A Brief Review of the Virginia Mutual Indemnity Treaty

Description

The title industry in Virginia has had a mutual indemnity treaty in place since the fall of 2015. This agreement among title underwriters eases the burden of title insurance agents to clear enumerated title objections, for insurance purposes only, by providing an alternative to letters of indemnity. The purpose of the agreement is stated in its introductory paragraph: â??In order to expedite the clearance of certain types of title insurance objections and limit the need to obtain individual letters of indemnity or performance, the companiesâ?¦ agreeâ?¦ to indemnify each other subject to the provisions and limitations contained (herein.â?• This article is a refresher on the provisions and limitations of the agreement.

The â??Big Fourâ?? in the title industry (the Fidelity National family, First American, Old Republic, and Stewart) were the parties to the original (ALTA Model) Inter-Underwriter Indemnification Agreement, executing the instrument between mid-August and mid-September, 2015. [Since MIUIA is unfamiliar and sounds like a Hawaiian island, I will use the acronym VMIT to indicate the Virginia mutual indemnity treaty.] VMIT was amended later in 2015 to admit the other Virginia licensed title underwriters as participants (Conestoga, Investors, North American, Title Resources, Westcor, and WFG). Currently, AmTrust Title is seeking admission to the VMIT.

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Be aware that First American did not execute the Amendment to VMIT that added the second group of underwriters. While First American did not veto the entry of any of the new members as it could under the terms of the VMIT, its decision not to execute the Amendment means that any of the second group having a title defect covered under a qualifying First American policy has to obtain a letter of indemnity (LOI) as in the past. The other three underwriters of the Big Four are participating with the second group of underwriters in VMIT.

Note that Southern Title is not a party to VMIT. Whenever you have a Southern policy that would otherwise qualify for treatment under the agreement, you need to find an LOI. An agent can start with Old Republic, as it acquired some of Southernâ??s assets, but Old Republic is under no obligation to indemnify for Southernâ??s policies. That is, at least insofar as I know.

WHAT TITLE DEFECTS ARE COVERED BY THE VMIT?

Section IV of the agreement lists the title defects that are indemnified by the participating insurers without the issuance of a letter of indemnity. This is a specific itemsâ?? list; that is, if a title defect is not listed â?? even one that seems to be much like one on the list â?? an agent should seek an LOI. These are the covered matters:

- Deeds of trust that have not been â??effectivelyâ?? released or discharged;
- Judgment liens, child support liens, HOA/condo liens, mechanicâ??s liens;
- Federal and state estate and inheritance tax liens ;
- Other federal, state or municipality liens;
- Marital rights of prior owners;

- Lack of authority or capacity of a prior grantor;
- Title to the insured estate being questioned due to a defective judicial or nonjudicial process in the chain of title (e.g., foreclosure, tax sale, bankruptcy);
- A document affecting the chain of title being questioned due to a defective execution, acknowledgment, recordation, etc.

While this list is comprehensive, the alleged defect has to precede the date of the policy under which you are seeking indemnification. Errors such as those above that are first created during the tenure of the current owners of the property are not matters covered by the VMIT. If you are unsure whether your facts fit within the agreement, check with your underwriter (not the prior insurer). If your insurer is not certain that a claim upon the prior underwriter will be honored, you will be instructed to seek an LOI to clear any ambiguity.

WHAT IS NEEDED TO ASSURE COVERAGE UNDER THE VMIT?

An agent must document the applicability of VMIT if its indemnification of one insurer by another justifies the title agentâ??s deletion of a title defect from a new title policy. Only one document is required: A prior ownerâ??s policy issued by one of the participating underwriters, which policy does not take exception to one or more of the list of covered title defects. The policy does not qualify if the defect at issue is excepted in Schedule B and affirmative insurance against the defect is given. You do, however, have to have possession of a copy of the actual issued policy. Neither a commitment to insure nor a settlement statement showing payment of a premium for an ownerâ??s policy is an adequate substitute for the actual issued ownerâ??s policy. In any event, the insured on the prior ownerâ??s policy providing the indemnification must be the seller or refinancing borrower on your current transaction.

