



FLTA Tallahassee

Report

Serving Title Professionals Throughout Florida

www.flta.org

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PRESIDENT'S MESSAGE

Rule Revisions Necessitate Data Call

- by Patricia (Pat) Hancock, Esq.



Administrative rules that govern the real estate title industry are archaic and in some instances conflict with state statutes. Some of Florida's insurance laws are open to interpretation with respect to title insurance, and some laws may not adequately address situations confronting the title agent in today's market. The Florida Land Title Association is having regular informal meetings with representatives of the Florida Office of Insurance Regulation (OIR) and the Florida Department of Financial Services (DFS) with the goals of modernizing and simplifying Florida laws regulating our industry, and adjusting title insurance rates if necessary. These meetings have occurred over the summer months in Tallahassee and via conference calls.

The group has reached a conclusion that amendments to our laws can best be accomplished by the analysis of meaningful data gathered in a uniform process. At this time, the group is studying a data call report form developed by the National Association of Insurance Commissioners as a starting point in drafting a form for use by Florida title agents. Once a final report form is agreed upon by the group, legislation, if necessary, will be drafted to enable and ratify the collection of data in a uniform format on a periodic basis. It is recognized that enough lead-time is necessary for the industry to revise software to collect the required data, and for at least a year's worth of data to be garnered in order to support a meaningful analysis of the current rates and rules. The OIR estimates that this process may take as long as three years before the first reporting of data and analysis may commence.

One of the purposes of a data call is to determine the appropriate rates for title insurance and the rules for application of those rates. Although, for approximately 20 years, there has not been an increase in the original title insurance rates, the FLTA has heard grumblings from Governor Scott and the OIR that current title insurance rates may be too high. However, many title agencies have gone out of business in the last few years, which means not only a loss of small businesses, but the loss of jobs for the employees. Many title agencies that are surviving today have had to lay off employees in order to keep their doors open for business. The FLTA believes that if the rates are lowered, more agencies may be relegated to close and more employees will find

themselves out of work. And consumers may have less title agencies to service their needs when a real estate transaction is sought.

An accurate and meaningful data call is crucial to the economic health of the real estate title industry. Your FLTA is working to preserve the integrity and value that our industry brings to the State of Florida's real estate market.

They Deserve Our Support!

While many of our elected officials have been strong supporters of preserving the sanctity of real estate ownership in Florida, two members of the Florida House have been recognized by the FLTA Board of Directors as meriting our special thanks and support.



Dorothy Hukill (R-Port Orange) has been a strong and consistent supporter of the title and real estate industries as the powerful chair of the House Economic Affairs Committee.

She worked with FLTA extensively in developing last year's title insurance bill, and then served as our house sponsor. Perhaps more importantly, as an attorney with extensive experience in real estate, probate and estate planning matters, she understands the legal significance of what we do, how we do it, and the importance of Florida law in preserving the sanctity of our real estate conveyancing system. Dorothy is a candidate for State Senate District 7, an open seat in 2012.



Will Weatherford (R-Wesley Chapel) has literally spent hours discussing title related issues and FLTA's legislative agenda with our own Jeannie Germaine and Jim Russick. What we do and its importance to a functioning real estate economy is not intuitively obvious. To say that Will understands our business and our contribution to Florida's economy is an understatement. He "Gets Us!" And he gets us so well that he was willing to co-sponsor (with Rep. Kevin Ambler, our 2010 Legislator of the Year) FLTA's first attempt to codify the recommendations of the Title Insurance Study Advisory Council.

When not discussing title and real estate issues (or the myriad other topics expected of any elected representative), Will has been designated by his fellow Republicans to serve as Speaker of the House during the 2012-2014 term.

The Title Industry greatly appreciates the hard work and dedication of both Rep. Hukill and Rep. Weatherford. The FLTA Board is actively soliciting contributions of any amount to both Candidates. These will be bundled by TIFPAC and presented to both at an appropriate ceremony. Please send separate checks payable to the "Dorothy Hukill Campaign" and to the "Will Weatherford Campaign" to the FLTA offices, 249 East Virginia Street, Tallahassee, FL 32302.

