

## November 5, 2008 Proposed Deletions within NMSA 1978, Section 59A-30-1

Morris J. Chaves, Superintendent of Insurance  
New Mexico Public Regulation Commission  
P.O. Box 1269  
Santa Fe, NM 87504-1269

**Re:** Opinion Request – Proposed Deletions within NMSA 1978, Section 59A-30-1

Dear Superintendent Chavez:

You have requested our opinion whether deleting one or both of the last two sentences from Section 59A-30-11(A) in the New Mexico Title Insurance Law (“Act”), NMSA 1978, §§ 59A-30-1 to 15 (amended through 1999), would remove the current negligence liability exemption. Section 59A-30-11 governs the underwriting standards that apply to title insurers. You also ask whether making these deletions would subject title insurers to double or triple damages for the same harm. We understand that your question arises from possible legislative proposals to amend the title insurance statute. Based on our examination of the relevant New Mexico constitutional, statutory, and case law authorities, and on the information available to us at this time, we conclude that:

- (a) deletion of only the second to last sentence (the financial stability provision), would not likely result in a significant change to current law;
- (b) the deletion of only the last sentence (the title insurer benefits provision), would likely eliminate the negligence liability exemption, but may require courts to balance the interests of both title insurance firms and consumers of title insurance and perhaps make it less likely that courts would award the double or triple damages that they might award if both sentences were deleted; and
- (c) the deletion of both sentences would likely eliminate the negligence liability exemption and return the law to its pre-1999 amendment status, and would allow the courts, in certain cases, to award double or triple damages for the same harm.

### **I. Deletion of the Financial Stability Provision Is Not Likely To Change Current Law**

Section 59A-30-11(A) provides:

No title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title using an abstract plant meeting the requirements of Section 59A-12-13 NMSA 1978 and has caused to be made a determination of insurability of title in accordance with sound underwriting practices. *The duty to search and examine imposed by this section is solely for the purpose of*

*enhancing the financial stability of title insurers for the benefit of insureds under title insurance policies. The New Mexico Title Insurance Law is not intended and should not be construed to create any duty to search and examine that runs to the benefit of, or to create any right or cause of action in favor of, any person other than a title insurer.*

(Emphasis added). The first issue presented is whether removal of the first italicized sentence (the financial stability provision), would allow plaintiffs to recover damages, including double or triple damages for the same harm, from title insurance agents and underwriters. For two reasons, we believe that it is unlikely that removing this provision would materially alter current law barring claims of negligence based on faulty title searches.

First, there is a trinity of cases regarding title insurance liability, but they all focus on the title insurer benefits provision. See *Barrington Reinsurance Ltd. LLC v. Fidelity Nat'l Title Co.*, 2007-NMCA-147, *Ruiz v. Garcia*, 115 N.M. 269, 850 P.2d 972 (N.M. 1993) (finding a statutory duty of reasonable care in conducting a title search running to the benefit of the seller of property), *Cottonwood Enterprises v. McAlpin*, 111 N.M. 793, 810 P.2d 812 (N.M. 1991) (finding a statutory duty of reasonable care in conducting a title search running to the benefit of the purchaser of property).

In the post-amendment case of *Barrington v. Fidelity*, the plaintiff alleged that the title insurance company conducted a deficient title search and gave false assurances regarding that search. See *Barrington Reinsurance Ltd. LLC v. Fidelity Nat'l Title Co.*, 2007-NMCA-147. at ¶¶ 3-4. The title insurance company claimed that Section 59A-30-11(A) provided an exemption from all conduct that flowed from the initial deficient title search. The court disagreed with the defendant's expansive interpretation, and construed the title insurance benefits provision more narrowly. *Barrington* made clear that Section 59A-30-11(A) does not create any duty, right, or cause of action based on negligent title searches, but stopped short of precluding liability based on other duties that may arise out of common law or another statute. See *id.* The court drew a line between the action of conducting a title search and any negligent misrepresentations made about the results of the search. By limiting the statutory exemption to only the title search itself, the court left open to injured plaintiffs other tort claims including: negligent misrepresentation, fraud; breach of implied contract; and violations of the Unfair Practices Act, *id.* at ¶¶ 16-20.

