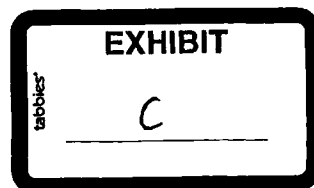


**BRIEF IN OPPOSITION OF ILTA'S PROPOSED
AMENDMENT TO SECTION 16.91**

**SUBMITTED TO THE ISBA AD HOC COMMITTEE
CONCERNING AMENDMENT OF SECTION 16.91**

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I. STATEMENT OF FACTS.

Section 16.91 of the Code of Iowa outlines what is required for an attorney to participate as an abstractor in the Title Guaranty program. To qualify as a participating abstractor, an attorney must satisfy one of three eligibility criteria. First, an attorney may qualify if that attorney owns or leases and maintains and uses in the preparation of abstracts, a title plant with tract indices. Iowa Code § 16.91(5) (2007). Second, an attorney may qualify if that attorney had been “grand-fathered” - providing abstracting services continuously from November 12, 1986, to the date of application for participation. *Id.* Finally, an attorney may qualify to participate as an abstractor if Title Guaranty grants that attorney a waiver from having to satisfy one the first two eligibility requirements. *Id.* Section 16.91 does not impose county-specific limitations on the provision of abstracting services by an attorney that has received a waiver. However, the Iowa Land Title Association has proposed an amendment to section 16.91 that would suggest a county-specific limitation to a waived attorney’s participation as a Title Guaranty abstractor. The Iowa Bar Association, through its Board of Governors seeks input for it to consider in developing a position on the proposed amendment.

II. ISSUE.

- A. WHETHER THE ISBA SHOULD SUPPORT THE ILTA'S PROPOSED AMENDMENT TO SECTION 16.91 WHICH WOULD ALLOW THE RESTRICTION OF TITLE GUARANTY APPROVED ATTORNEY ABSTRACTORS TO A SPECIFIC COUNTY.

III. RESPONSE.

- A. THE ISBA SHOULD NOT SUPPORT THE ILTA'S PROPOSED AMENDMENT TO SECTION 16.91.

IV. ARGUMENT.

- A. THE AMENDMENT WOULD LIMIT THE ABILITY OF ATTORNEYS TO ABSTRACT IN THE STATE OF IOWA.

The adoption of ILTA's proposed amendment to section 16.91 of the Code of Iowa would drastically limit the ability of attorneys to abstract in Iowa. Although the proposed amendment does not expressly limit an attorney abstractor to a single county, a practical application of the statute, once amended, would do so. On its face, the amendment does not directly restrict an attorney from abstracting in certain counties. It does, however, restrict an attorney abstractor's participation in the Title Guaranty program to a single county. This is tantamount to restricting an attorney's overall abstracting practice to a single county. "Given the scope and economic significance of the Title Guaranty program in Iowa, the importance of a lawyer's eligibility to participate should not be underestimated." Berger v. Iowa Finance Authority, 593 N.W.2d 136, 140 (Iowa 1999). The vast majority of lenders in Iowa selling residential loans on the secondary market utilize Title Guaranty. A brief review of the board meeting minutes contained on Title Guaranty's website reveals increasing market shares and revenue for the program, which evidences its continued and growing significance. The overwhelming popularity of Title Guaranty in Iowa real estate transactions makes it clear that where an attorney cannot prepare an abstract for Title Guaranty in a particular county, that attorney effectively cannot abstract in that county.

B. THE AMENDMENT WOULD HARM THE TITLE GUARANTY PROGRAM, MUCH TO THE DETRIMENT OF THE PUBLIC AND THE BAR.

The Title Guaranty program plays a very important role in real estate transactions throughout the state of Iowa. The program provides significant financial assistance to first-time home buyers and helps maintain the role of the attorney in residential real estate transactions. The adoption of ILTA's proposed amendment would have a significant negative impact on the Title Guaranty program in the state of Iowa, much to the detriment of the general public and members of the Bar engaged in real estate practices.

In 1985, the Iowa legislature created Title Guaranty. Although section 515.48(10) of the Code of Iowa prohibits the origination of title insurance within the state, mortgage lenders relying on the secondary market increasingly felt the need for a similar title assurance option. Title Guaranty was Iowa's answer. In establishing Title Guaranty, the legislature aimed "to provide guarantees of Iowa real property titles, facilitate mortgage lenders' participation in the secondary market and to help assure the integrity of Iowa's land-title system." About Title Guaranty, at http://www.ifahome.com/en/title_guaranty_division (December 17, 2007).

Today, Title Guaranty is an entirely self-supporting division of the Iowa Finance Authority. Id. All revenue received by Title Guaranty in excess of its operating expenses is re-invested in the state of Iowa, providing essential funds for home ownership programs for first-time home buyers. Id. This is in sharp contrast to title insurance companies, which are private entities whose profits are paid to its shareholders.

