

What's Past is Prologue:

ATG's Battles to Preserve the Lawyer's Role in Real Estate Transactions



ATTORNEYS' TITLE GUARANTY FUND, INC



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ATG's Hard-Fought Successes of the Past Position Us to Face Today's Challenges

It's been my pleasure to reconnect with so many of you at our recent Town Hall gatherings. These meetings cover important issues facing our profession, how ATG and our devoted members can meet these challenges, and how our history prepares us to build the future together.

We've been hosting Town Hall events since I started at ATG almost 42 years ago. Throughout the years one thing has remained the same: ATG and our attorney agents are unified in our mission to preserve the role of the lawyer for the benefit of the public. As a collective we are a powerful advocate for consumers and the profession.

Through collaboration with the Illinois Real Estate Lawyers Association (IRELA) led by John O'Brien and the Association of Real Estate Attorneys (AREA) led by Kelli Fogarty, we are a formidable force that can effectuate meaningful changes to benefit consumers and the profession.

I have had the privilege to be a part of ATG's storied history and with it a career that has brought immense personal satisfaction and gratitude. Coming from that perspective, we see two challenges that could pose an existential threat to the practice of real estate law:

1. The emergence of programs that offer real estate salespeople the opportunity to make money as title agents, even where the vast majority of real estate salespeople lack the training and skill to perform these services.
2. A small minority of the real estate bar are offering "free" or deeply discounted legal fees while obfuscating the fact that they are earning title fees or charging "junk fees."

Working with IRELA, AREA, and others we will address these challenges in the legislature, the media, with regulators, and in the courts if necessary.

Do Today's Lawyers Know Our History?

To those not as familiar, it is a history worth revisiting because today's existential threats remind us of our early battles to survive.

I begin with statements that reflect our past, present and future:

- **ATG's Mission and Purpose:** To preserve the lawyer's role in real estate transactions for the benefit of the public.
- **But for ATG:** Lawyers would be out of the real estate practice.
- **Working Together:** We will preserve and protect your role long into the future.

Dating back to Abraham Lincoln's years of practicing law, lawyers have written title opinions to evidence good title to buyers. In the early 1960s, lawyers were being pushed out of representing clients who were buying or selling homes.

Title companies and brokers told consumers they didn't need lawyers because they could take care of this "simple" transaction.

Our founder Stan Balbach and a group of downstate lawyers saw it differently. Understanding our history shows how it shapes our response to the current environment. If you've been part of ATG for a while and know the history, skip ahead to **War Clouds**, below.

Consumers Need an Advocate

Then and now, we believe the sale or purchase of a home is the largest transaction of most consumers' lives. It is a stressful, complex, and baffling process. To best navigate the transaction, we have always believed consumers need an advocate solely devoted to their interests.

ATG: The Original Disrupter

Lawyers joined together in 1964 and formed a title insurance company, or "Guaranty Fund." In so doing, they developed a way for attorneys to compete with title companies and continue to represent clients: Complementing their legal services with title services.

From inception we faced an uphill climb as evidenced by an *ALTA News* article from 1981, *The Saga of the Bar Funds*, where ALTA's General Counsel wrote:

"Like a chronic infection, the bar fund movement has resisted all of our efforts to eradicate it and, if left to fester, could ultimately contaminate the entire commercial title insurance market."

That article came out the very first month I started at ATG. Ever since, I have eyed warily the behavior of the commercial title companies (as we called them—most were national underwriters) and have viewed suspiciously their rhetoric.

Resistance to the Bar-Related® Movement and ATG's Battle to Survive

One of the most satisfying experiences of my career has been facing head-on and overcoming the many efforts to defeat ATG. We waged many battles and won.

Litigation: Incredibly, in my early days, Chicago Title sued ATG for anti-trust claiming a conspiracy to take over the market. It was an ironic allegation given that at the time Chicago Title had 97% of the market and ATG less than 1%. We spent much of our then precious resources defending this case. With support from the local bar associations, we won a Motion to Dismiss.

Legislation: At the urging of commercial title companies, lenders routinely refused ATG-insured policies. Through a grassroots legislative effort, we were able to get legislation passed to prevent lenders from refusing to take our policies. See **Section 2T Illinois Consumer Fraud Act**.

