemnifying
29 owners of, or other persons lawfully interested in, personal or real property
30 against loss or damage arising from any of the following conditions existing
31 on, before, or subsequent to the policy date and not specifically excepted or
32 excluded:

33 (A) Defects in or liens or encumbrances on the insured
34 title;

35 (B) Unmarketability of the insured title;

36 (C) Invalidity or unenforceability of liens or

1 encumbrances on the insured title of the personal or real property;

2 (D) Title being vested ~~otherwise~~ other than as stated in
3 the policy;

4 (E) Lack of a legal right of access to the land that is
5 part of the insured title in a policy relating to real property;

6 (F) Lack of priority of the lien of any insured mortgage
7 over any statutory lien for services, labor, or materials as specifically
8 described in the policy;

9 (G) Invalidity or unenforceability of any assignment of an
10 insured mortgage subject to certain conditions; or

11 (H) The priority of any lien or encumbrance over the lien
12 of an insured mortgage;

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

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

23 (i) Title search, abstracting, or examination of
24 title;

25 (ii) Obtaining a title opinion;

26 (iii) Document preparation fees;

27 (iv) Escrow or closing fees;

28 (v) Notary fees;

29 (vi) Attorney's fees;

30 (vii) Fees incurred to cure defects in title;

31 (viii) Tax report or tax certification fees;

32 (ix) Title report fees;

33 (x) Processing fees;

34 (xi) Courier fees; and

35 (xii) Fees incident to the issuance of a title
36 insurance report or policy;

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

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

8 (17) "Underwrite" means the acceptance or rejection of risk on
9 behalf of the title insurer.

10
11 SECTION 2. Arkansas Code § 23-103-403 is amended to read as follows:
12 23-103-403. Requirement for license.

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

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

20 (1) Properly appointed by a title insurer;

21 (2) Affiliated with a title insurance agency; and

22 (3) ~~licensed~~ Licensed in this state under this subchapter.

23
24 SECTION 3. Arkansas Code § 23-103-405 is amended to read as follows:
25 23-103-405. Title insurers – Limitation of authority – Powers.

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

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

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

35 (c)(1) Notwithstanding subsection (a) of this section, a title insurer
36 shall give notice of availability of closing protection to all parties to a

1 transaction in which it is contemplated that title insurance may be issued.

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

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

10 (A) Theft or misappropriation of closing funds; or

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

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

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

22
23 SECTION 4. Arkansas Code § 23-103-406 is amended to read as follows:
24 23-103-406. Title insurance agents – Examination of records.

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

30
31 SECTION 5. Arkansas Code § 23-103-407 is amended to read as follows:
32 23-103-407. ~~Underwriting~~ Agency contracts.

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

1 agency.

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

6 (3) The written contract shall also contain:

7 (A) The types of risks that may be undertaken;

8 (B) The maximum authority or limits of liability;

9 (C) The territorial limitations;

10 (D) All terms of compensation for the title insurance

11 ~~agent~~ agency;

12 (E) Policies and funds remittance;

13 (F) Termination provisions;

14 (G)(i) The date by which all funds and policies due under
15 the contract shall be accounted for to the title insurer.

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

18 (a) Issuance of the policy;

19 (b) The satisfaction of all requirements and
20 condition of any report; or

21 (c) The time specified in the contract if
22 ~~sooner~~ less than sixty (60) days; and

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

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

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

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

1 agency's permit or license to do business;

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

4 (C) In accordance with any other termination provision of
5 the contract.

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

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

13
14 SECTION 6. Arkansas Code § 23-103-408 is amended to read as follows:

15 23-103-408. Minimum search requirements.

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

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

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

30
31 SECTION 7. Arkansas Code § 23-103-410 is amended to read as follows:

32 23-103-410. Title insurance inventory maintenance.

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

36 (b) If title insurance policies are generated electronically by the

1 title insurer, the title insurer shall maintain the inventory of policy
2 numbers assigned to the title insurance agency.

3
4 SECTION 8. Arkansas Code § 23-103-411 is amended to read as follows:
5 23-103-411. Title insurer – Audit.

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

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

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

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

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

24
25 SECTION 9. Arkansas Code § 23-103-412 is amended to read as follows:
26 23-103-412. Title insurer – Restrictions.

27 A title insurer shall not:

28 (1) Appoint any director, officer, controlling shareholder, or
29 employee of a title insurance ~~agent~~ agency to serve on the title insurer's
30 board of directors if the title insurance ~~agent~~ agency wrote five percent
31 (5%) or more of the direct premiums of the title insurer written during the
32 previous calendar year as shown on the title insurer's most recent annual
33 statement on file with the Insurance Commissioner, unless the title insurer
34 and the title insurance ~~agent~~ agency are under common control or ownership;
35 or

36 (2) Jointly employ an individual who is employed with the title

1 ~~insurance agent~~ agency unless the title insurer and the title insurance ~~agent~~
2 agency are under common control or ownership.

3
4 SECTION 10. Arkansas Code § 23-103-413 is amended to read as follows:
5 23-103-413. Policyholder rights and disclosure.

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

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

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

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

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

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

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

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

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

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

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

9 (3) A copy of the notice signed by the purchaser-mortgagor shall
10 be retained in the closing file for at least five (5) years after the
11 effective date of the lender's title insurance policy.
12

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

14 23-103-414. Record retention requirements.

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

19 (b) The Insurance Commissioner may prescribe the specific records and
20 documents to be kept and the length of time for which the records shall be
21 maintained.
22

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

24 23-103-416. Penalties - Liabilities.

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

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

35 (B) If the title insurer, title insurance agency, title
36 insurance agent, or other person knew or reasonably should have known that

1 the title insurer, title insurance agency, title insurance agent, or other
 2 person was in violation of this subchapter, the penalty shall not exceed five
 3 thousand dollars (\$5,000) for each act or violation and not exceed an
 4 aggregate penalty of fifty thousand dollars (\$50,000) in any six-month
 5 period; or

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

12 (b) If an order of rehabilitation or liquidation of the title insurer
 13 or of conservation of assets of the title insurer has been entered and the
 14 receiver appointed under the order determines that the title insurance agency
 15 or title insurance agent or any other person has not complied with this
 16 subchapter or any rule or order promulgated under this subchapter and the
 17 title insurer suffered any resulting loss or damage, the receiver ~~shall~~ may
 18 maintain a civil action for recovery of damages or other appropriate
 19 sanctions for the benefit of the title insurer and its policyholders and
 20 creditors.

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

24
 25 SECTION 13. Arkansas Code Title 23, Chapter 103, Subchapter 4 is
 26 amended to add an additional section to read as follows:

27 23-103-417. Access to public records.

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

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

32 (2) Be permitted to:

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

36 (B) Compile, post, copy, and maintain books, records, and

1 indices.

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

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

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

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

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

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

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

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

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33
34 /s/ R. Green

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36 APPROVED: 4/7/2009