WFG National Title Insurance Company
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UNDERWRITING BULLETIN

To: **All Florida Agents of WFG National Title Insurance Company**

From: **WFG Florida Agency Department**

Date: **June 19, 2014**

Bulletin No.: **FL 2014-10**

Re: **Florida Legislature Reaffirms Economic Loss Rule for Title Insurance**

Representative Kathleen Passidomo (R-Naples) and Senator Bill Galvano (R-Bradenton) introduced counterpart versions of HB 321, which was unanimously adopted in both the house and senate, and made a number of changes to Florida Statutes affecting the title insurance industry. The bill was signed into law by Governor Scott on June 13, 2014 and will take effect July 1, 2014 (Laws of Florida 2014-112). Here are some of the changes the bill will make:

Economic Loss Rule Restored

The primary change made by this bill was to restore the Economic Loss Rule to title insurance. This is a highly technical, and poorly understood, legal principle that the parties to a contract are limited to the remedies they agreed to in the contract. The rule prevents a party to the contract from suing the other party for negligence if the contract sets a different standard and allows the parties to agree to contractually limit the extent of their liability.

In March, 2013, the Florida Supreme Court limited the economic loss rule so that it only applied in product liability cases.(1)

Title insurance policies have historically been treated as a contract subject to the economic loss rule, so limiting the Economic Loss Rule to product liability cases meant that anyone could sue their insurer, agents and abstractors in negligence for matters covered by (or even expressly excluded from coverage under) their a title policy.

Most title policy claims are the result of some error or omission somewhere in the search or examination process. That type of negligence is obvious, and under the title policy the liability would fall first to the title insurer. Absent the economic loss rule, an agent's decision to take an exception for a known defect in a title policy (rather than taking steps to cure it), could also be the basis for a negligence suit. Without an economic loss rule to limit title claims to the policy, it almost becomes malpractice for the insured's attorney NOT to name the agent and abstractor anytime they file suit to enforce a title policy. That would really drive up an agent's E&O coverage costs.

Recognizing these potentially devastating results to the title industry, the Florida Legislature restored the economic loss rule as to title insurance policies by adding new §627.778(3). That provision provides: "Only contractual remedies are available for a breach of a duty which arises solely from the terms of a contract of title insurance or an instrument issued pursuant to [a Closing Protection Letter]."

The trial lawyers and other stakeholders expressed concern about the language of the originally filed bill.(2) They argued that it could be read as inappropriately eliminating liability of title agents for closing functions not covered by title insurance or a closing protection letter, and even for an attorney's malpractice,(3) so compromises were made. While the ultimate statutory language is not as clear as we might like, so we know its scope will ultimately be tested in court, the legislative intent and the effect was to re-apply Economic Loss Rule protections to ALL matters covered by or excluded from a title policy and closing protection letter. Title insurance professionals faced with tort claims after the effective date of this bill should take special note and comfort from the legislative intent expressed in the Staff Analysis for CS/CS/SB 570(4).

Adjusting Premium Reserve Requirements

In hopes of attracting new title insurers to formally move to Florida, HB 321 reduced the statutory premium reserve requirements for large underwriters. The new reserve requirements are in line with (and sometimes higher than) the Statutory Premium Reserve requirements in other states. As it always has been, the SPR is subject to an annual "true-up" so that the required reserves meet or exceed the actuary's estimates of liability. So this is not a change that will hurt the solvency of Florida based underwriters.

The bill also made other technical changes to the computation and release of reserves and the establishment of bulk reserves. Nearly identical changes to reserve requirements were made in HB 805 (Laws of Florida 2014-132).

Restriction on Title Agency Names

Feeling that the name "title company" could confuse the public into believing that an agency was really a title insurer, the bill expands the existing restrictions on naming a title agency.

After October 1, 2014, a title insurance agency may not adopt a name that contains the words "title insurance," "title company," "title guaranty," or "title guarantee," unless followed by the word "agent" or "agency."

This does not require any existing agency to change its name.

Elimination of the "Double Bond" Requirement

Last year, the legislature shifted the responsibility for confirming that each title agency held the required surety bond from DFS to the insurers. Because of legislative procedural rules, the DFS duty remained in the statute and could erroneously be read to require two bonds. HB 321 eliminated the DFS requirement, while maintaining the requirement for a single bond verified by the insurers. So it is now clear that only a single $35,000 surety bond is required of a title agency.

Changes Due Date of Data Call

The Florida data call required of all title agencies and insurers (but not attorney agents or law firms) originally was to be filed by March 31 of each year. Since Federal tax information is required in the data

call, it was decided that a May 31 filing date made more sense and this bill changes the filing date to May 31 of each year.

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1 *Tiara Condominium Assoc. Inc. v. Marsh & McClennan Companies, Inc*., 110 So.3d 399 (Fla. 2013)

2 As originally proposed, 627.778 (3) would have read:

> "The terms of a contract of title insurance constitute an insured's sole remedy for any claim of loss against a title insurer, an agent issuing the title insurance contract, or an abstractor providing a title search for the contract, arising out of the status of title to the estate or interest covered by the contract."

And this language would have been added to §627.786(3): "[A Closing Protection Letter] is the insured's sole remedy for any liability assumed pursuant to this section."

3 Tort claims involving professional services have been an exception not barred by the economic loss rule. See e.g. *Indemnity Insurance Co.* at 537

4 http://www.flsenate.gov/Session/Bill/2014/0570/Analyses/2014s0570.cm.PDF

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