

# IOWA'S TITLE GUARANTY SYSTEM: IS IT SUPERIOR TO OTHER STATES' COMMERCIAL TITLE INSURANCE?

## TABLE OF CONTENTS

I.	Introduction.....	385
II.	Background Information.....	386
	A. Defining Title Insurance.....	386
	B. Title Insurance and Iowa Law .....	388
	1. History of Title Insurance in Iowa.....	388
	2. Iowa's Current Title System.....	388
III.	Arguments Surrounding Commercial Title Insurance.....	392
	A. Arguments Supporting Commercial Title Insurance.....	392
	B. Criticisms of Commercial Title Insurance.....	393
IV.	How Iowa's System Stacks Up.....	395
	A. How Iowa's System Addresses the Criticisms of Commercial Title Insurance .....	395
	B. How Iowa's System Fails to Address the Criticisms of Commercial Title Insurance .....	398
V.	Conclusion .....	399

## I. INTRODUCTION

Iowa has a title system unlike any other state.<sup>1</sup> In 1947, the Iowa General Assembly prohibited the sale of title insurance in Iowa.<sup>2</sup> The Iowa Supreme Court upheld the prohibition.<sup>3</sup> In the years since the General Assembly's prohibition, and especially after the Iowa Supreme Court held the law constitutional, the Iowa "General Assembly has consistently rebuffed efforts to permit title insurance companies to operate in Iowa."<sup>4</sup> Because Iowa is the only

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1. See Melynda Dovel Wilcox, *Home Buyers Beware: You Pay the Price for Title Insurance Coverage. But Everyone Else Reaps the Benefits*, KIPLINGER'S PERS. FIN., Oct. 2001, at 97, 98-100 (classifying Iowa's title system as unique).

2. S.F. 370, 52d Gen. Assemb., ch. 258 § 5, at 333-34 (Iowa 1947) (enacting IOWA CODE § 515.48(10)).

3. *Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 30 (Iowa 1977).

4. *The Iowa State Bar Position on Title Insurance*, IOWA LAW., Jan. 2001, at 20.

state that prohibits the sale of title insurance,<sup>5</sup> the battle against title insurance has been unwavering. However, the question remains whether the General Assembly's continual efforts to rebuff the sale of commercial title insurance are in Iowa's best interest.

In other states, lenders require title insurance to protect their interest in property.<sup>6</sup> The state legislatures are responsible for regulating the sale of title insurance within their own borders.<sup>7</sup> Although each state determines how to regulate title insurance, Iowa is the only state to prohibit the sale of commercial title insurance.<sup>8</sup>

The purpose of this Note is to explore whether Iowa's title system is superior to those of other states, which allow the sale of commercial title insurance. Many issues affect this analysis. The first is whether Iowa's title system is able to rectify the criticisms of the commercial title insurance industry. A second issue is whether Iowa can provide the same benefits that the commercial title insurance industry offers. In order for Iowa's system to be superior, it must be able to practically provide the same benefits the title insurance industry offers and address its criticisms. If Iowa's system is unable to meet this challenge, then the criticisms of the title insurance industry must be weighed against the benefits. To be superior, Iowa's title system must provide more desirable characteristics.

## II. BACKGROUND INFORMATION

### A. Defining Title Insurance

Before exploring Iowa's unique title system, it is important to understand title insurance. A title insurance company promises to accept liability if the insured property is lost or damaged due to defects, liens, or encumbrances on the title.<sup>9</sup> The policy is "evidence that a particular title insurance company is willing to indemnify an owner or lender in the event that the title to the property is

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5. See Wilcox, *supra* note 1, at 98-99 (labeling Iowa's title system as unique and giving consumers a bargain); *Okay, We Know We're Not Supposed to Talk About This, But—It Looks Like Consumers Get a Good Deal in Iowa Where Title Insurance Is, Well, Sorta Illegal—Meanwhile, Iowa Finance Authority Goes On-Line*, TITLE MGMT. TODAY, Feb. 1998, at 5-6 (classifying Iowa's title system as unique) [hereinafter *Okay, We Know We're Not Supposed to Talk About This*].

6. Wilcox, *supra* note 1, at 97.

7. See *id.* at 98. (discussing the various regulations enacted by state insurance departments dealing with different aspects of title insurance).

8. *Okay, We Know We're Not Supposed to Talk About This, supra* note 5, at 5-6.

9. 43 AM. JUR. 2D *Insurance* § 525 (1982).

different than as set forth in the policy, subject to whatever exclusions and exceptions are contained in the policy."<sup>10</sup> However, a critical definition of title insurance is that it is insurance to protect the policyholder from mistakes the insurance company made doing the title search.<sup>11</sup>

Before title insurance, security of title was assured through title opinions, where an attorney gave a legal opinion after reviewing the chain of title in a title abstract.<sup>12</sup> The secondary mortgage market drove the current popularity of title insurance.<sup>13</sup> It discovered that the title opinion system was cumbersome and complex and that paperwork could be reduced by using title insurance.<sup>14</sup> Title insurance policies consist of minimal paperwork and provide readily discernible protection.<sup>15</sup>

A consumer buying a house with a mortgage purchases title insurance for a one-time fee.<sup>16</sup> The premium is normally based upon the amount of the mortgage, approximately one-half to one percent of the loan.<sup>17</sup> "The title insurance premium pays for the title search, the maintenance of a title plant, and precautionary measures to assure the accuracy of the search."<sup>18</sup> If the title is different from what the policy insures, subject to any exclusions, the title insurance company will indemnify the owner of the policy, paying for all legal expenses necessary to get a release on the mortgage or whatever is necessary to compensate the owner of the policy.<sup>19</sup> The title insurance company is also obligated to defend the policyholder if the title is challenged in legal proceedings.<sup>20</sup>

The distinction of who owns the policy is important. When lenders require title insurance, they require lender's coverage, which protects the lender, not the homeowner, in the case of a title defect.<sup>21</sup> In order for the homeowner to receive any benefits from the title insurance company, the homeowner must have

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10. Fred I. Feinstein, *Title Insurance: The Role of the Lawyer*, in TITLE INSURANCE 553, 557 (PLI Real Estate Law & Prac., Course Handbook Series No. N-412, 1995).

11. Wilcox, *supra* note 1, at 97.

12. John F. Rohe, *Proving the Elements of a Claim Under a Title Insurance Policy Covering Real Property*, 38 AM. JUR. P.O.F. 3D § 3 (1996).

13. *Id.* § 4.

14. *Id.*

15. *Id.*

16. Wilcox, *supra* note 1, at 97.

17. *Id.*

18. Rohe, *supra* note 12, § 6.

19. Feinstein, *supra* note 10, at 557; Wilcox, *supra* note 1, at 98.

20. Interview with Matthew J. White, Deputy Director, Title Guaranty Division of Iowa Finance Authority, in Des Moines, Iowa (Nov. 27, 2001).

21. Wilcox, *supra* note 1, at 97-98, 100.

purchased an additional title insurance policy called an owner's policy, which is typically available for a small additional cost.<sup>22</sup>

## B. Title Insurance and Iowa Law

### 1. History of Title Insurance in Iowa

In 1947, the Iowa General Assembly amended Iowa Code section 515.48, authorizing businesses to insure against any risk not listed in the statute.<sup>23</sup> The statute prohibits businesses from issuing "title insurance or insurance against any loss or damage by reason of defective title, encumbrances, or otherwise."<sup>24</sup> This law was challenged, but the Iowa Supreme Court held that it was constitutional.<sup>25</sup>

After Iowa banned the sale of title insurance, real estate transactions were secured by attorneys drafting title opinions after examining the title abstract.<sup>26</sup> In 1985, Iowa established the Iowa Guaranty Division, which offers Title Guaranty Certificates that protect Iowa real estate at a low cost.<sup>27</sup> The Iowa Guaranty Division was created, in part, to meet the demand of out-of-state lenders on the secondary mortgage market who demanded more protection than what was provided by attorney abstract opinions.<sup>28</sup>

### 2. Iowa's Current Title System

For the typical homeowner in Iowa, titles are secured by attorney title abstract opinions which are required by lenders.<sup>29</sup> A lawyer searches the title registry and then certifies that the title is clear of defects by drafting an opinion letter.<sup>30</sup> If the lawyer is wrong and the title is clouded, the homebuyer or mortgage lender can sue the lawyer for damages.<sup>31</sup> However, if the lender's attorney issues the title opinion, only the lender has a malpractice remedy, not the homeowner.<sup>32</sup> The lender is the only party with a remedy due to basic contract

22. *Id.* at 98, 100.

23. S.F. 370, 52d Gen. Assemb., ch. 258 § 5, at 333-34 (Iowa 1947).

24. *Id.*

25. *Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 29-30 (Iowa 1977) (holding that "a rational basis exists upon which the legislature could logically treat title insurance dissimilarly from other forms of like coverage").

26. *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 5-6.

27. Act of May 31, 1985, ch. 252, 1985 Iowa Acts 26 (codified as amended in IOWA CODE § 16.2 (2001)).

28. *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 6.

29. *Id.* at 5-6.

30. Michael Fitz-James, *Adapt or Perish in Real Estate Bar: Fees Tumble: Title Insurance Changes the Landscape*, NAT'L POST, Apr. 16, 2001, available at 2001 WL 18856524.

31. *Id.*

32. Interview with Matthew J. White, *supra* note 20.

principles.<sup>33</sup> The lender benefits from the attorney-client relationship because the lender, not the homeowner, contracted with the attorney who issued the title opinion.<sup>34</sup> Thus, if the lender's attorney makes an error in the title opinion, the lender has a malpractice remedy and the homeowner suffers the loss.<sup>35</sup>

The abstract-attorney title opinion system "promotes land title stability for determining the marketability of land titles and is a public purpose."<sup>36</sup> This system has worked well and defects are rare "[b]ecause of Iowa's existing system of maintaining public records and the forty year marketable title act previously enacted by the Iowa Legislature . . . ."<sup>37</sup> However, in cases where secondary mortgage lenders require additional assurance or the purchaser would like additional peace of mind, Iowa provides a title insurance equivalent, the Title Guaranty Program.<sup>38</sup>

In creating the Iowa Title Guaranty Program, the Iowa Legislature intended to serve a public purpose "by providing, as an adjunct to the abstract-attorney's title opinion system, a low cost mechanism to provide for additional guaranties of real property titles in Iowa."<sup>39</sup> Title Guaranty Certificates enable free transfer of Iowa mortgages on the secondary market and increase the quality of the state's real property-title transfer system.<sup>40</sup>

In the Title Guaranty enabling statute, the Legislature gave the Iowa Finance Authority, of which Title Guaranty is a division, all powers necessary to fulfill its purposes and duties.<sup>41</sup> This power includes the ability to guarantee titles on Iowa real property in a manner acceptable to the secondary market.<sup>42</sup> Further, the Title Guaranty Division is authorized to establish the price and collect the fees of the guarantees and to reinsure the guarantees against any related loss.<sup>43</sup> The authority to reinsure allows Title Guaranty to give a portion of the risk to other insurers in order to protect itself and the insured while still maintaining complete legal liability.<sup>44</sup>

33. *Id.*

34. *Id.*

35. *Id.*

36. IOWA CODE § 16.3(15) (2001).

37. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20; see also *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 5 (asserting that Iowa's attorney title system has worked well, due in part to Iowa's diligent record keeping).

38. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20.

39. IOWA CODE § 16.3(15).

40. *Id.*; IOWA ADMIN. CODE r. 265-9.12(16) (2001).

41. IOWA CODE § 16.5.

42. *Id.*

43. *Id.*

44. Feinstein, *supra* note 10, at 574-75.

The Iowa Title Guaranty Division “sells Title Guaranty Certificates which provide low cost title protection for any real estate located in the state of Iowa.”<sup>45</sup> The owner, the lender, or both may be issued a Title Guaranty Certificate.<sup>46</sup> The Title Guaranty Certificates provide the same coverage as provided in other states by title insurance policies obtained from a member of the American Land Title Association.<sup>47</sup> The certificates protect against “loss or damage caused by defective titles to Iowa property,” but at a low cost.<sup>48</sup>

Title opinions issued by participating attorneys form the basis for Title Guaranty Certificates.<sup>49</sup> Currently, about two thousand attorneys in the state participate in the Title Guaranty Program.<sup>50</sup> Any Iowa licensed attorney is eligible for the program once the division executes and accepts the attorney’s participation agreement.<sup>51</sup> The participation agreement requires the attorney to have malpractice insurance with a limit of at least \$100,000 per claim and a total annual limit of at least \$300,000.<sup>52</sup>

The Title Guaranty Division “will issue a title guarantee for properties up to \$250,000.”<sup>53</sup> If the property value exceeds this amount, the Title Guaranty Division reinsures the coverage over \$250,000 with a Florida underwriter.<sup>54</sup> Title Guaranty Certificates provide the homeowner with coverage for the amount of the property’s market value, while the lender gets coverage for the loan amount.<sup>55</sup> The price of the premium for either owner or lender coverage is based on the amount of coverage, at a rate of one dollar per one thousand dollars of coverage.<sup>56</sup> If an owner policy is issued in a transaction, the premium is based on the sale price, and the lender policy is issued for an additional fifteen dollars.<sup>57</sup> If only a lender policy is issued, the premium is based on the amount of the loan.<sup>58</sup>

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45. TITLE GUAR. DIV. OF THE IOWA FIN. AUTH., TITLE GUAR. PROGRAM, at [http://www.ifahome.com/partner\\_tgd.asp](http://www.ifahome.com/partner_tgd.asp) (updated Jan. 2, 2003) [hereinafter TITLE GUAR. PROGRAM].

46. IOWA ADMIN. CODE r. 265-9.12(16) (2001); TITLE GUAR. PROGRAM, *supra* note 45.

47. TITLE GUAR. PROGRAM, *supra* note 45.

48. IOWA ADMIN. CODE r. 265-9.12(16).

49. TITLE GUAR. PROGRAM, *supra* note 45.

50. *Id.*

51. *Id.*

52. IOWA ADMIN. CODE r. 265-9.13.

53. *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 6.

54. *Id.*

55. TITLE GUAR. PROGRAM, *supra* note 45.

56. *Id.*

57. *Id.*

58. *Id.*

There is a minimum premium of thirty-five dollars, and some endorsements cost fifteen dollars.<sup>59</sup>

All premiums from the Title Guaranty Program go to the title guaranty fund to pay claims and the program's administrative costs.<sup>60</sup> If there is a surplus in the title guaranty fund (as decided by the Finance Authority and the Title Guaranty Division boards), those funds are transferred into the housing program fund.<sup>61</sup> The housing program fund is used for the following purposes:

1. To cover initial commitment costs of authority bond issues and loans in order to facilitate and ensure equal access across the state to funds for programs for first-time homebuyers.
2. For the home maintenance and repair program . . . .
3. For the rental rehabilitation program . . . .
4. For the homeownership incentive program . . . .<sup>62</sup>

The Iowa Title Guaranty System uses all profit to benefit housing in the State of Iowa, as no money or interest on the money in the housing program fund reverts to the Iowa general fund.<sup>63</sup> In fiscal year 2000, the Iowa Title Guaranty Division generated more than \$1 million in profit, which was then funneled into the housing program fund.<sup>64</sup> In fiscal year 2002, the Title Guaranty Division had their highest grossing year, with more than \$5.25 million in revenues.<sup>65</sup> Including the contribution to the housing fund of approximately \$2.5 million in fiscal year 2002, the Title Guaranty Division has transferred nearly \$25 million to the Iowa Finance Authority's housing programs since 1988.<sup>66</sup> Ten million dollars alone has been contributed between fiscal years 1999 and 2002.<sup>67</sup>

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59. TITLE GUAR. DIV. OF THE IOWA FIN. AUTH., TITLE GUAR. DIVISION PREMIUM RATES, at [http://www.ifahome.com/docs/tgd\\_rates.pdf](http://www.ifahome.com/docs/tgd_rates.pdf) (last visited Jan. 17, 2003).

60. IOWA CODE § 16.91(1)(2001).

61. *Id.*

62. *Id.* § 16.40.

63. *Id.* § 16.91(1).

64. Wilcox, *supra* note 1, at 98.

65. Dennis Dietz, *Iowa Title Guaranty's Year Breaks Record*, IOWA LAW., Sept. 2002, at 10.

66. *Id.*

67. *Id.*

### III. ARGUMENTS SURROUNDING COMMERCIAL TITLE INSURANCE

#### A. Arguments Supporting Commercial Title Insurance

Title insurance protects the interest of the policy owner.<sup>68</sup> It fills in the gaps of what a lawyer cannot do.<sup>69</sup> A lawyer cannot promise that he or she is absolutely positive there are no clouds on the title, such as undisclosed claims, errors in records, or forged signatures.<sup>70</sup> If a lawyer makes a mistake on the title search that causes the policy owner to suffer a loss, then the policy owner may sue the lawyer for malpractice.<sup>71</sup> However, if the lawyer who conducted the search no longer works or has died, the policy owner would have no recourse without title insurance.<sup>72</sup> Thus, so long as the homeowner or lender has a title insurance policy insuring the title, they are assured protection of their interest, subject to any exceptions in the policy.<sup>73</sup>

Hand in hand with protection of the policy owner's interest is another benefit of title insurance, peace of mind. Lenders in states other than Iowa require a title insurance policy to protect their interest and give them peace of mind.<sup>74</sup> However, owners must ensure they have an owner's policy to protect their interests.<sup>75</sup> This additional policy may cost as little as thirty dollars.<sup>76</sup> Even a harsh critic of commercial title insurance, such as Melynda D. Wilcox,<sup>77</sup> will admit that thirty dollars for an owner's policy is "a relatively cheap price for peace of mind, for the remote chance that there's a shrimp fisherman lurking in your home's past."<sup>78</sup> It is hard to refute that title insurance gives every policy owner peace of mind.

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68. See 43 AM. JUR. 2D *Insurance* § 525 (1982) (noting that such interests are "loss or damage by reason of defects in the title to the property"); Feinstein, *supra* note 10, at 557 (explaining that a title insurance policy "is the only evidence that a particular title insurance company is willing to indemnify an owner").

69. Joanne Lovering, *Title Insurance Is a Homeowner's Security Blanket: Covers Everything a Lawyer Does, Plus Fraud and Forgery*, NAT'L POST, Aug. 18, 2001, available at 2001 WL 25982237.

70. *Id.*

71. *Id.*

72. *Id.*

73. Feinstein, *supra* note 10, at 557.

74. Wilcox, *supra* note 1, at 98, 100.

75. *Id.*

76. *Id.* at 98.

77. *Id.* at 97.

78. *Id.* at 98.



Another benefit of title insurance is that it is very quick.<sup>79</sup> In comparison to the attorney title abstract opinion, which takes a considerable amount of time, title insurance can be very speedy.<sup>80</sup> "Title insurance is credited with adding significant value to real estate by speeding up marketplace transactions and providing a reliable foundation for the securitization of mortgage-backed securities."<sup>81</sup>

### B. Criticisms of Commercial Title Insurance

One criticism of commercial title insurance is that the quality of titles and reliability and integrity of public records decrease.<sup>82</sup> Instead of taking the time to do a chain-of-title search and prepare a title opinion, title insurance companies will, in most instances, assume the title is clear and insure it.<sup>83</sup> This assumption results in title insurance speeding up marketplace transactions.<sup>84</sup> However, speed comes at a price. Instead of taking the steps necessary to fix a clouded title, title insurance companies may allow a clouded title to be transferred by making an affirmative decision to assume the risk and insure over it.<sup>85</sup> As title defects and clouds are continually insured over rather than fixed and documented, the quality of the public records decreases.<sup>86</sup> Both of these practices of title insurance companies are very destructive to the quality of titles and the reliability and integrity of public records.

As the quality of records decreases, state residents almost become dependent on title insurance because it becomes the only way for the lender or homeowner to feel secure in their interest.<sup>87</sup> Thus, commercial title insurance begins a "race to the bottom" in terms of quality of title and public records, while securing a need for their industry in the market.

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79. See Marietta Morris Maxfield, *Why You Need Title Insurance*, 15 PROB. & PROP. 8 (2001) (stating that title insurance speeds up market transactions).

80. *Id.*

81. *Id.*

82. See Fitz-James, *supra* note 30 (stating that title insurance companies insure titles under the assumption that they are clear).

83. *Id.*

84. Maxfield, *supra* note 79, at 8.

85. Fitz-James, *supra* note 30.

86. See *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20 (explaining how high quality public records are maintained by always correcting title defects and clouds before transfer).

87. See Lovering, *supra* note 69 (noting that Stephen Shub, a real estate attorney, expected that within a year no institutional lender would advance money on a mortgage without title insurance coverage).

The greatest criticism of commercial title insurance is the expensive premiums in relation to the industry's low percentage of payout.<sup>88</sup> "Claims are so rare, in fact, that insurers spend as little as five cents to ten cents of every premium dollar to pay them."<sup>89</sup> In comparison, auto and health insurance companies typically pay "ninety cents or more of every premium dollar in claims."<sup>90</sup>

The Iowa Supreme Court commented on the industry's high premiums when compared to the percentage of pay out in *Chicago Title Insurance Co. v. Huff*,<sup>91</sup> where the court held the law prohibiting the sale of title insurance constitutional.<sup>92</sup> In that case, Chicago Title Company admitted that it made about \$370,000 from title insurance premiums in Iowa in five years, but paid out nothing in claims.<sup>93</sup> The court stated: "Obviously, a loss ratio of zero percent presents a potentially lucrative source of revenue to an insurer of titles and this court cannot say the general assembly overstepped its power in barring a costly form of 'insurance' for which plaintiff's own testimony demonstrates there is little need."<sup>94</sup> The court's distrust of the commercial title insurance industry can be detected in *Huff* from the fact that, in the court's opinion, the industry earns an enormous amount of money while paying out relatively nothing.<sup>95</sup> Another criticism of commercial title insurance, which may be linked to the high premium criticism, is the lack of real competition in the commercial title insurance industry.<sup>96</sup> Most consumers buy only a few homes in their lifetime. The home buying process is complicated for most people, and many buyers may be unaware they have the opportunity to shop around for title insurance.<sup>97</sup> The consumer probably knows that his or her lender requires title insurance, and simply purchases the title insurance recommended.<sup>98</sup>

[E]ven though [the homeowner is] paying the bill, the title company's client is the real estate agent, lender, lawyer or homebuilder [(the middlemen)] who brought in the business. Part of the premium goes toward rebates or

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88. See, e.g., Wilcox, *supra* note 1, at 97 (describing the excesses enjoyed by title insurance companies while consumers foot the bill).

89. *Id.*

90. *Id.*

91. Chi. Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).

92. *Id.* at 27.

93. *Id.*

94. *Id.*

95. *See id.*

96. See Wilcox, *supra* note 1, at 97 (stating that title insurance companies do not compete on price).

97. *See id.* (stating that homeowners do not look for the best deals when buying title insurance).

98. *Id.*

other rewards for the referral (critics call them kickbacks) which many title insurers consider a cost of doing business.<sup>99</sup>

The little competition that does exist does not allow consumers to benefit from the competition by receiving lower premiums—the middlemen benefit.<sup>100</sup> There is not only lack of competition, but also reverse competition as the title insurance companies compete with each other for referrals from the middlemen and not directly for the consumer's business.

A final criticism of the commercial title insurance industry is that homeowners purchase title insurance policies that may only protect the lender and not the homeowner.<sup>101</sup> The homeowner often thinks that he or she is the beneficiary of the purchased title insurance policy. However, the lender is the beneficiary of the lender policy, and the lender requires the borrower to purchase the lender policy as part of the loan agreement.<sup>102</sup> Those premiums "totaled more than \$8.7 billion in 1999, one-third more than doctors and hospitals spend on medical malpractice coverage."<sup>103</sup> Thus, title insurance will benefit the homeowner in case of a loss, but only when the homeowner purchases a separate homeowner policy.<sup>104</sup>

#### IV. HOW IOWA'S SYSTEM STACKS UP

##### *A. How Iowa's System Addresses the Criticisms of Commercial Title Insurance*

The commercial title insurance industry has been harshly criticized for a variety of reasons.<sup>105</sup> These criticisms include decreasing the quality of the property-record system and charging very expensive premiums, especially in relation to the claims paid out.<sup>106</sup> The Iowa title system, through the Title Guaranty Division, attempts to provide the benefits of title insurance while eliminating the drawbacks of commercial title insurance.

Iowa's title system ensures the quality of the state's public records and property titles. As the deputy director of the Title Guaranty Division affirmed, "Iowa's titles are considered to be the cleanest in the nation."<sup>107</sup> Attorney-

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99. *Id.*  
 100. *See id.*  
 101. *Id.*  
 102. Interview with Matthew J. White, *supra* note 20.  
 103. Wilcox, *supra* note 1, at 97.  
 104. *Id.* at 98.  
 105. *See* discussion *supra* Part III.B.  
 106. *See* discussion *supra* Part III.B.  
 107. Wilcox, *supra* note 1, at 98.

abstract opinions deserve much of the credit for Iowa's clean title system.<sup>108</sup> Attorney-abstract opinions examine the chain of title and correct any clouds or defects on a title before it is transferred.<sup>109</sup> These are performed on all real estate transactions in Iowa.<sup>110</sup>

Another reason for Iowa's clean title system is the approach taken by the Title Guaranty Division when issuing Title Guaranty Certificates. Unlike commercial title insurance, an applicant for Title Guaranty must have a title opinion performed and demonstrate marketable title before a certificate will be issued.<sup>111</sup> The Title Guaranty Division will not insure over known title problems as commercial title insurance companies will.<sup>112</sup> Thus, the integrity of the record and title system remains intact because clouds and defects are corrected and properly recorded, not insured over.

Furthermore, Title Guaranty Certificate premiums are regulated. The premiums are regulated by the Title Guaranty Division, which determines the price of premiums for their certificates.<sup>113</sup> The determination of premiums by the Title Guaranty Division eliminates the possibility of price gouging by a commercial title insurance company.<sup>114</sup> Also, because the only legal land title insurance sold in Iowa is provided through the government, consumers do not need to research and understand the commercial title insurance business when going through the confusing ordeal of purchasing a home.<sup>115</sup>

The premiums for a Title Guaranty Certificate are reasonable in comparison to commercial title insurance. The Title Guaranty Certificate premiums cost "\$1 per thousand of coverage."<sup>116</sup> Iowans purchasing Title Guaranty Certificates pay for their insurance premium and the cost of a title opinion, which costs approximately \$150 to \$300.<sup>117</sup> Although Title Guaranty requires the purchaser to pay for a title opinion in addition to the insurance premium, the total cost is still a fraction of the cost of commercial title insurance premiums.<sup>118</sup> For example, property "with a \$150,000 mortgage, that would

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108. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20.

109. *Id.*

110. *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 5.

111. Interview with Matthew J. White, *supra* note 20.

112. *Id.*

113. *Id.*

114. *Okay, We Know We're Not Supposed to Talk About This*, *supra* note 5, at 6.

115. *Id.*

116. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20.

117. Wilcox, *supra* note 1, at 98.

118. *Id.*

mean a maximum of \$450, versus as much as \$1500 for title insurance in any other state."<sup>119</sup>

The Iowa Title Guaranty system, although different than commercial title insurance on many levels, including procedure and price, protects landowners' and lenders' interests and peace of mind just as commercial title insurance does.<sup>120</sup> Although the commercial title insurance industry is criticized for many reasons, one undisputable benefit is the peace of mind it provides policy owners.<sup>121</sup> Because the Iowa Title Guaranty Certificates provide the same coverage provided by commercial title insurance, Title Guaranty can also claim that it provides peace of mind.<sup>122</sup> However, Title Guaranty provides peace of mind minus many of the criticisms of commercial title insurance previously discussed,<sup>123</sup> which may allow Title Guaranty to claim that it provides the ultimate peace of mind.

A final benefit of the Title Guaranty system is that its profits are funneled back into the state,<sup>124</sup> rather than into the pockets of large businesses.<sup>125</sup> The surplus from the Title Guaranty fund is transferred into Iowa's housing program fund.<sup>126</sup> The Iowa Finance Authority and the Title Guaranty Division determine the amount of the surplus.<sup>127</sup> The housing program fund benefits various programs aimed toward low to moderate-income housing in the state.<sup>128</sup>

Since the inception of the Title Guaranty Division, over \$25 million of excess revenues have been transferred to the housing fund.<sup>129</sup> From fiscal years 1999 to 2002, over \$10 million of the total excess revenues were transferred.<sup>130</sup> The amount of money transferred to the housing fund should continue and even

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119. *Id.* For owner policies, the amount of coverage is determined from the property's purchase price or, if refinancing, the property's appraised value. Letter from Matthew J. White, Deputy Director, Title Guaranty Division, Iowa Finance Authority, to Shannon Strickler, student, at 1 (Nov. 30, 2001) (on file with the DRAKE LAW REVIEW). Lender coverage is based upon the mortgage amount. *Id.* However, if both lender and owner policies are purchased, the cost of both policies is the amount owed for owner coverage, plus an additional flat fee of fifteen dollars and the cost of endorsements. *Id.*

120. *The Iowa State Bar Position on Title Insurance, supra* note 4, at 20.

121. Wilcox, *supra* note 1, at 98.

122. *Id.*

123. See discussion *supra* Part III.B.

124. IOWA CODE § 16.91(1)(2001).

125. Wilcox, *supra* note 1, at 98.

126. IOWA CODE § 16.91(1).

127. *Id.*

128. *Id.* § 16.40.

129. Letter from Matthew J. White, *supra* note 119, at 6-8.

130. *Id.*

increase at times because the number of Title Guaranty Certificates issued has remained fairly constant, with some increase.<sup>131</sup>

The total profit of the Title Guaranty Division does not compare to that of the commercial title insurance industry, which realizes almost \$1 billion a year in profits.<sup>132</sup> However, the profits earned from the Title Guaranty Division are funneled back into state programs<sup>133</sup> that help other Iowans become property owners, instead of being sent into the pockets of an out-of-state business.<sup>134</sup>

#### B. *How Iowa's System Fails to Address the Criticisms of Commercial Title Insurance*

The Title Guaranty program ensures the quality of public records and titles by requiring a title opinion rendering marketable title before issuing a Title Guaranty Certificate.<sup>135</sup> Although this is a positive trait of the Title Guaranty program, it also has a down side. Title insurance companies have been complimented because they are able to speed-up marketplace transactions.<sup>136</sup> They accomplish this by often assuming that title is good or insuring over the defect.<sup>137</sup> The Title Guaranty Division will not make assumptions about the title nor insure over a defective title that could be repaired.<sup>138</sup> Thus, the Title Guaranty system takes as much, possibly even more, time than the attorney-abstract opinion system that commercial title insurance companies have replaced in many states.<sup>139</sup> For some, the difference in speed is a fault of the Title Guaranty system. However, this criticism needs to be weighed against the value of having accurate public records and clean, marketable titles. Accuracy and "repaired" titles come at a price—time. In order to maintain a quality public record system, time must be taken to ensure that flaws within the chain of title are detected and corrected.

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131. In 1997, a total of 23,106 Title Guaranty Certificates were issued. *Id.* at 4. In 1998, 22,489 certificates were issued. *Id.* at 5. That total rose in 1999 to 41,122 certificates issued. *Id.* at 6. In 2000, 40,935 certificates were issued. *Id.* at 7. But in 2001, only 26,686 certificates were issued. *Id.* at 8.

132. See Wilcox, *supra* note 1, at 97-98 (explaining the premiums and profit margins of the commercial title insurance industry).

133. IOWA CODE § 16.91(1) (2001).

134. Wilcox, *supra* note 1, at 98.

135. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20; Interview with Matthew J. White, *supra* note 20.

136. Maxfield, *supra* note 79, at 8; Fitz-James, *supra* note 30.

137. Maxfield, *supra* note 79, at 8; Fitz-James, *supra* note 30.

138. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20.

139. *Id.*; Interview with Matthew J. White, *supra* note 20.

Another criticism of title insurance that the Title Guaranty system does not resolve is the lack of owners' coverage on residential land transactions.<sup>140</sup> Although the total number of Title Guaranty Certificates purchased has doubled in recent years, the increase is largely due to lender policies.<sup>141</sup> Between 1997 and 2001, the number of lender policies purchased from the Title Guaranty Division has varied between 21,464 and 39,696 certificates per year.<sup>142</sup> On the other hand, the number of owner certificates purchased between 1997 and 2001 has varied between 1006 and 1840 certificates per year.<sup>143</sup> Thus, the amount of owner policies has remained fairly constant.

Lenders are more educated on how to secure their interest in mortgages because that is what they do. Most homeowners purchase a home only a few times in their lives and do not understand that the lender policy, for which the homeowner likely paid, does not also protect them.<sup>144</sup> Iowa's Title Guaranty program provides a consumer-friendly alternative to commercial title insurance, and the Title Guaranty Division needs to better advertise and educate the public about its program and its purpose.<sup>145</sup>

## V. CONCLUSION

Iowa's title insurance system is unique in comparison to other states.<sup>146</sup> Iowa has also been said to have the cleanest titles in the country—an indication that Iowa is doing something right.<sup>147</sup> Iowa's Title Guaranty system provides protection to policyholders, while ensuring that the public records and titles remain of high quality.<sup>148</sup> Of course, the Iowa system trades the speed of commercial title insurance for high-quality public records. However, this sacrifice of speed to maintain quality records aligns with the long-term goal of a quality land title system. Land will continue to pass, and in the long run, the quality of the public records is more important than the speed of a single

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140. Letter from Matthew J. White, *supra* note 119, at 1 (providing statistics on the number of owner policies sold in comparison to lender policies); Wilcox, *supra* note 1, at 98-99 (explaining that homeowners often do not realize they need to purchase a separate insurance policy to protect themselves as lender policies do not benefit the homeowner).

141. Letter from Matthew J. White, *supra* note 119, at 1.

142. *Id.*

143. *Id.*

144. Wilcox, *supra* note 1, at 98.

145. See IOWA CODE § 16.5 (2001) (explaining the public purpose that the Title Guaranty Division was created to serve).

146. Wilcox, *supra* note 1, at 98-99.

147. *Id.* at 98.

148. See IOWA ADMIN. CODE r. 265-9.12(16) (2001) (outlining the purposes of the Title Guaranty Division and describing the duties of participating attorneys).

transaction. Iowa's sacrifice of speed in favor of quality public records is in the best interest of the state.

The Iowa Title Guaranty program sells essentially the same product as commercial title insurance, but at a fraction of the cost.<sup>149</sup> Moreover, all profits from the program are funneled back into the state's housing fund.<sup>150</sup> In this regard, the Iowa Title Guaranty system creates a win-win situation for everyone but the commercial title insurance industry, which would like the ability to make large profits from selling title insurance in Iowa.<sup>151</sup>

A criticism of title insurance that Iowa's title system does not address is that property owners unknowingly do not have coverage under lender policies.<sup>152</sup> Often, homeowners pay for lenders' policies, but the policy only protects the lender.<sup>153</sup> The homeowner does not realize that he or she must purchase an additional owner policy in order to be covered.<sup>154</sup> Another problem is that many Iowans do not know about the Title Guaranty program—evident from the few owner policies purchased in the state compared to the many lender policies.<sup>155</sup> Because the sale of commercial title insurance is illegal in Iowa, many homeowners do not understand the concept of title insurance. Rather, they just get an attorney's title opinion as required. As such, they do not receive the additional benefit of peace of mind from extra protection. Luckily, due to Iowa's quality record keeping system, there are not many problems after the transfer of title, so homeowners have not suffered consequences from their ignorance.<sup>156</sup>

Iowa's title system, providing the option of Title Guaranty Certificates while banning commercial title insurance, is superior to other states that allow the sale of commercial title insurance.<sup>157</sup> The Title Guaranty Division offers the benefit of title insurance—peace of mind—without most of the drawbacks. However, in order for the Title Guaranty Division to be truly effective and provide the benefit of peace of mind, an advertising and educational campaign

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149. Wilcox, *supra* note 1, at 97-98.

150. IOWA CODE § 16.91(1).

151. See *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20 (stating that the Iowa General Assembly has consistently rebuffed efforts to allow the sale of commercial title insurance in Iowa).

152. Wilcox, *supra* note 1, at 97-98.

153. *Id.* at 98.

154. *Id.*

155. See discussion *supra* Part IV.B (discussing the amount of owner and lender policies sold by Title Guaranty).

156. *The Iowa State Bar Position on Title Insurance*, *supra* note 4, at 20.

157. See generally Deborah J. Cook, Note, *Iowa's Prohibition of Title Insurance—Leadership or Folly?*, 33 DRAKE L. REV. 683 (1984). Cook's Note examines and criticizes Iowa's title system. See *id.* However, the Note was written prior to the establishment of the Title Guaranty Division. Compare *id.*, with Act of May 31, 1985, ch. 252, 1985 Iowa Acts 26 (codified as amended in IOWA CODE § 16.2 (2001)).



must be undertaken. This will temporarily reduce the amount of surplus transferred into the housing fund. However, in the long run, it should increase the amount of Title Guaranty Certificates sold within the state, increasing the amount of surplus in the future. If the Title Guaranty Division is able to expand its use among homeowners and lenders, Iowa will solidify the claim that it has a system that should be a model for other states and even other countries.

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