The NEW and even MORE Improved FLTA Website

When you read the last *FLTA Tallahassee Report*, you learned that we had a great new website at www.flta.org. Since then, many of you have offered ideas and suggestions for making it an even better resource for our members. We took many of those ideas and have implemented them! With your help, we will continue to add resources and content and use our website as a tool to improve the value we bring to our members.

So, what have we added since the last *Report*?

- **Marketing Video.** In the first, of what we hope will be many, marketing resources for our agent members, Erin Cassidy of Majesty Title has recorded a short video directed to Realtors® in which she explains the importance of using an FLTA member for all of their closings. She very generously made this available on a Royalty Free Basis to FLTA and to any of our members if you would like to add it to your website. We thank Erin and Majesty and urge you to take a look at it. The video itself is on the homepage at www.flta.org. The license and the instructions for linking it to your website are on the Members Only [Marketing Resources](#) page. While you are there, you can also pick up the FLTA logo for your webpage. These are both “Members Only” resources, so you will have to be logged in to access them.
- **Title Forum.** We added a new [Title Forum](#) as a place where our members can share their thoughts about the land title industry, what they are seeing in the marketplace, concerns about evolving industry practices and regulatory actions or just ask a question.

There is an ongoing discussion thread about changes we would like to see made to the new [FR/BAR contract form](#). Its authors have been very receptive to suggestions for improvement in the past, and FLTA will be compiling the thoughts and recommendations from the Title Forum to present for consideration in the next round of revisions.

Also on the Title Forum, you can check out the latest check fraud scam and our Executive Director’s vision for FLTA over the next few years. We encourage you to check it out at <http://www.flta.org/TitleForum> – and tell the rest of us what you are thinking. We might learn something!

- **2011 Convention Registration.** Our new website is fully integrated with our membership database and event registration. So it is now much more convenient for you to register for an FLTA event. Linda Martin did a great job in putting together the pages that tell you everything you might want to know about our [2011 Convention](#) and registration is now open. So take a minute, [check it out](#), and come join us for the FUN!



- **Fraud Prevention Committee.** FLTA formed a new Fraud Prevention Committee, chaired by Deb Boyd of First American. She is actively seeking new members and participation for that committee. To keep everyone informed of what's happening out there, she created a special [Fraud Prevention Page](#) on our website. Please e-mail Deb at deborboyd@firstam.com, let her know you like her webpage, and offer to join the committee.
- **Zone Meetings.** We started holding Zone Meetings a couple of years ago, and when incoming President Beverly McReynolds, CLC announced that the theme for her year was "FLTA: We're Coming to You" – Our Zone Vice-Presidents really ramped up our level of activity. We have Seven – yes 7 – zone meetings scheduled between now and the end of the year, each with CE credits. [Here's the List](#). And I wouldn't be surprised to see a Lobby Day in Tallahassee sneak into early December.

After the first of the year, Debi Smith, CLS, our education chair promises we'll see even more Continuing Ed programs around the state.

Why does this appear in an article about continuing improvements to our website? Because all of these events – and many more affecting the title industry – appear in the [Online Calendar of Events](#) and you can register for most of our events online. You can even add them to your Outlook calendar with a single click

- **Survey of Jobs Lost in the Title Industry.** Governor Scott recently suggested that title insurance rates should be cut ([more here](#)). As a result, FLTA is expecting still more attacks on our premium structure. We all know that the industry has lost thousands and thousands of jobs over the last few years (Yeah – Sure, I'm going to hire more people if my premiums are cut). To be effective in protecting the industry, we need your help! We have created a survey and urge all title agencies to help us quantify the number of jobs lost so that we can show our Governor that this is NOT the time or the way to cut premiums. [Take our Survey](#).

A good website is only a tool for making resources and valuable content conveniently available to our members. To pat ourselves on the back a little, our website has come a long way in the last few months. But we know that there is still more valuable content and resources that we should be providing – and we look to our members to tell us what that should include. Don't hesitate to email alan@flta.org with your ideas and suggestions.

Did You Know ...

Your 1099 Employees and other Independent Contractors may not be covered by your E&O Policy. Read your policy carefully and discuss this and other coverage issues with your insurance agent.

Not Logged In?