Secondly, Section 59A-30-2(B) provides that the purpose and intent of the Act is to "provide for the protection of ... the financial stability of the title insurance industry." Consequently, even if the similar language in Section 59A-30-11(A) were removed, courts would likely still consider the title insurance industry's financial stability when deciding claims premised on a breach of duty to use reasonable care when conducting title searches, making the proposed deletion largely inoperative.

## **II. Deletion of the Title Insurer Benefits Provision Would Likely Reinstate Negligence Liability for the Title Insurance Industry**

The second question is whether deleting only the title insurer benefits provision would reinstate negligence liability and cause the title insurance industry to pay double or triple damages for the same harm. If the title insurer benefits provision were removed, the pre-amendment duty of reasonable care in conducting title searches, as outlined in *Cottonwood* and *Ruiz*, *infra*, would likely be reinstated. However, under this scenario, the duty would remain modified by the financial stability provision.

With the financial stability provision intact, courts might rely on that provision to weigh the interests of both title insurance firms and consumers of title insurance. Courts might create a balancing test weighing the harms to consumers due to faulty title searches against the statutory goal of industry financial stability and the ramifications on title insurance consumers, including rate increases, benefits declension, and industry insolvency. Although impossible to be certain at this point, applications of a balancing test could make it less likely that courts would award an amount of damages which could be awarded in the absence of both provisions.

### **III. Deletion of 1999 Amendments Would Restore Negligence Liability and Might Result in Rare Cases of Double or Triple Liability**

The third issue presented is whether removal of both the financial stability and title insurer benefits provisions (i.e., the 1999 amendments to Section 59A-30-11(A)) would allow plaintiffs to recover double or triple for the same harm from title insurance agents and underwriters. Because it is presumed that the Legislature is aware of existing law and intends to change existing law when enacting new law, see *Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 213, 922 P.2d 1205, 1209 (N.M. 1996), the reversion back to pre-amendment construction would likely be interpreted as an affirmation of pre-amendment holdings.

There are two cases that outline the scope of the pre-amendment duty. In *Cottonwood Enterprises v. McAlpin*, 111 N.M. 793, 810 P.2d 812 (N.M. 1991), the court made clear that Section 59A-30-11(A) created a statutory duty of reasonable care in conducting title searches, running to the benefit of buyers of property, imposed upon title insurance agents, and that such a duty was independent of any duties or obligations to the buyer arising out of the contract of insurance. See *Cottonwood* at 796. In *Ruiz v. Garcia*, 115 N.M. 269, 850 P.2d 972 (N.M. 1993), the court extended this statutory duty to run to sellers of property (“purchasers of title insurance”). Thus, even if no express or implied contractual duty to perform a title search existed between either the buyer or seller of property and the title insurer, *Ruiz* found that the title insurer nevertheless had a statutory duty, independent of any contract terms, to provide reasonable care in the required title search. *Id.*

Under the legislative directive of removing the 1999 amendments, courts would likely find causes of action based on negligent title searches. It is possible that under such a regime, title insurers could be, but would not often be, liable for damages double or triple those otherwise limited by claims made on the title insurance policy. This could work in several ways. For example, in *Cottonwood*, the plaintiff-purchaser sought to

recover the cost of employing architects and engineers to adequately redesign a building, the cost of attorneys to remove the undisclosed easement, the cost of canceling its original development plan, the cost of resubdivision, the cost of delay in development, losses in sales, and attorney fees. While actual numbers from *Cottonwood* are not available, such costs could realistically aggregate to double or triple the amount covered by the insurance policy. Further, the plaintiff in *Barrington* specifically raised an Unfair Practices Act claim, which is subject to a triple damage award.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

BRIAN HARRIS  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General