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Land Title Insurance in India: Lessons from U.S. Regulatory Approaches

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Summary

The poor quality of land title records in India is a significant impediment for growth and urbanization. Bad land title records result in excessive litigation, property disputes, and cases of fraud. This in turn affects the cost and certainty of transactions that involve land and real estate. While the Indian government has been operating a land record modernization program for over a decade, progress has been slow. This paper accordingly proposes that land title insurance be encouraged to reduce losses in land transactions. Title insurance will also provide buyers of land and real estate a mechanism for mitigating the risks that arise from such transactions.

Insurance products cannot be launched in India without prior registration with the insurance regulator, the Insurance Regulatory and Development Authority of India (IRDAI). So far, IRDAI has registered some title insurance products, and it is now in the process of developing a general regulatory framework for the product. Once in place, this regulatory framework will determine the development of the title insurance market and consequently its ability to solve issues related to land transactions. Therefore, it is important that the regulatory framework adopted be suitably tailored to the unique characteristics of land title insurance as a product. In addition, the regulatory framework must give due regard to the incipient nature of the market in India.

While title insurance is a new product in India, it is widely used in the United States. India's regulatory framework can therefore be better informed by an examination of title insurance regulation in the United States. This is especially so given that insurance in the United States is determined at the state level, so different states follow different models of regulation. This diversity provides an opportunity to better understand how title insurance should be regulated given the local environment.

This paper accordingly analyzes the nature of title insurance that makes it different from other kinds of insurance and identifies specific aspects of the title insurance business that are generally regulated. This analysis highlights the following issues that merit some thinking on regulatory approaches:

1. Pricing of title insurance and the regulation of rates
2. The financial soundness of title insurance businesses
3. The relationship between title insurance companies and their agents who deal directly with clients.

An analysis of regulation in the United States reveals that while all states agree on these being the most important aspects of regulation, they adopt varying approaches to address these issues. Many states for example, regulate rates of insurance policies to be filed with the state while others explicitly prescribe the rates to be followed. Similarly, all states require title insurance firms to keep financial

reserves as a safety measure in case an insurance company becomes insolvent. However, states vary on the exact nature of these requirements.

This paper applies this analysis to the Indian context and finds that regulation in India needs to take account of some distinguishing features of the Indian market. These include the incipient nature of title insurance in India and the lack of adequate information for effective regulation on some aspects. Some other features are the specific legal framework for land titles and the poor state of land records in many parts of the country.

Accordingly, this paper proposes that the proposed regulatory framework should follow a light regulatory approach toward title insurance. Title insurance rates should not be regulated before the market develops. The focus should instead be on ensuring that title insurers treat consumers fairly and with due diligence. Second, IRDAI will have to grapple with the financial risks peculiar to the Indian insurance market. This is because while U.S. title insurers provide only one product (mono-line insurance), existing Indian general insurers will provide title insurance. This is likely to cause the risks from one line of insurance to spill over into title insurance. Third, it is too early to think of the specific harms that title insurance agents can cause to consumers that are different from other kinds of insurance. Therefore, there should not be additional regulatory requirements on insurance companies and their agents with respect to their dealings with consumers.

Introduction

Land titles document the ownership of land or immovable property. Land title records are often inaccurate or defective due to administrative gaps. Because of these defects, inaccurate land titles misrepresent the actual nature of property rights being transferred in a transaction, creating a potential for subsequent losses. This adversely affects the use of land for activities like agriculture, housing, and industrial development. It also affects the use of land as collateral for credit. Title insurance helps protect land title holders (property owners) from the losses caused by such defects.

Title insurance is a promise to indemnify an insured person if such person suffers a loss due to an error or defect in the title that was not captured while the insurance company was making a determination about the land title. While India suffers from a problem of poor land records, title insurance is still a nascent industry in the country.

The accuracy and accessibility of land title records are a critical component of India's ability to transition to a middle-income country. Some estimate that property-related litigation makes up a significant majority of ongoing litigation in India.[1] India scores low on the ability to enforce contracts, making property transactions costly and risky. The risk of defective titles in property transactions is therefore an important constraint to achieving higher growth and prosperity in India.

The Indian government has been cognizant of this issue for at least two decades. In 1995, it initiated the National Land Records Modernization Program (now called Digital India Land Records Modernization Program, or DI-LRMP) to improve the quality of land records across the country.[2] Progress in implementing the program, however, has been slow.[3] In this context, land title insurance is an alternative, market-based mechanism for improving land titles and accelerating India's economic transition.[4]

The market for title insurance is currently constrained by regulatory and administrative bottlenecks. To address some of these bottlenecks, this paper examines the regulatory frameworks for title insurance in the United States. Title insurance originated in the United States and continues to be widely used there. The evolution of the U.S. title insurance market as well as its regulation can therefore provide important insights for title insurance regulation in India.

This paper proposes a regulatory framework for title insurance in India that is based on an evaluation of U.S. title insurance regulations. First, this paper explains the nature and characteristics of title insurance as a product for indemnifying land titles. It identifies issues that regulations should seek to address in title insurance markets. Second, it provides an overview of the regulatory requirements of

title insurance in different states of the United States. Third, it analyzes the commonalities and differences in title insurance regulation in the United States and their relevance for similar regulatory requirements in India. Finally, it concludes by developing a simple heuristic framework for evaluating the relevance of U.S. title insurance regulation for India. In addition, it proposes a framework for thinking about regulatory requirements for title insurance in India.

Title insurance indemnifies the land title holder (for example, the owner, mortgagee, or lessee) against any loss that may result from defects in a title that were not discovered at the time of the transaction. For example, a buyer purchases a residential property but is unaware that it has been earmarked for demolition by the municipal authorities. The loss due to this defect can then be indemnified through title insurance. When issuing a title insurance product, a title insurance company conducts due diligence on all aspects of the property, prepares a report of the nature of the title, and insures the holder against any undiscovered defect that may come up in the future.

By purchasing title insurance, the purchaser is able to insure himself or herself against any inaccuracy or error in land title records.[5] This also benefits third parties that may wish to transact in the same immovable property at a later date. Insurers have to indemnify their customers for any losses or adverse litigation. They are therefore incentivized to maintain accurate title records of their own and to update government land records as well.

Therefore, given the poor state of property records and the prevalence of property disputes in India, title insurance has the potential to both reduce losses suffered in property transactions and improve property records.

The 2016 Real Estate Regulation Act (RERA) provides Indian state governments the option of mandating title insurance for guaranteeing a title to immovable property.[6] The act states that title insurance can be mandated for developers of real estate projects.[7] Further, such title insurance must be transferred to the buyers of property when the developer enters into an agreement for sale.[8] However, the act does not make title insurance mandatory merely by application of law. Since state governments are in charge of implementing the provisions of this act within their own states, they can choose to introduce title insurance within their states. So far, no Indian state has made title insurance mandatory for RERA projects.

Existing title insurance products in India have been designed for real estate projects registered with RERA. The Maharashtra Real Estate Regulatory Authority could soon mandate title insurance in the western state of Maharashtra.[9] However, existing regulatory and administrative bottlenecks could potentially inhibit the development of title insurance products.

In India, a new insurance product can be introduced in the market only with the prior approval of the insurance regulator—the Insurance and Regulatory Development Authority of India (IRDAI).[10] Some existing insurance companies have received such regulatory approvals—for example, ICICI Lombard General Insurance Company, Ltd., HDFC ERGO General Insurance, Tata AIG General Insurance Co., Ltd., and National Insurance Company, Ltd.[11] However, the IRDAI has not published any general regulatory framework for title insurance.

In October 2019, IRDAI formed a working group to create a standardized framework for title insurance products.[12] The findings of the working group will determine the regulatory framework for the title insurance business, and consequently, the degree to which this product can help improve land records in India. The proposed regulatory framework can be improved significantly by the analysis provided in the following sections of this paper regarding the efficacy of regulations in the United States and their relevance to the Indian market.

Title insurance was first offered as a product in the United States, and the first law regulating title insurance dates back to the 1880s.[13] Title insurance originated in the United States and is used widely in property transactions.[14] In recent years, title insurance has also come to be used in Europe and Australia even though both jurisdictions follow different types of property registration systems.[15] Insurance in the United States is regulated by each individual state, and a detailed examination of different regulatory frameworks prevalent in the country will provide a comparative framework for evaluating the advantages and disadvantages of different regulatory approaches.

While title insurance and its regulation have existed in the United States for approximately 150 years, its introduction in India is recent and the market is at an incipient stage of development. This paper therefore proposes a framework for thinking about adaptations from different regulatory approaches toward title insurance regulation. By doing so, this paper seeks the right balance between encouraging market growth in title insurance and protecting consumers in India.

While the impetus for title insurance has come from the enactment of the 2016 Real Estate Regulation Act, title insurance is also viable for general use in property transactions in India. To propose an appropriate regulatory strategy for regulating title insurance products in India, this paper evaluates existing U.S. regulations in light of India's market realities. This paper is divided into the following sections: the first section provides a brief overview of the design of title insurance and the major market failures that regulations should seek to address in title insurance markets. Next, the paper provides an overview of the regulatory requirements regarding title insurance in different states in the United States. This part analyzes the commonalities and differences in title insurance regulation in the United States and their relevance for similar regulatory requirements in India. The final section concludes by developing a simple heuristic framework for evaluating the

relevance of title insurance regulation for India and proposes a framework for thinking about regulatory requirements for title insurance in India.

Regulating Title Insurance

Title insurance is a financial indemnity against defects in titles to land and property, but the underwriting process for title insurance differs from that for other insurance products.[16]

The report of the U.S. Government Accountability Office explains the title insurance process:

> Before issuing a policy, a title agent checks the history of a title by examining public records, such as deeds, mortgages, wills, divorce decrees, court judgments, and tax records. If the title search reveals a problem . . . the agent arranges to resolve the problem, decides to provide coverage despite the problem, or excludes it from coverage. The title policy insures the policyholder against any claims that might have existed at the time of the purchase but were not identified in the public record. . . . Title searches are generally carried out locally because the public records to be searched are usually only available locally. . . . The variety of sources that agents must check during a title search has fostered the development of privately owned, indexed databases called "title plants." These plants contain copies of the documents obtained through searches of public records, and they index the copies by property address and update them regularly. Insurers, title agents, or a combination of entities may own a title plant. In some cases, owners allow other insurers and agents access to their plants for a fee.[17]

The business, its features, and risks that need to be regulated are therefore distinct. Underwriters in other lines of insurance try to determine the probability that they will have to pay insurance (and suffer losses) based on the nature of the insured person or thing. In title insurance, by contrast, underwriters attempt to reduce the possibility of loss itself.[18]

Regulation that enables title insurance should therefore be tailored to title insurance specifically and should regulate the risks to consumers emanating from five facets of its peculiar design:

1. Title insurance covers risks arising from defects in land titles.[19] This primarily means any loss suffered due to the incompleteness or negligence in the title search that led to the issuance of the insurance.[20] This makes title insurance retrospective in nature. It insures purchasers of insurance from defects that existed on the date of the insurance, not those that arise after it.[21]

2. Title insurance also covers the legal defense of the title insured by the insurance company. Sometimes, legal costs are also borne by the insurance company.[22]
3. Title insurance requires administrative expenses in title searches. This includes searches in public records, inspections of the property, and an examination of applicable zoning laws and tax laws.[23] Because of this process of underwriting, a large part of the premium charged is devoted to meeting administrative costs.[24]
4. Because title insurance is retrospective, and because the proportion of administrative expenses as a part of the premium is large, the cost of the insurance is front-loaded: the purchaser of the insurance usually pays a one-time premium.[25]
5. The cost of title insurance goes down over time. Since title insurance companies help reduce title defects and maintain records of titles, administrative expenses for title searches are reduced over time.[26]

These points of difference also point to four possible sources of risk for consumers in the title insurance market, specifically in India:[27]

1. **Poor quality of underwriting:** Insurers could sell insurance based on poor quality underwriting of title records. This itself could arise due to two possible reasons: the poor quality of title records that insurers would rely on to underwrite insurance or negligence or lack of skill in underwriting. This could cause financial loss to consumers as well as insurers. For example, the solvency and financial condition report of First Title Insurance Plc (a title insurance company) states three main causes of risk from underwriting:
   - Inadequate assessment or understanding of the risk
   - Incorrect pricing or reserving assumptions
   - Miscalculation of the size or frequency of future claims.[28]
2. **Monopoly power:** Abuse of monopoly power could lead to insurers charging monopoly prices or imposing unfair contractual terms on purchasers of title insurance. Since title insurance companies maintain private records of titles, they are in a position to improve information about titles over a period of time, to the exclusion of others who do not possess this information. In the United States, most, if not all, title insurance companies maintain title plants, which are essentially privately maintained indexes of land and property titles.[29]
3. **Low underwriting outcomes that affect prudential safety:** The poor quality of underwriting could result in bad pricing decisions leading to undercharging or overcharging customers and misallocation of reserves for indemnifying customers. These outcomes could put the safety of the insurance firm—and consequently the safety of the insured's indemnity—at risk.
4. **Judicial uncertainty leading to prudential risks:** Title insurers have an interest in participating in litigation on behalf of the customer whose title has been challenged. However,

delays in litigation in India are common, and it is hard to get precise estimates of the cost of litigation due to the uncertainty of judicial processes. Improper estimation of litigation could be another source of misallocation of costs that could lead to either very high costs for consumers or very low provisioning for litigation-related expenses.

These sources of risk in turn create four specific aspects of title insurance markets that could become subjects of regulation:

1. **Underwriting processes for title insurance,** especially the process of issuing insurance, including the documents and databases that must be studied or examined before forming an opinion about the quality of the title to be insured;
2. **The conduct of title insurers** vis-à-vis consumers and contractual terms that govern this conduct;
3. **Competition within title insurers,** considering that while regulation must promote the growth of title insurers, there is a regulatory role in preventing abuse of monopoly power; and
4. **Solvency** of title insurance funds.

Most U.S. states primarily regulate the subjects mentioned above. The following section examines how U.S. states regulate these issues.

Title Insurance Regulation in the United States

Insurance is regulated by individual states in the United States.[30] Each state has its own statute for regulating title insurance, and regulatory requirements in each state differ across subjects such as the rates insurers may charge, the prerequisites for issuing insurance, and disclosure and reporting requirements. Based on the analysis in the prior section, this section reviews title insurance regulation in the United States along four broad parameters: underwriting standards, regulation of conduct and unfair contractual terms, competition and rate regulation, and the solvency of title insurers.

Underwriting Standards

Most U.S. states regulate multiple processes for the issuance of a title insurance policy. The two most common regulated processes are those of the policy issuance and risk transfer.

Generally, states mandate that the property records be examined before the issuance of the title insurance.[31] Colorado requires that extensive disclosures regarding the title of the property, the

proposed exceptions, and the premiums and charges be made to consumers at the time of the policy issuance.[32] Colorado also prescribes requirements regarding the codification of standard exclusions from title insurance policies and requires that such modifications be suitably disclosed and recorded in the insurance contracts. Missouri law mandates the recording of all "outstanding, enforceable recorded liens or other interests against the title."[33] Florida mandates that policies display the "dollar amount of the risk assumed."[34] On the other hand, some states such as Missouri adopt a light-touch regulatory approach on this issue and merely require title insurance companies to "establish underwriting guidelines."[35]

Some states are prescriptive regarding the exclusions that are permissible in title insurance contracts. For example, Florida law states the following:

> 627.7842 . . . (1)(a) If a survey meeting the standards of practice for surveying required by the Department of Agriculture and Consumer Services and certified to the title insurer by a registered Florida surveyor has been completed on the property within 90 days before the date of closing, the title policy may only except from coverage the encroachments, overlays, boundary line disputes, and other matters which are actually shown on the survey.[36]

It goes on to add that if the seller signs an affidavit to the effect that the seller is in sole possession of the property being sold, the title insurer cannot exclude the claims of other possessors who are not mentioned in public records. Similarly, if the seller declares that no improvements have been made to the property, the insurance policy cannot exclude any lien or encumbrance that is not shown in the public record. These requirements have the effect of giving priority to the public record and favoring recorded rights and sworn affidavits over unrecorded rights.

There are three broad regulatory approaches that U.S. statutes have incorporated for regulating the process of policy issuance and risk transfer. This usually involves the regulation of the underwriting process and the information to be given to consumers about the nature of titles of the property to be insured. In addition, some states incorporate specific requirements with respect to underwriting practices that either require greater information in the insurance contracts or provide legal benefits to insurers and consumers by privileging recorded rights over unrecorded ones.

One approach prevents title insurers from issuing insurance unless they have conducted a title search of the property, and states have different levels of requirements with respect to the title search to be conducted. Another approach followed by some states is to not only require a prior title search but also require extensive disclosures regarding the title to the property, the encumbrances and liabilities on the property, and the exceptions to the defects that are going to be insured. Last, some states,

such as Missouri, merely require all insurers to have underwriting guidelines that should be followed when title insurance is issued.

Regulation of Conduct and Unfair Contractual Terms

One important method of regulating conduct for title insurers is to prevent them from conducting any business other than title insurance.[37] This monoline restriction is unusual in title insurance, since most of the defects in titles are discovered at the time of policy issuance, and title insurers generally have a low risk of bankruptcy.[38] However, risks arise due to the possibility of contamination of title insurance by other, higher-risk insurance products.[39] This risk is arguably the greatest when title insurers are also in the business of issuing mortgage insurance, which suffers from much higher insolvency rates. During the Great Depression, multiline title insurers that issued both products suffered a 72 percent insolvency rate.[40]

Title insurance firms do not benefit from risk diversification in the way that other insurers derive from multiline insurance. This is because there is little likelihood that a wave of claims will bankrupt title insurance firms.[41] Therefore, there are risks that title insurance consumers may be harmed from multiline insurance as a business practice, necessitating the regulatory monoline restrictions on title insurance. On the other hand, title insurance firms do not benefit from the risk pooling from other types of insurance.

The second major subject of conduct regulation is the relationship between title insurers and their agents.

Agents in this business are much more involved in the underwriting and insurance issuance process than in other lines of insurance. U.S. states allow title agents to perform most of the functions conducted by insurers: policy issuance, title searches, examination of titles, clearing of title defects, and the closing of agreements.[42] Most states explicitly license or register title insurance agents (both individuals and firms).[43] Most states have powers to review contracts between title insurers and their agents.[44]

The conduct of title insurance agents themselves is regulated to varying degrees. Ohio law requires agents to maintain books of accounts and separate accounts for funds to be kept in escrow.[45] Some states explicitly prohibit the inducement of agents by insurers in return for title insurance business.[46] In addition, most states explicitly state that insurers will be liable for any misconduct by their agents.[47]

Competition and Rate Regulation

The title insurance industry in the United States has existed since the late 1800s, but the main regulatory issue in contemporary times is that of competition and super-normal profits. The U.S.

Government Accountability Office in its report states: "The U.S. title insurance market is highly concentrated at the insurer level, but market characteristics varied across states. In 2005, for example, five insurers accounted for 92 percent of the national market, with most states dominated by two or three large insurers."[48]

According to the U.S. Government Accountability Office, this leads to a situation where "consumers find it difficult to shop for title insurance based on price. Purchasing title insurance is a transaction that consumers are unfamiliar with, and it can be difficult for them to gather information on all title insurance-related costs."[49] This has led to two regulatory approaches: regulation of incentive arrangements between insurers and their agents, and rate regulation. Most U.S. states have some form of rate regulation. Only three states do not regulate rates in any form. Among the others, three different methods of rate regulation are followed. Some states, such as Alabama, Indiana, and Louisiana, as well as Washington, DC, approve rates of title insurance. Others, such as Arizona, California, and Colorado, follow a file-and-use system, while others adopt a use-and-file approach. Finally, some states (for example, Florida, Texas, and New Mexico) promulgate rates for title insurance.[50]

However, rate regulation means different things in different states. While most states include the rate of the actual policy issuance, others regulate the rates for title searches, clearing of title defects, and escrow services within their power to regulate rates.[51]

The U.S. Government Accountability Office report found large variations in rates of title insurance problematic and used this as a basis to recommend increased oversight of title insurers.[52] However, a study by Feinberg et al. found that variations in title insurance rates could not be easily explained by broad industry-level practices.[53] While it found evidence of substantial variation and discriminatory practices, it also found that variation in title insurance rates occurred because of extremely contextual factors that affected the cost of insurance. These include the following:[54]

1. Rates of foreclosure in local markets;
2. Property characteristics, such as:
    - age of property, as older properties were more expensive to insure due to longer title histories,[55]
    - multiple prior properties combined, as such situations required a separate search for each property, and
    - turnover of property, introducing a greater likelihood of prior mistakes or liens;
3. Cross-subsidization, where higher premiums on expensive houses are often used to cover for lower-income consumers; and
4. Payments to agents that are negotiated with individual agents in local markets.

Solvency of Title Insurers

Title insurance presents different financial risks to insurers and regulators compared with other lines of insurance. This is because, "its basic goal is risk elimination and not loss reimbursement. This risk elimination function results in significantly lower losses than that of other lines of insurance. Because of this fact, the title insurance business is organized and functions differently."[56]

Title insurance has much lower loss expenses relative to other lines of insurance. However, it has higher operating costs.[57] Therefore, other lines of insurance have to manage loss costs in order to maintain solvency. Title insurance businesses, on the other hand, have to ensure their operational expenses are low in order to generate profits and maintain solvency.

Since insurance can only be underwritten if property transfers are taking place, the title insurance industry's financial strength is dependent on the dynamism of real estate markets. However, the higher proportion of operational expenses means that insurance companies have to maintain personnel and title records, constituting a source of fixed costs for title insurers. Some rating services believe that "it is as difficult for a company to reduce its costs of doing business in the face of a downturn in real estate activity as it is to reacquire trained staff when activity rebounds."[58]

To reduce the risk of insolvency, U.S. regulation of title insurance requires the following types of financial requirements:

1. **Special premium reserve.** Most states require title insurance companies to establish a deferred income account called a statutory premium reserve.[59] The formulas for calculating the amounts to be placed in the reserve are state mandated.[60] The state of Pennsylvania, for example, requires 10 percent of all premiums earned to be put in a reserve fund. This fund is statutorily liable to only the following claims:
   One. To pay all outstanding claims of indemnity that have arisen by virtue of any policies of insurance.
   Two. For the purchase of reinsurance to indemnify and protect the remaining outstanding policies.
   Three. To distribute among policy holders, upon cancellation of their policies, the proportionate share of the reserve fund to which they are entitled.[61]
2. **Known claims reserve.** This is the "aggregate estimated amount required to settle all claims submitted to the company and unpaid as of the balance sheet date."[62] For example, Missouri law requires claims reserves to be established and to be sufficient to cover "all unpaid losses, claims, and allocated loss adjustment expenses arising under title insurance policies for which

the title insurer may be liable, and for which the insurer has discovered or received notice by or on behalf of the insured or escrow or security depositor."[63]

3. **Maximum single risk regulation**. This regulation aims to limit the exposure of an insurer to a single project or policy. Missouri law, for example, limits the risk to "fifty percent of surplus as regards policyholders plus the statutory premium reserve less the company's investment in title plants."[64] The model law proposed by the National Association of Insurance Commissioners proposes the same requirements.[65]

Conclusion: A Contextual Framework for Thinking About Title Insurance Regulation in India

The broad variety of regulatory approaches followed by different states within the United States highlights the need for context-specific evaluation before a suitable regulatory approach can be designed. As stated earlier, title insurance can provide a market-based mechanism to reduce losses due to defects in property titles, and consequently reduce the existing high costs of property litigation in India. However, if title insurance is to serve this purpose well, the market for this product has to be allowed to evolve within the appropriate regulatory framework. This will require the insurance regulator IRDAI to not just consider important questions related to financial risks associated with the product but also decide on how to enable this market to develop in the most sustainable manner.

The regulatory evolution of title insurance in the United States presents important insights for those considering some of these issues. Based on the analysis in the previous sections of this paper, the following considerations can enable us to think of a regulatory framework for India while learning from the United States.

The Stage of Market Development

India is in the early stages of title insurance as a product. This has implications for the design of regulation in India. Specifically, this necessitates thinking differently about issues like competition and rate regulation. There is likely to be significant political economy pressure to regulate rates. The language of the regulation allows states to make title insurance mandatory, distorting the ability of buyers to negotiate rates for insurance products. This exerts pressure on government authorities and regulators to regulate rates in the interest of buyers and consumers.

On the other hand, since this is a new product in India, there is very little available information to use for regulating rates. For example, policymakers and insurers do not have information on how

risks to property titles can be priced or the likely win-loss ratio for insurers in a title-related litigation. This information does not exist in India because the title insurance market has only just commenced. Many U.S. states collect regular information on the internal functioning of title insurers and therefore have better information for regulating rates.[66]

In addition, rate regulation seeks to obviate the problem of monopoly pricing, which is usually a feature of anticompetitive markets. Since the market has only just started in India, it is too early to determine whether the title insurance market will be anticompetitive. The U.S. title insurance industry consolidated over a long period of time into its present shape.[67] Regulating rates to solve the problem of monopoly pricing in India would therefore be premature.

Finally, there could be negative consequences from rate regulation at this incipient stage of the market's development. If prescribed rates are not set correctly, they could skew the business proposition for insurers. Similarly, high rates would disincentivize project developers and consumers from buying title insurance.

The Quality of Land Records

The risk of undiscovered defects leading to claims may be larger in India due to the poorer quality of land records. This affects the costs of title insurance as well as solvency risks to title insurance businesses. At present, however, there is insufficient data on the precise effect the quality of land records might have on actual claims insurers would have to settle. This in turn has important implications for the feasibility of rate regulation and prudential risks insurers may face due to claims arising from undiscovered defects.

A pragmatic approach at this stage of development of India's title insurance market would dictate that prices and prudential risks be left to a market discovery process for the near future. This is because currently there is inadequate information on how to price the legal liability arising from defects in land titles.

Legal Framework for Land Titles

The legal framework that provides evidence of titles to property is different from that of the United States. While both the United States and India follow a system of deed registration (where the record of property titles is in the agreement for buying and selling property, and the law requires that such agreements be registered with the government to be legally enforceable), laws in the United States vary from state to state, while India has central laws that govern transfer of property and registration of property deeds.

In addition, each jurisdiction is bound to have unique legal characteristics. For example, Indian law provides that if a person discovers fraud or a mistake in a property transaction, the period of limitation on bringing a suit regarding such fraud or a mistake starts from the date of the discovery.[68] Therefore, if fraud were committed one hundred years ago but discovered today, the period of limitation would start from today. Insurance regarding fraudulent transfers of property is therefore likely to be much harder to price in India. It is preferable that title insurance firms be given an opportunity to discover unique costs and legal kinks such as these through everyday operations in the title insurance market.

Legal Framework for Insurance Business

Insurance in India is regulated under the 1938 Insurance Act. The law regulates the ability of foreign firms to offer title insurance in India and places restrictions on the ability of foreign firms to offer insurance in the Indian market. These restrictions are likely to inhibit the entry of specialized title insurance firms, unlike the entry of such firms in the European Union.[69] By placing such restrictions, the legal framework also affects how existing insurers can compete with or learn from specialized title insurance firms operating outside India.

From a regulatory perspective, this means that existing Indian insurance firms will provide title insurance as a new product, which will increase the importance of prudential requirements aimed at separating the risks of other lines of insurance affecting the traditionally low-risk title insurance business within the same firm. On the other hand, the risks from title insurance may be higher than in the United States due to the poorer quality of land titles and may also negatively affect preexisting insurance products sold by insurance firms.

Therefore, the IRDAI and real estate regulators will have to grapple with the issue of how to separate risks from title insurance and other insurance products being sold by insurance firms.

The Degree of Reliance on Intermediaries and Professionals

Title insurance in the United States evolved in a market where a number of professionals—lawyers, title abstractors, and real estate agents—provided title verification services. Title insurance in the United States has evolved by co-opting these professionals. The relationship between these professionals and title insurers has therefore become a subject of regulatory oversight.

It is not clear whether the business model of providing title insurance in India will develop along the same lines. Therefore, at this stage of market development it may be better for firms to identify business relationships that are most conducive to the growth of the title insurance business. The

IRDAI must therefore adopt a wait-and-regulate approach to consumer protection and fraud issues that may arise in the near future.

This analysis highlights that while basic regulatory concerns in the title insurance market remain similar across jurisdictions, the regulatory approach in the Indian market should ideally allow market failures to be highlighted before expansive regulation is imposed on the sector. In the present circumstances, the emphasis should be to encourage innovation and competition. The main regulatory concern at this stage emanates from the unknown factor of the degree of risk in the title insurance business. This will require a clear focus on prudential safety concerns in the near future.

About the Author

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