Our new site has been “Live” since the beginning of June. We’ve discovered that several of our members have still not “logged in” so that they can take full advantage of all the site has to offer. We encourage all of you to do that SOON and update your profile so that your most current information – including your picture and Company Logo -- appears in the FLTA member directory. If you are having trouble logging in, check [here](#).

To make your company’s FLTA membership even more valuable, some of our more useful online resources are restricted to “members only” and we’ll be adding more as a benefit just for our members. To access the “Members Only” portions of the site, all of your employees will need to register as employees of an FLTA member. There is no charge for registering additional employees – and it only takes a few minutes. Here’s how to [create a new Employee Registration](#).

So Log-In, update your profile, and then have all of your employees do the same!



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The Agent Section Report --

Why Is A Data Call Important For Me?

by Beverly McReynolds, CLC – Section Chair



As title agents we have too often perceived a data call to be either a lot of unnecessary work or an invasion of our privacy. 2011 is the year for us to rethink that position! The Governor has stated in writing that he believes our rates to be too high. The Office of Insurance Regulation has hinted that they might re-circulate their File and Use Bill in the upcoming legislative session. The Department of Financial Services has taken a step back and let the OIR take the lead in investigating industry rates and practices. Does it sound like a good time to stand up for ourselves? I believe the answer to be a resounding “YES”!

Between the decrease in purchase prices and downward pressure on rates from national lenders, we are collecting less for every closing that we do. At the same time and because a huge percentage of the closings we handle are either bank owned or short sales, the amount of work on each file has doubled or tripled before you reach the closing table. Also, the cancellation rates on our orders are increasing. However, just stating these facts is not enough to protect ourselves. We need to provide accurate and complete data that will prove that our rates are far from too high and that we as an industry have in fact lost ground as it relates to revenue.

Our industry leaders that are participating with the OIR in Tallahassee have worked long and hard to have our regulators see the value of a complete data call. What we need from our agent members is immediate support for this concept. Then when the data call format is circulated, we need you to diligently collect and submit your information. If you are asked for your opinion on a data call, state that you support it. We should also inform anyone who asks that in those states where complete data call is collected on a regular basis, rates increase during an economic downturn as opposed to decreasing. That is why a data call is in our best interest. It is my sincere hope that we can all agree to get behind this concept and know that the data call is really good for us!

The World is Watching!

We sometimes forget that “www” stands for World Wide Web. But when Beverly McReynolds posts something on the FLTA Title Forum, the entire title world pays attention. Her warning about a [new type of check fraud](#) has been picked up and redistributed by the ALTA, state land title associations in other states, in National Underwriter Bulletins, and by several bar associations.

So join the discussion in the [New Title Forum](#) and have your own impact on the World!

2012 Dues Structure Announced

At its August meeting, the FLTA Board of Directors approved a 2012 Dues Structure with No Increases and Periodic Payments.

There was an extended discussion of how today's rough real estate economy is hurting all of our members and some suggested considering a significant reduction in agency member-dues. Members of the finance committee pointed out that FLTA is already running very "lean" and couldn't maintain its increased level of service and activity if dues were cut significantly. In spite of last year's increase in contributions by our title insurers, the preliminary projections are that this year it will be necessary to dip into the "rainy day" fund.

So, while 2012 dues will not change in amount, the board decided to make it a little easier for our members to pay them and authorized periodic payment plans – with a \$10 per payment surcharge to cover credit card fees and the added administrative costs. So the 2012 agency/law firm dues will be:

- A. \$400 if paid in full at the time of renewal.
- B. Semiannual - \$420 total in two payments of \$210 each.
- C. Quarterly - \$440 total in four payments of \$110 each.

All periodic payments must be made by credit card, and at the time you sign up for this payment alternative, you will be asked to authorize us to automatically bill the rest of the year's payments.

To take advantage of the periodic payment option, you must sign up for it before the first payment would be due on January 15, 2012. After that date, the periodic payment option will not be available.

Dues for all other membership categories will remain unchanged.

Upcoming Events

September 13, 2011 -- Zone meeting – Miami [Register Here](#)

September 14, 2011 – Zone meeting – Ft. Lauderdale [Register Here](#)

September 15, 2011 – Zone meetings

Naples [Register Here](#)

Ft. Myers [Register Here](#)

West Palm Beach [Register Here](#)

September 15, 2011 – Scholarship Application Deadline

FLTA is now accepting applications for this year's scholarship program. The criteria, instructions and application are available via this link [2011 Scholarship Application](#) or on the website. **Time is running out.** Make sure your student has this information so they can apply.