Regulatory: A good example was the passage of a rule amending the Real Estate Settlement Procedures Act (RESPA) to allow banks to package title insurance as part of a "one-stop shopping" experience. With a strong assist from then White House Counsel Abner Mikva—a legendary Chicago lawyer, politician, and Chief Judge of the DC Court of Appeals—the rule was rescinded.

Bar Associations: Today, we have close friendships and working relationships with all the bar associations, but in our early days we were not allowed to market ATG at bar association functions because Chicago Title said it would withdraw financial support from bar events. The entire commercial title insurance industry argued it was an unethical conflict of interest for a lawyer to provide title services while representing a client. With dogged determination, we secured ABA and ISBA Opinions in support of lawyers providing title services. Today, mainly through our efforts,

lawyers in Illinois provide title services in the vast majority of transactions and the bar associations look to us for leadership.

Direct Threats from Competitors - Price Wars: In the late 1980s, frustrated at our growing success, Chicago Title dropped their prices in the Chicago Metro market by 40% overnight to take the profit out of lawyers providing title services. Chicago Title cynically believed that lawyers would simply quit *en masse*, and Chicago Title could reclaim its dominance. When we learned of the price war, we gathered lawyers from around the Chicago area in Town Hall meetings much like the ones we've been hosting these past few months. At those meetings, ATG and our member attorneys agreed we would be resolute even if we all had to work for free. Chicago Title saw that ATG and its member attorneys wouldn't blink in battle and they ultimately surrendered.

Chicago Title pivoted, and everyone followed. All of a sudden Chicago Title (and then eventually all the other title companies) began telling attorneys they were the lawyer's best friend.

Emergence of Competing Companies: Today, lawyers provide title services in 90% of Chicago-area transactions. In some cases the competition for lawyers have resulted in programs of ever-increasing splits while at the same time requiring less substantive work by the lawyers. For reasons expressed more fully below, this "race to the bottom" has ramifications that could hurt our profession.

Trojan Horses: All this history begs the question: Are you expedient or expendable? To ask the question is to answer it. I can assure you the title industry views lawyers much in the same way they did when I first started at ATG. Imagine the impact on their corporate bottom lines if they did not have to pay a large part of the premium to law firms?

Our Impact

We are proud of the impact we have had on the legal community:

- Generate on average \$90,000,000 per year; \$50,000,000 in fees earned by and paid to our attorney-agents.
- Issued more than 3.5 million policies.
- Provided for thousands of lawyers who rely on ATG to support their careers and their livelihoods.

Since 1964, ATG lawyer agents have earned more than \$1 billion dollars in fees from providing title services as an adjunct to their law practices.

War Clouds on the Horizon

In recent months we have seen the emergence of programs that offer real estate salespeople the opportunity to make money as title agents.

Title Agency Demands Training and Knowledge: In almost all the cases we have seen, the companies soliciting this business have said they will pay the real estate salesperson \$1,000 or more for being a title agent. Conspicuously missing from this offer is whether the real estate salesperson is required to or has the ability to perform actual compensable services.

Legitimate Title Agency or Sham Affiliated Business?: In addition, some companies offer to set up LLCs for individual real estate salespeople to funnel "compensation." To our knowledge, none of these LLCs are independently staffed, have offices, or offer the commensurate overhead associated with providing these services.

Real Estate Bar Must Take Action

The past is indeed prologue! ATG, our beloved agent attorneys, and our well-respected members of the real estate bar need to take action against these practices, which will harm consumers. When RESPA was enacted in 1974, its Section 8 anti-kickback provision was in response to conduct exactly like these emerging programs. Congress found

that the cost of kickbacks are borne by consumers in the form of higher prices. Section 8 was enacted to protect consumers from these abusive practices.

ATG is exploring all available remedies in cooperation with IRELA, AREA, and others.

Proposed Legislative Response: We believe we need to raise the bar to become a title agent. We have drafted a bill that would require:

- Title Agent Pre-Licensing Education
- Title Agent Pre-Licensing Examination
- Title Agent Continuing Education
- Testing Exemption for Lawyers
- Mandatory Errors and Omissions Insurance
- Defined “Core Title Services”

Regulatory: Both RESPA Sec. 1024.14(b) and the Illinois Title insurance Act prohibit the giving of compensation for the referral of title and insurance services where the referring party provides no meaningful service aside from the referral. RESPA is administered by the Consumer Financial Protection Bureau (CFPB) and the Department of Justice. In Illinois, the industry is regulated by the Illinois Department of Financial and Professional Regulation (IDFPR). In addition, the state Attorney General has standing to bring an action under RESPA.

Sham Controlled Businesses: In addition, when Congress enacted the Affiliated Business amendments to RESPA 12 USC 2602(7), it specifically prohibited sham controlled business arrangements and published in the Federal Register a 10-part test to determine the legitimacy of an affiliated business. You can view the full text of **24 CFR Part 3500**, here is a summary:

Test to Determine the Legitimacy of an Affiliated Business

1. Does the entity have sufficient initial capital to conduct the settlement service business?
2. Is the entity staffed with its own employees?
3. Does the entity manage its own affairs?
4. Does the entity have a separate office?
5. Is the entity providing substantial services for which the entity receives a fee?
6. Does the entity provide the substantial services or contract them out, and if contracted out, how much is contracted out?
7. Are contracted services provided by an independent or a parent or affiliated entity?
8. Is the contracted party receiving payment that bears a reasonable relationship to the work being performed?
9. Is the new entity actively competing in the marketplace or attempting to obtain business only from the settlement service provider that created the entity?
10. Is the new entity exclusively sending business to one of the entities that created it?

Based on what we’ve seen, some companies are setting up sham affiliated businesses with real estate salespeople by setting up shell LLCs as vehicles to funnel kickbacks.

The CFPB has prosecuted cases against attorneys based upon similar facts. For example, in an October 2013 case, the CFPB filed a federal lawsuit against a law firm in Louisville, Kentucky. The principals of the firm, J. David Borders and his two sons, provided real estate closing services. The CFPB claimed the firm illegally paid for referrals from real estate and mortgage broker companies through a network of shell companies.

The Enemy Within

The phrase “physician heal thyself” now applies to the real estate profession. When some doctors began taking excessive incentives from pharmaceutical companies or having undisclosed ownership in testing equipment, the American Medical Association stepped in and banned all such practices. Sadly, because of the unethical conduct of some of our peers, we run a similar risk. See *In Re Rukavina*, where an Illinois lawyer was disciplined by ARDC for failure to properly disclose his interest in fees associated with his survey and title businesses.

The conduct itself does not have to be unethical. Indeed, in many cases lawyers are seduced by companies that increasingly offer more money for less work. Sadly, if these programs meet regulatory or other challenges, the lawyers will be made to be the fall guys by the companies that created the programs.

Take Back the Profession

It is time we did something about those who put our profession into disrepute. ATG, IRELA, and AREA believe we must:

- Call out bad actors through regulatory action, legislation, and unified resolve.
- Provide impeccable service, zealous representation.
- Take the long view of what is in the long-term interest of the public and the profession.
- Launch an extensive media and grassroots campaign to educate and empower consumers on the value of having an independent legal advocate for what is in most cases the largest single financial transaction of their lives.
- Charge reasonable fees for representing clients. When title revenue exceeds legal fees the tail is wagging the dog. As lawyers, you should be proud of the work you do when representing clients and your fees should reflect that.

Our Pledge to You

We will always serve attorneys and their clients. With your help, we can face these challenges and succeed:

- We will always serve the community.
- We will always advocate for lawyers and consumers in the media, the courts, and the legislature.
- We will always educate and lead.

Building Our Future, Together

We will face these challenges together, and win. ATG is in the best position to lead that challenge.

Someone once said, “*The best way to predict the future is to create it.*” I love that quote because it speaks to our collective ability to face challenges, overcome them, and build a brighter future for the profession and the consumers we serve.

Please join us in this fight, stand up for the profession and for your clients. I welcome your **feedback or questions** and value your ongoing support



Peter J. Birnbaum
ATG President and Chief Executive Officer