

IOWA TITLE GUARANTY DIVISION

IN RE: APPLICATION FOR A
TITLE PLANT AND TRACT
INDEX WAIVER BY
CHARLES W. HENDRICKS

BRIEF AND ARGUMENT OF
INTERVENOR IOWA LAND TITLE
ASSOCIATION

STATEMENT OF THE CASE

This matter involves the Application for a Title Plant and Tract Index Waiver under Iowa Code section 16.91 filed by Charles W. Hendricks ("Hendricks") as amended and supplemented on May 2, 2007. On April 27, 2007, the Iowa Land Title Association ("ILTA") intervened by its own petition in this matter. Hendricks' application is scheduled to be considered by the Iowa Title Guaranty Board at its meeting scheduled for June 5, 2007.

STATEMENT OF FACTS

Background

The Iowa title guaranty program was created by the Iowa legislature in 1985 "to provide additional guarantees of Iowa real property titles, to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system." Title Guaranty Manual, Title Guaranty Division, Article I. The authority to initiate and operate the program is vested in the Iowa Title Guaranty Division of the Iowa Finance Authority. Section 16.91(1), Iowa Code (2007).

The Iowa Title Guaranty Division ("the Division") has described its mission in its administrative rules:

The mission of the division is to operate a program that offers guaranties of real property titles in order to provide, as an adjunct to the abstract-attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system in the state..." 265 Iowa Admin. Code Section 9.2.

Under the program established by the Iowa legislature, before a title guaranty can be issued, "an abstract of title" must be "brought up-to-date and certified by a participating abstractor...and a title opinion issued by a participating attorney...stating the attorney's opinion as to the title..." Section 16.91(6) Iowa Code (2007).

In order to participate as an abstractor under the title guaranty program, "each participating abstractor is required to own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles are guaranteed by the division." Section 16.91(5), Iowa Code (2007).

The statute further requires what is known as the "forty-year title plant":

"The tract indices shall contain a reference to all instruments affecting real estate which are recorded in the office of the county recorder, and shall commence not less than forty years prior to the date the abstractor commences participation in the title guaranty program." Id.

The statutory scheme provides two exemptions from the forty year title plant requirement. The first, known as the "grandfather" provisions, exempts those participating attorneys who provided "abstract services continuously from November 12, 1986, to the date of application." Id.

The second exemption, known as the "waiver" provision, provides that:

"The division may waive the requirements of this subsection pursuant to an application of an attorney or abstractor which shows that the

requirement imposes a hardship to the attorney or abstractor and that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state." Id.

To the best institutional memory of the division, it has approved waivers for attorneys on five previous occasions¹:

June 5, 2001	David Dunakey
June 5, 2001	Charles Augustine
June 14, 2005	Steven Sents
December 6, 2005	John Donohoe
December 6, 2005	Michael Gorsline

There have been no waivers from the forty-year title plant requirement granted to non-attorney abstractors, although the division has, on occasion, permitted abstractors to participate on a temporary waiver basis while their title plant was being created. In all of those cases, the abstractors completed their forty-year title plant within a year.

In those cases where the Division has granted waivers to attorney-abstractors, the record is sketchy at best in attempting to discern the bases for the board's decisions. In none of the cases did the board enter a ruling containing findings of fact and conclusions of law, nor did the board make and keep a record of the proceedings beyond its routine minutes. Where record was made, it was made by the applicants.

In the absence of a complete record, the Sents, Donohoe and Gorsline cases appear to have been granted waivers on the basis of the location of their practices (Louisa County, Scott County and Scott County, respectively) and the fact that each was mentored by "grandfathered" attorneys that would soon be retiring from practice.

¹ A sixth waiver, for attorney Mitchell Taylor, was overturned by the district court on appeal. Des Moines County Abstract Company vs. Iowa Finance Authority, Title Guarantee Division, CVEQ006597, Des Moines County, (4/5/07).

Hendricks Application

In his amended application, Hendricks requests that he be granted a "statewide" waiver from the forty-year title plant requirement (Amended App., ¶ 9).