Like title insurance, Title Guaranty provides guarantees against loss or damage caused by real property title defects. See Iowa Code § 16.91(1) (2007). Unlike title insurance, however, the use of Title Guaranty ensures the continued involvement of attorneys in real estate transactions throughout the state of Iowa. The issuance of Title Guaranty requires, as a condition precedent, the issuance of an attorney title opinion. Iowa Code § 16.91(6) (2007). Title insurance, on the other hand may be issued entirely independent of any involvement by an attorney. The continued participation of Iowa attorneys in real estate transactions, therefore remains at least partially dependent on the continued existence and viability of Title Guaranty.

In addition to an attorney's title opinion, the issuance of Title Guaranty also requires as a condition precedent the preparation and certification of an abstract of title. Iowa Code § 16.91(6) (2007). It is this abstract of title upon which the requisite attorney's title opinion is based. The adoption of ILTA's legislative proposal would restrict the number of Title Guaranty participating abstractors in any given county. This would lead to a reduction in, or entire lack of competition, which in turn would lead to higher prices, slower abstracting production and a lower quality of customer service. The end result would be a Title Guaranty system without the means to compete against out-of-state title insurance companies that issue title assurance policies without the need for abstractors or attorneys, and without reinvesting their profits into programs benefitting the general public.

C. AN ABSTRACT PRODUCED BY AN ATTORNEY EMPLOYING A DIRECT SEARCH IS NO LESS RELIABLE THAN AN ABSTRACT PRODUCED FROM A TITLE PLANT.

A major component of the ILTA's argument in support of their proposed amendment to section 16.91 is that it promotes the creation of a better abstracting product. This argument is based on two erroneous assumptions. First, that an abstract created with the use of a title plant and tract index is superior to an abstract prepared with the use of the grantor/grantee index and records maintained by the county recorder. Second, that an attorney who has learned to use the indices of one county cannot learn to use the indices of another county. Both assumptions are false.

There are two types of Title Guaranty participating abstractors: those that utilize independently maintained title plants and tract indices in preparing abstracts, and direct record searchers who rely on the records and indices maintained by the county recorder in preparing abstracts. Grand-fathered and waived attorney abstractors generally fall into the later category, while proponents of the ILTA's amendment fall into the former.

The direct searching method of abstracting employed by waived and grand-fathered attorneys is directly in tune to the principles upon which Iowa's constructive notice laws are based. The provision of constructive notice is the underlying rationale for recording instruments affecting title to real estate in Iowa. In order to be afforded constructive notice, an instrument

affecting real estate must be properly recorded and indexed in the grantor/grantee indices maintained by the county recorder. Iowa Code §§ 558.55, 558.60 (2007). In preparing their abstracts, waived and grand-fathered attorney abstractors utilize the indices upon which this system of constructive notice is based; the very indices maintained by the county recorder. Under this system, all instruments properly recorded and entitled to constructive notice under Iowa law are readily ascertainable and available to the direct-record searcher. The resulting product is therefore based entirely upon the use of the same facilities used in providing constructive notice under Iowa law.

Title plant abstractors, on the other hand, pull documents from the recorder's office and re-index those documents into their own, independently-maintained indices. When an abstract is made by a title plant abstractor, it is done entirely independent of, and without regard for the county recorder's grantor/grantee index upon which Iowa's system of constructive notice is based. The final product, therefore is one that is made without direct regard to Iowa's model of constructive notice. Of further concern with title plant abstracting is the inherent practice of re-indexing instruments pulled from the records maintained by the county recorder. This additional step is not present in the direct-search method of abstracting utilized by waived and grand-fathered attorney abstractors, and lends itself to potential errors inherent with the addition of a human step in any system.

Title plant abstractors are necessarily restricted to abstracting in those counties with regard to which they maintain a title plant and tract index. Without the benefit of their own title plant and tract index, they lack the fundamental means to prepare or update abstracts in other counties. Direct searchers such as waived and grand-fathered attorneys, on the other hand, are not restricted to any particular county in connection with the preparation or continuation of abstracts. Since every county recorder maintains grantor/grantee indices and independent records of instruments affecting real property within that county, the direct searcher has the means, by use of each such separate set of indices and records to abstract in any county. The ILTA, through its legislative proposal aims to restrict direct searching Title Guaranty abstractors to a single county. There is no reasonable rationale for this limitation. If an attorney has learned to use the indices and records maintained by one county in creating abstracts, there is no reason to assume that the attorney cannot learn to use the indices and records maintained by another county.

V. CONCLUSION.

Based on the foregoing, the ISBA should not support the ILTA's proposed amendment to section 16.91 of the Code of Iowa. In the alternative, if the ISBA does elect to support the proposed amendment, such support should be conditioned upon county limitation contemplated by the amendment not being applicable to those attorneys and other abstractors that were grand-fathered or have received a waiver.