

TITLE INSURANCE: ISSUES AND CONCERNS





Title insurance is a form of insurance which protects against financial loss from defects in title, and is accordingly different from traditional products which provide protection against future losses. In a sense title insurance has retrospective effect to it because insured is protected against losses arising from acts or omissions which have occurred prior to the commencement of insurance cover. While title insurance is very common in the US and Europe, it is largely unheard of in India with virtually no insurance company offering it due to lack of underwriting expertise and robust reinsurance support.



With the enforcement of the Real Estate (Regulation and Development) Act, 2016 (“**Real Estate Act**”), title insurance will soon be a reality in the Indian insurance market. As per the Real Estate Act, promoters will now be required to obtain insurance cover for the title of the land and will have to pay premiums for the insurance cover before transferring the insurance to the allottee or the association of the allottees.

Apart from the obvious benefit of protecting the purchaser, title insurance would also benefit the developers by making the projects more secure and hence more attractable. It is also expected that title insurance will boost private equity investment in real estate sector as most of them insist on clear titles.

This article deals with the issues which need to be considered with respect to the title insurance provided that while the Real Estate Act makes it mandatory obligation on promoters to obtain title insurance, it does not address related issues set out below:.

(a) Assignment of policy benefits

While the Real Estate Act provides that the ultimate beneficiaries of the title insurance are the allottees, and insurance must be transferred to the benefit of either the allottee or the association of allottees (at the time of promoter entering into an agreement for sale with the allottee), it does not address the followings:

- (i) the procedure for assignment of title insurance benefit to the allottee or the association of allottees, i.e., will there be a predefined clause on assignment in the title insurance policy or will the assignment take place by way of a separate assignment deed; and
- (ii) as a matter of practice, the association of allottees is formed at a much later stage and not when the promoter and an allottee signs the agreement for sale. Hence, in this regard, is the insurance benefit to be assigned to allottees on individual basis, as and when they enter into an agreement for sale with promoter, or should the assignment take place once the association is formed.



(b) Policy coverage inception date

The Real Estate Act does not clarify the start date of the cover. However, given that it provides transfer of insurance to the allottee or the association of allottees (as the case may be) at the time of entering into the agreement, it can be inferred that the policy must be effective at such time. In this regard, clarification must be provided in relation to the insurance coverage date. Since insurance policy covers the risk of defect in the title of land, hence ideally promoter should take title insurance at the time of purchase of land. However, the agreement for sale between the promoter and the allottees would be executed at a much later stage. Considering this scenario, there is an ambiguity on the insurance coverage start date i.e. shall it be the date on which the land was purchased by the promoter or the date on which promoter and allottee enter into an agreement for sale (which may be different for different allottees as all the units in a project may not be sold on one single date). Further, in case the insurance is to be transferred to the association then will the cover still be valid between the date of signing of the sale agreement and the formation of the association.

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(c) Fixing of sum insured

- (i) There is no clarity as to the basis of arriving at the sum insured. It is fairly common for the price of apartment to go up as the project develops and for the allottees, who may have purchased apartments in the same project at different time, to pay different prices. Keeping this in mind there is a need for clarification, as, the manner in which the insured amount would be determined. Further, one would also need to factor escalation in project cost.
- (ii) What will be the effect of under-insurance at the time of claim? In traditional insurance products, when a property is under-insured, any claims made get subject to an average. This means that any valid claim pay-out will be proportionally reduced by the amount that the property is underinsured.

Though the concept of title insurance sounds good, implementation would be a big challenge considering the skewed data management system in India. Further, lack of transparency and digital infrastructure issues will also need to be addressed.

-by Sachin Kumar, Associate

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