Hendricks has not submitted a business plan, but it appears his intent is to offer clients state-wide standardized pricing, standardized "wash" agreements, and standardized "turn-around" time (Amended App., ¶ 3).

Hendricks intends to construct abstracts utilizing "direct grantor/grantee searches" (Amended App., Argument, p. 16, fn. 12) through on-line (Internet) records sources (Argument, p. 21).

Hendricks asserts two distinct categories of "hardship" in his application. The first is in the form of a competitive hardship. He asserts that the primary competition for his business is title insurers that can provide wash agreements, quick turn-around and standard pricing. Relieving him of the burden of utilizing a forty-year title plant in creating abstracts will permit him to provide services that are competitive to those products offered by title insurance companies.

The second form of hardship that Hendricks asserts is personal. He asserts that he has maximized his credit line to build his current business and that the estimated cost of creating any title plant, let alone one state-wide, is prohibitive. Hendricks has not submitted a business plan that would explain his inability to lease the forty-year title plant or plants that would meet the needs of his business, although he does acknowledge he will be required to "sub-contract all root of title abstract requests" (Amended App., ¶ 6).

ARGUMENT

The Iowa legislature created a two-part test that applicants must meet to obtain a waiver of the requirement that the participating abstractor or attorney "own or lease" a forty-year title plant. An applicant must show:

"The requirements impose a hardship to the attorney or abstractor and that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guarantees throughout the state." Section 16.91(5), Iowa Code (2007). (Emphasis added).

Hendricks does not assert as part of his application that his state-wide waiver is "absolutely necessary to ensure availability of title guarantees throughout the state." Therefore, ILTA will focus its argument on the "hardship" and "public interest" prongs of the test.

I. HENDRICKS' APPLICATION FAILS TO ESTABLISH THE IMPOSITION OF A HARDSHIP AS THAT TERM IS CONTEMPLATED BY THE STATUTE

Neither section 16.91(5) nor the division's rules (265 Iowa Admin. Code 9.7(4)) define what level of "hardship" to the applicant one must establish to earn a waiver of the forty-year title plant requirement. However, the statute is instructive in how the division should interpret this requirement in the waiver application process.

A review of section 16.91(5) reveals an understanding of the deep appreciation the legislature had for the land-title transfer system existing in Iowa upon its passage in 1985 and the public interest in maintaining its integrity. That section is replete with terms demonstrating its desire that the high quality of the land-title transfer system be maintained:

- Participating abstractors are "required to own or lease and maintain and use... an up-to-date abstract title plant including tract indices..." (Emphasis added)

- The tract indices "shall contain a reference to all instruments affecting the real estate...and shall commence not less than forty years prior..." (Emphasis added)
- Before a guaranty can be issued, "the division shall require evidence that an abstract of title...has been brought up-to-date and certified by a participating abstractor..." (Emphasis added)

Certainly the legislature understood the complexity of the program for title guaranties it was creating and both the capital cost and administrative costs inherent in such a system when these provisions were enacted. By requiring these costs, the legislature obviously performed its own cost/benefit analysis and its own risk analysis in the enactment. By coming down on the side of requiring these costs, the legislature clearly intended that the integrity of the land-title system be maintained at such costs.

An examination of Hendricks' application shows he has not submitted any type of business plan demonstrating an incapability of obtaining a forty-year title plant through construction, purchase or lease. His application simply expresses his speculative projection that the costs associated with a construction of such a plant are prohibitive. His application fails to make even a speculative attempt to satisfy the requirement through lease. In the absence of any bona fide business plan, an applicant cannot show a hardship.

In addition, Hendricks' assertions of competitive hardship simply bear no relevance to any statutory criterion for the consideration of a waiver. In asserting these hardships, Hendricks seeks to establish a business competitive with title insurers. The legislature was mindful of the existence of title insurance when the title guaranty program was promulgated and could have established a program enough similar to title insurance to be competitive on pricing, turn-around time and other title industry practices. However, the legislature instead opted for the

development of a contract "acceptable to the secondary market," section 16.91(3), Iowa Code (2007), which maintained all of the protections of the land-title system in sections 16.91(5) and (6). Hendricks' "hardship" is that he seeks to provide a product and service with a guarantee issued by the division without the investment of the capital and administrative costs required by the statute. Accordingly, his application should be denied for failure to establish a hardship.