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Under limited circumstances a loan policy can serve as the prior policy. First, the insured on the loan policy has to have acquired title to the property through foreclosure or by deed in lieu of foreclosure. Then, as above, the insured has to be the current seller and the new purchaser cannot be related to a party in the transactions creating the interest of the current seller (i.e., borrower, lender, etc.). There can be nuances at play when using a loan policy as the prior policy (e.g., assignee of the lender as insured, REO entity in title out of foreclosure, mortgage insurer or guarantor in title by purchase or assignment of foreclosure bid). Check with your underwriter for instructions in such uncertain situations.

WHAT ARE THE LIMITATIONS ON INDEMNIFICATION UNDER VMIT?

Just like a title policy (a policy of indemnification), the agreement for indemnification among underwriters has exclusions from coverage and exceptions, as well as conditions for payment of claims. An unwritten rule, like the myriad unwritten rules of baseball, that may be insisted upon by your underwriter is a rejection of a loan policy as the prior policy if that loan policy is less than one year old. This position is based upon underwriting principles that except to a one year period after a foreclosure or deed in lieu due to fraudulent conveyance concerns or worries about a suit against the trustee to set aside the transaction. Check with your underwriter on loan policies being used as ownerâ??s policies that are less than one year old.

Also, call it a grace period, but if less than one year has passed since the prior ownerâ??s policy was issued, check with the prior closer to determine if any off-record action is pending to clear the defect. If you learn, for example, that a release of judgment lien is still being pursued, check with your

underwriter. If you have knowledge of enforcement actions of record or off-record, advise your underwriter. Probably your underwriter will require a letter of indemnity in such circumstances.

The indemnity treaty only applies to insured property located in Virginia. This may be a tautology, but it important to remember. It does mean that a prior policy on property in another state, issued by a title agent which has its principal place of business in Virginia, is not within the ambit of the VMIT. On the other hand, a policy on Virginia property issued by a nonresident title agent may be used.

Probably the key limitation of the indemnity agreement for a title agent is this: The **maximum** amount of indemnification under the VMIT is **the lesser of** (1) the amount of insurance of the prior policy, (2) the extent of liability of the insurer on the prior policy, or (3) $ 500,000.00. Some examples of how this applies:

- IRS tax lien for $ 15,000.00 and prior policy is for $ 175,000.00. Option (2) applies and indemnification is limited to $ 15,000.00.
- Unreleased deed of trust for $ 600,000.00 and prior policy is for $ 900,000.00. Option (3) applies and indemnification is limited to $ 500,000.00.
- Environmental clean-up lien of $ 125,000.00 and prior policy is for $ 100,000.00. Option (1) applies and indemnification is limited to the policy amount. [Note: This is an extreme example for illustrative purposes only. While it is almost certain that such a lien would be excepted in the prior policy, if the lien were a more distant event, a letter of indemnity might have been obtained and the Exception deleted form the policy. Stuff happens sometimes.]

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The examples point up what can be a concluding underwriting caution: If you have a title defect that is a monetary lien that exceeds $ 500,000.00 â?? even if the prior policy exceeds the amount of the title defect â?? contact your underwriter for guidance. VMIT does provide indemnification against the lien up to $ 500,000.00, but your underwriter may require a letter of indemnity to be assured of coverage for the excess amount. The prior insurer may choose not to issue the LOI, in winch event your underwriter may choose not to insure.

Be sure to disclose to your underwriter any issues you find when trying to apply VMIT to a title defect you uncover as you examine the title to your prospective title insurance case. All parties to VMIT favor clearing title objections in the most efficient way possible. Also, an underlying principle to VMIT is that liability for handling title defects remain with the party who first incurred the risk of loss. VMIT is a tool to replace the system of obtaining letters of indemnity. In some circumstances, an LOI is still the best option for indemnification between underwriters. A decision to accept an LOI or rely on the indemnity treaty is one for your underwriter to make. Consequently, and in conclusion, if you have any doubt as to application of VMIT to any single case, contact your underwriter and follow its instructions.

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