November 2 – 4, 2011 – FLTA Annual Convention PGA National Resort & Spa, Palm Beach Gardens

The 2011 FLTA Annual Convention will be held at the Beautiful PGA National Resort. Bring your clubs. See your friends and catch up on everything happening in the wonderful world of title. The [convention pages](#) are now “live” on our website. Please visit SOON and make your reservations to join us.

November 8, 2011 – Zone meeting, Miami [Register Here](#)

November 9, 2011 – Zone meeting, Ft. Lauderdale [Register Here](#)

For more information on the various zone meetings, [click here](#), or visit the website and select the event you want to attend from the “upcoming events” listings on the RIGHT.

Tired of Paying Condo Estoppel Fees?

For years, I have been hearing complaints from agents about how much they are losing each year paying condominium and HOA estoppel fees on deals that cancel. Four years ago, **Jim Moran** (now at First International Title in Ft. Lauderdale), **John LaJoie** and others at First American started looking at this problem in earnest and drafted a proposed legislative solution. The industry quickly got behind their proposal and a law was passed to require the Condo and Home Owner Associations to refund Condo and HOA estoppel fees paid by a title agent when a transaction does not close.

By the time it had gone through the legislative “Sausage Grinder” it was not a perfect solution, but still much better than what we had before. **Past President, Shelley Stewart**, CLC, and the FLTA Affiliated Industries Committee are looking at whether there might be an even better solution to this problem. In the meantime, we have a workable solution that should get you paid back for these out of pocket expenses.

When the current law was first passed, many agents couldn’t be bothered to seek refunds – “I’m too busy making money”, “The statute doesn’t give me enough time,” “I don’t know what form to use” -- and people continued to complain about how much money they were losing.

So FLTA created a simple to follow checklist and sample forms. A few agents tried the forms, some got paid back. Others didn’t. Some management companies simply refused to refund these fees – even with proper notice. Many agents dropped it, feeling it wasn’t worth enforcing their rights in court – and encouraged this “bad behavior.”

The statute we drafted provided for repayment of attorneys’ fees if it was necessary to enforce your rights. FLTA imposed on some of our attorney members, who agreed to represent FLTA members in recovering these estoppels fees on a contingent basis, collecting their fees from the other side (if successful) and to WAIVE their normal cost retainer.

With our handy new www.flta.org website, we’ve tried to make it easy. You will find a checklist and suggested forms [HERE](#). It’s all in Word format to make it easy to load into your closing software so that the key fields will auto-populate. If you follow the checklist and are not repaid, you will find links to contact some first rate attorneys to pursue the recovery for you.

Give it a try! Recovering just one or two of these fees can cover your entire membership in FLTA for the year. Who knows? Maybe by this time next year, we’ll be reporting that we have an even better legislative solution.

Some Things Should Be Said Twice ...

The Department of Financial Services interprets Florida Statutes §626.112 as prohibiting an Agency from paying its unlicensed marketing reps a commission based on the premium or number of title insurance policies sold. And is enforcing violations of this statute and assessing fines and other penalties.

[A more detailed bulletin is attached here.](#)

Governmental Affairs Report – by Ted Conner, Esq. – Chairman

Every ten years, following the U.S. Census, Florida holds its legislative session early in order to complete redistricting in time for the next election. So while it seems like we are barely finished with the 2011 legislative session, we are already gearing up for next year. Bills are being pre-filed; and committee meetings will begin in September.

While relatively little has been filed as yet, from our friends in the legislature and in other industries, we already have a sense of some of the bills and initiatives which we will likely see this session. Those include:

1. In the last [newsletter](#), we reported on the work with the Office of Insurance Regulation and the Department of Financial Services on a major review and rewrite of the title insurance rules. The first projects to be addressed in this process are rate simplification, establishing the framework for a data call; and a more direct process for approving new forms in order to avoid a repeat of the problems with the 2006 policy forms. We have had a series of meetings on those topics and work is ongoing.
2. In December, 2009 the legislatively created Title Insurance Study Advisory Council delivered a report with twenty-three recommendations for regulating title insurance in Florida. You may recall the first recommendation was to retain the promulgated rate system. We anticipate a bill will be filed seeking to implement a number of the remaining recommendations. When the bill is filed the proposed legislation will be promptly circulated to the Governmental Affairs Committee for review and comment.
3. State Representatives Kathleen Passidomo and George Moraitis, both very good real estate lawyers themselves, have been working diligently on a proposal to reform, simplify, expedite and make the judicial foreclosure process in Florida more fair and efficient. . In the drafts we have seen, they have done a very thorough analysis of the problems currently plaguing the foreclosure system and addressed them systematically. Because this bill requires lenders to comply with existing law and tries to strike a fair balance among all of the interest groups, it likely will be opposed by all sides.
4. In 2010, state tax law was amended to make the purchaser of a business liable for unpaid sales and other taxes of the seller. Reports indicate the tax law has been interpreted by the Department of Revenue to be triggered by the sale of assets which are not obviously a business -- such as a rental condominium or even a home. Since this type of liability is not a "lien" on the property it likely is not covered by the title policies we may issue. Representative John Wood (another long time real estate attorney) has been working on this issue for the last two years and

will again be introducing legislation to clarify the safe-harbors and to exempt most stand-alone real estate sales of 1-4 family residential properties, unimproved lands and owner-occupied commercial properties from this potential liability. This bill has been endorsed by the Real Property, Probate & Trust Law, the Business Law and Tax Law Sections of the Florida Bar.

5. The Real Property, Probate and Trust Law Section (RPPTL) will be proposing an amendment to the condominium statute to extend the applicability of the Distressed Condominium Relief Act beyond its original sunset of July 1, 2012 until July 1, 2017. This is the Act which provides that bulk buyers of condominium units do not automatically accede to all of the liabilities of the original developer.

6. A bill is expected to provide guidance and regulation with respect to the creation of a condominium unit within a condominium unit (think of a condo building constructed on a land condominium) and to address the relationship between the primary condominium and the secondary condominium units.

7. An inadvertent amendment to last year's bill fixing the problems created by the Everglades Electric case (dealing with the notices that a landlord is not liable for tenant improvements) made the fix less effective than hoped. A bill, also recommended by the RPPTL Section will be filed to restore the omitted language.

8. The Business Law Section of the Florida Bar is working on a complete redraft of the Florida LLC Act for possible introduction during the 2012 legislative session. Obviously provisions of this could impact real estate conveyancing practices, and the Government Affairs Committee will be reviewing the drafts carefully.

In the coming weeks, we expect a flood of newly filed bills, which the FLTA Government Affairs committee will be carefully reviewing for potential impact on the land title industry and the sanctity of the real property recording system.

We'll try to keep the membership posted as this process progresses. Please plan on joining us at the FLTA Convention in November where we will have an opportunity to discuss these and other bills in more depth.

Did You Know ...

In Broward County, the Clerk of the Court is NOT the Recorder -- and many people still send their recording to the wrong place. This results in delays and an extended GAP. The correct addresses can be found [here](#).

Did You Know ...

That seven years after recording a deed that purports to be from "all heirs" or the "sole heir" or similar words, the conveyance of an interest is perfected even if there were other heirs or beneficiaries who had an interest – unless their names appeared of record under the will or estate or trust administration. Florida Statutes §95.22.



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We're so HAPPY to have you with us!

In these tough economic times it can be difficult to find something to cheer about. FLTA membership has taken a beating like everything else in our world these days, but we do have something positive to report. The following is a list of very smart companies who have taken that first big step and joined our Association, or have rejoined after a short hiatus.

Cornerstone Management Solutions, Inc

Arthur Parent
Rumson, NJ

Fort Dox

Anthony Rinaldi
Delray Beach, FL

Integrity Title & Guaranty Agency, LLC

Barbara Brownell
Clearwater, FL

James S Morris, P.A.

James S Morris
Daytona Beach, FL

Noble Title & Trust

Rhonda Evans
Naples, FL

Rels Title

Mandi Shuler
Fort Myers, FL

Selco Title & Escrow Corp

Grisel Serpa
Hallandale Beach, FL

Southern Security Title Services, Inc

Nancy Sloan
Citrus Springs, FL

Weiss Title Services

Kristin Weiss
Palm Harbor, FL

Williams Schifino Mangione & Steady, P.A.

John Agliano, Esq
Tampa, FL

Guess Who??



Hint: ONE is a former FLTA President

SUPPORT OUR ASSOCIATE MEMBERS

Many of us are associate members of our local Board of Realtors or of builder trade associations. And rightly get upset when other agents - who are NOT members and not supporting the local programs - seem to get a LOT of the title orders from those groups!

Well, OUR associate members do more than “just pay association dues”, too. They show up at our meetings and conventions, PAY for the privilege of displaying their products, often contribute additional funds to help pay for our luncheons, receptions, banquets, AND pay to advertise in our programs, brochures, and YES!! Even this Newsletter!!

DON'T FORGET OUR ASSOCIATE MEMBERS! When you need a new product or service, be sure to check the Associate member list in our new website – www.FLTA.org - and give our Partners the FIRST opportunity to earn your business.

Your CLS or CLC designation has REAL Value

For years, earning a CLC or CLS designation was a way to show the world that you were one of the best in the title profession. It requires a minimum of five years of working experience as either a Closer or a Searcher, followed by a very rigorous examination for either designation.

Through the hard work of some of our Associate Members, several E&O carriers have recognized the CLC and CLS designations as a basis for actually lowering your premium. Others are expected to follow in that practice.

When it is time to renew your E&O insurance, check with our Associate Members and make certain that the E&O carrier is aware of all of the hard work and the professional expertise it took to earn your CLC and/or CLS designation – and are giving you the credit you deserve!

For a complete list of FLTA's Associate Members, visit www.flta.org select “Member Directories” and then “Affiliates and Vendors” or just click [here](#)

Speaking of CLC's....

The Certified Land Title Institute would like to announce that of the SIX tests administered this year, FOUR applicants were successful in obtaining their CLC designations. We are happy to announce that

Kristin N Konecy of **Stewart Title Company**, Tampa,

Tris R. Moriondo of **Leading Edge Title**, Maitland,

Marilyn Olliver of **North America Title Company**, Spring Hill and

Kelley M. Paul of **Express Title Services of Citrus, Inc.**, Crystal River,

are the newest CLC's added to our industry. Please join us in congratulating them!



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A special “thanks” to our advertisers

We would like to extend a special THANK YOU to our members who have taken the time to update their ad formats (including working with a novice in the publishing arena). We so appreciate your continued support of our Association.

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for contributing to this issue. We can't do it without you!

Soldiers & Sailors Act

A Refresher on the Servicemembers Civil Relief Act

At a time when significant numbers of America's Servicemen and Women have been bravely serving our country overseas and at home, millions of Americans are impacted by historic levels of mortgage foreclosures. Regrettably there is almost certainly some overlap between the two groups. Recognizing the important service being provided on behalf of our country, often at great personal economic sacrifice, Congress has established some protections for these Patriots in the form of the Servicemembers Civil Relief Act. 50 App. U.S.C. 501 *et seq.* (“the Act”) (Those of us who have a little more gray in our hair remember this as the “Soldiers and Sailors’ Civil Relief Act”).

Three parts of this Act affect us in the title world and remind us of the importance of carefully examining foreclosure proceedings:

Stays of Mortgage Proceedings; Invalidity of Foreclosures

Section 533 of the Act protects military personnel from legal proceedings to enforce a secured debt created prior to the date on which military service commenced.

Under subsection 533(b), a court must stay any proceedings to enforce a secured debt unless the court finds that the ability of the debtor to comply with the terms of the debt was not materially affected by military service. While the court has some discretion in the timing, the stay may remain in effect for up to 90 days after the end of military service. §524

From a title standpoint, it is important to note §533(c) which provides any foreclosure made during the period of military service or for nine months thereafter is invalid unless agreed to by the mortgagor or specifically approved by the court.

Interest Rates Capped, Payments Adjusted.

Interest rates on pre-service debts are capped at 6% per annum, with any excess interest forgiven and periodic installments payments recomputed to reflect the lower rate. §527 The cap on interest rates applies for the entire period of service as to all debts. As to mortgage debts, the interest rate cap continues for an additional one year after the end of military service.

In order for a servicemember's debt to be subject to the interest rate limitation, written notice and a copy of the servicemember's orders must be provided to the creditor no later than 180 days after the date of the servicemember's release from military service. Then the interest limitation and reduction in periodic payments is retroactive to the date of call-up. §527(b)

These same protections are available to the dependents of a servicemember, if the dependent's ability to comply with a lease, contract, bailment, or other obligation is materially affected by reason of military service. §538.

This is a significant trap for the unwary and may actually invalidate a default by retroactively lowering payments. This defense must be asserted in the process of a foreclosure.

Protections against Default Judgments

Of particular interest in the foreclosure context is §521 of the Act, which provides protections for the servicemember against any default judgments.

In any action in which a defendant does not make an appearance, "the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit ... stating whether or not the defendant is in military service and showing necessary facts to support the affidavit." Contrary to common belief, personal service on a person does not remove one from the requirements of the Act.

As the Act is phrased, this affidavit would seem to be a condition precedent to the entry of a judgment, such that a judgment entered in violation of this provision would be void. However, the case law holds that it is merely voidable at the instance of the servicemember. See e.g. Davidson v. General Finance Corp., 295 F. Supp. 878, (N.D.Ga.1968); Rentfrow v. Wilson, 213 A.2d 295 (D.C.App.1965); Krumme v. Krumme, 636 P.2d 814, 6 Kan.App.2d 939 (Kan.App. 1981).

Where it appears the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case do not waive any defense of the servicemember or otherwise bind the servicemember.

Providing a false affidavit is a criminal violation under §521(c) of the Act, and subjects the parties to state law penalties for fraud on the court and perjury. Moving for a default judgment without providing the required affidavit may also constitute an ethical violation for foreclosing counsel.

From a title insurance standpoint the danger is that the court is statutorily obligated to reopen the judgment and allow the servicemember to defend the action (potentially unwinding the insured sale) if it appears that the servicemember was materially affected by reason of military service in defending the action and has a meritorious or legal defense to the action or some part of it. The

motion to reopen the judgment may be filed up to 90 days after the end of military service. §521(g)(2). Note this is in addition to the basic voidability of the foreclosure under §533(c).

So when examining title following a foreclosure you should confirm the following instruments appear in either the official records or the court file:

1. An affidavit of non-military service in the court file for each individual against whom a default judgment was entered.
 - a. Note: corporations and other “entities” cannot serve in the U.S. Military, so no affidavits are required for defaulted corporations or other “entities”.
 - b. Since the absence of an affidavit makes a judgment voidable, not void, a foreclosure completed without the required affidavit(s) may be cured from a title standpoint by requiring the omitted non-military affidavits to be recorded in the Official Records.
2. Any motions raising military service as a defense must be reviewed along with the Order resolving the Motion and you must make certain that the Order did not limit the scope of the final judgment (for example, by staying the action against a necessary servicemember while proceeding to judgment against other defendants).

Fortunately, the Department of Defense has set up websites to make it relatively easy to determine an individual’s current military status. These websites, which can be searched by name and/or Social Security Number, can provide both the factual basis for the required court affidavit and a ready means of correcting omissions in the foreclosure file.

www.dmdc.osd.mil/appj/scra/scraHome.do

Absent a social security number, it will sometimes be difficult to confirm non-military status, especially as to defendants with common names. Where that problem arises, the foreclosing lender or foreclosing attorney (who should have the borrowers’ social security numbers) should be contacted.

Did You Know ...

That under the Marketable Record Title Act you must search back to a Root of Title that is AT LEAST 30 years old. So you often must search much more than 30 years for a MRTA search. And even then, many older interests are not eliminated by MRTA.

Keeping Up to Date

Keeping our members informed of matters that impact the title insurance industry is a primary focus of our Association. The quarterly newsletter will continue to keep you abreast of developments, but the term quarterly alerts you to the fact that the news stories that have a short shelf life may be stale when you read them. To stay on top of things on a daily basis consult the FLTA web site, www.flta.org and subscribe to the [Government Affairs Blog](#) and the [Title Forum](#).