II. HENDRICKS' WAIVER IS NOT CLEARLY IN THE PUBLIC INTEREST AS THAT TERM IS CONTEMPLATED BY THE STATUTE

Pursuant to section 16.91(5), applications for waiver of the forty-year title plant requirement can only be granted upon evidence "that the waiver clearly is in the public interest." (Emphasis added). The public interest of the citizens of the State of Iowa is articulated in the mission of the title guaranty division and is reasonably derived from the forty-year title plant requirement contained in section 16.91(5):

"The mission of the division is to operate a program that offers guaranties of real property titles in order to provide, as an adjunct to the abstract-attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders' participation in the secondary market and to add to the integrity of the land-title transfer system in the state..." 264 Iowa Admin. Code 9.2 (Emphasis added).

It is against this public interest that the Hendricks application should be measured. The waiver should be denied for its failure to clearly establish such a public interest.

Instead of utilizing "up-to-date" and "certified" abstracts derived from forty-year title plants as required by section 16.91(5), Hendricks indicates in his application his intent to conduct "direct grantor/grantee searches" and "direct on-line searches." He describes his on-line searches as "the way abstracting is done" and describes the investment in a forty-year title plant and tract index as "an unnecessary monetary expenditure of thousands, if not millions of dollars." He

describes a forty-year title plant as "actually inferior and...certainly unnecessary to the abstracting of real estate within the state of Iowa. By searching the tract, and not the grantor/grantee, an abstractor will discover stray recordings without any true legal effect on the property. Once these stray recordings are noted, the examining attorney must clear them."

The application fails to meet the public interest in several ways. First, as argued above, the legislature clearly expressed its desire to maintain the integrity of abstract-attorney opinion role in the land-title system by establishing the requirement of a forty-year title plant. Hendricks not only acknowledges he will neither use nor establish a forty-year title plant, he argues the forty-year title plant is inferior. However, any reliance on internet-based searches ignores the warnings contained on the website databank. At www.iowalandrecords.org the Iowa County Recorders Association, Inc. states:

"The information contained herein is provided as a service to the public for informational services only and no representation is made as to its accuracy or fitness for any particular purpose. The Iowa Land title Records System or the County Land Record Information System, is not intended to replace a search of the official records maintained in the office of the County Recorder..."

Similarly, the Iowa Court Information System warns its users to:

"Be advised, depending on the county, cases prior to September of 1997 may exist in manual docket format only and are not available on this page."
www.judicial.state.ia.us/online_court_services/online_docket_record/index.asp

Any reliance on such internet-based information, to the exclusion of utilizing up-to-date, certified abstracts from forty-year title plants, cannot be in the public interest.


Additionally, the grant of a waiver will weaken the public interest in the title guaranty "brand." Consumers purchase title guaranties with knowledge of the legislative requirements found in section 16.91(5) that a guaranty is issued only upon an attorney's title opinion after

review of a certified, up-to-date abstract from a forty-year title plant. Waivers will weaken the consumers' faith in title guaranties as it is discovered that guaranties are being issued without the statutory protections.

Finally, the title guaranty system will be further weakened by claims caused by failure to utilize forty-year title plants. All of the program's underwriting standards are based upon the understanding that guaranties are issued only upon a title opinion rendered after review of a certified, up-to-date abstract from a forty-year title plant. Iowa Title Guaranty Manual, section VII. Abandonment of that requirement will stress the program's underwriting standards, increase program costs and weaken the faith placed in the program's product, all in derogation of the public interest.

Hendricks argues that the integrity of the program will be protected by the professional licensure standards required of attorneys. The legislature could have set that standard, had it desired to do so, to protect the public interest. In requiring participating abstractors to own or lease a forty-year title plant, the legislature established a different standard for abstractors to meet. Hendricks' application fails to clearly establish it is in the public interest that he be granted a waiver. The board should deny his application.

Respectfully submitted,


James H. Gilliam

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 22 day of May, 2007.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature 