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LEGAL ASPECTS OF TITLE INSURANCE AS AN ELEMENT OF PUBLIC SAFETY IN THE IMPLEMENTATION OF REAL ESTATE TRANSACTIONS

The problem of safety during the implementation of property transactions is all stronger integrated in adjusting of property relations, what their doubtfulness and mistrust cause to them. Property rights and financial risk of loss or limitation of right of ownership for the object of the real estate title insurance is called to secure. A reliable economical and legal instrument which is functioning successfully in the world leading countries and protecting the rights of market relations subject is title insurance.

Key words: right of ownership; corporate raid; title insurance; financial risk; real estate; damage to the person; accident insured; security.

O. M. Заєць

Правові аспекти титульного страхування як елемента безпеки населення під час здійснення операцій з нерухомістю

Проблема забезпечення безпеки населення під час здійснення операцій з нерухомістю все сильніше інтегрується в регулювання майнових відносин, чим викликає їх сумнівність і недовіру до них. Захистити майнові права та фінансові ризики (втрати) або обмеження права власності на об'єкт нерухомості покликане титульне страхування.

Ключові слова: право власності, рейдерство, титульне страхування, фінансовий ризик, нерухомість, відшкодування шкоди, страховий випадок, захист.

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Правовые аспекты титульного страхования как элемента безопасности населения при осуществлении операций с недвижимостью

Проблема обеспечения безопасности населения в ходе осуществления сделок с недвижимостью все сильнее интегрируется в регулирование имущественных отношений, чем вызывает их сомнительность и недоверие к ним. Защитить имущественные права и финансовые риски (потери) или ограничения права собственности на объект недвижимости призвано титульное страхование.

Ключевые слова: право собственности, рейдерство, титульное страхование, финансовый риск, недвижимость, возмещение ущерба, страховой случай, защита.

Problem definition. The problem of raiding interference is the most up-to-date for the countries of the former USSR. There is no country in the world having avoided this trespass, some countries (the USA, Germany, Great Britain) have successfully overcome raiding and have elaborated their own countermeasures, typical only of the certain state. Some states (the East-European countries) are not able to deliver the optimal system of means and power for the interference with this negative development even nowadays.

As it has been remarked by the authors of the monograph «Raiding: sources, procedures, ways of prevention» [2, p. 83], raiding in Ukraine causes negative impact to the entrepreneur environment, destabilization of the work process at the enterprises, destroys work collectives, becomes the reason for society conflicts, produces disadvantageous investment climate and international country image.

Nowadays raiding is an offense unpunished by state, and it might appropriate immovable property. Within the last several years there has been no tres-

passer of the right of property, neither person, nor company who took part in illegal takeover of enterprises, establishments or organizations who have been held liable. Even though this offense comes amid a range of other criminal offenses, such as: document forgery, swindling, bribery, interference with legal economical activities, etc.

Analysis of the latest research and publications. The discussions concerning the counter-measures to raiding have been held for a long time in legal and economical studies. The research of this problem has been conducted by both native and foreign scientists. Lets recollect the publications of Andreev L. A., Vamaliy Z. S., Borisov U. O., Belikov O. I., Bocharova O. V., Burbelo O. A., Goryn V. A., Zhytomirskiy V. S., Kozachenko A. V., Lazurenko V. I., Sergeev M. A. and other scientists of this field. However, it is necessary to mark that there is a lack of complex research in protection of property rights and ways of risk minimization concerning this type of criminal offense.

Statement of the base material. The real estate market of Ukraine has existed for 20 years. Within this time a range of regulatory legal enactments has been adopted, main juristic institutions, such as the right of property, state real estate registration, legal regulation of realtor services, have been declared and allocated. However, as aggravating as it is, relations in the real estate field hereafter stay the most uncertain and unbeaten in terms of legislation. Realtor activity does not require the licensure, and, consequently, does not provide distinct demands for its fulfillment. And where it is about the big amounts of money, there will always be those who are eager to get benefits from trustful customers. All the above mentioned predetermines quite an intense interest in this activity from big number of tricksters, who receive efficient «economical effect» using imperfect legislation and people mindlessness. Indeed, having allocated the institution of the right of property legislatively, the members of legislative body have not completely elaborated the mechanisms of protection of this right. In particular this might be applied to the protection of the right of property of fair purchasers.

The classical variant of raiding has appeared alongside with implementing the shares, therefore it is connected with the switch of the countries with

centrally planned system to market relations. Thanks to the shares which are freely introduced on market, there has appeared a possibility to purchase enterprises without the accordance of its factual owner [2, p. 28].

Nevertheless, the existence of these facts queries the legitimacy of the right of property and is often the reason for its invalidating. The consequence is: fair purchaser is forced to return the purchased real estate, while the return of the costs paid is his own business, as long as it is very difficult to act to collect them (even by virtue of the court judgment).

The similar situation exists in all the CIS countries. The conflict of two owners, legal and factual, is usually solved in profit of the first one. However, there exists an institution of financial warranties which stands for financial risks insurance. The real warranty of protection of fair purchaser violated interests might be the insurance of financial risk of loss or restriction of the right of property for the real estate or, as it is also named, title insurance. This type of insurance service is now at the very early stage of development in Ukraine and the number of companies fulfilling this function is not quite big.

Russia, for example, has some experience in this sphere. This process was started in 1993, and by late 90's this type of service has been provided by many insurance companies, and in 2004-2005 the title insurance was gradually becoming an ordinary service on Russian insurance market. Besides, it is necessary to take the peculiarities of the tariff policy of this type into consideration. Yet, fires and natural catastrophes are ordinary and well-known events, the probability of them and risks evaluations are known to most underwriters.

The tariff policy is established based on fundamental basis of statistics, in the environment where the laws of mathematics work; but, unfortunately, the loss of the right of property by virtue of the court judgment (using illegal raider actions), as it usually happens, is not known to both customer and underwriter, neither it is known what factors impact the probability of loss and in which way it happens. That is why only some underwrites are developing the programs of the right of property loss risk.

In Ukraine an efficient and economically sensible way of protection of property right might be ti-

title insurance which is the insurance of financial risk of loss or restriction of property right for the real estate. Nowadays, this type of insurance service is brand new on Ukraine insurance market and is represented by not numerous amounts of insurance companies, and the problematic of title insurance of the right of property stays almost unexplored by native science and legal studies.

In most of developed countries the state is carrying the responsibilities for the compensation of damage to the real estate market participant in particularly mentioned circumstances, and the payments are either provided by the budget or the funds of special foundation (but in case the funds are not efficient, there comes the budget subsidiary liability).

The responsibilities for the mistake of registrars are carried by budgets of the corresponding territorial establishments (on the territory of which they are located) in the countries where the system of registration of the rights of real estate property is based on land register. In case the funds are insufficient the subsidiary liabilities are brought to the budgets of more complex level. This system of damage compensation to the former immovable property owners is typical of Germany and Austria.

In Sweden the system is different from the one shown above. Swedish legislation does not provide specialized warranty foundation for this purpose. The damage cover to the market participant is fulfilled with the help of general budget incomes regardless of grounds for this kind of payment. By virtue of court judgment the funds could be either paid to fair purchaser (and the property is impounded from him) or the former property owner (shall the property stay in fair purchaser possession).

In the USA (where it was in 1853 when the first title insurance company Law Property Assurance and Trust Society [3] has been formed) the adopted system of the agreement registration (act registration) when the state registration institution does not take into regard the point of agreement and does not interpret the legal meaning of the rights which might be accrued; it just provides the registration of the documents giving them status of publicity and availability for related parties. This system does not provide the warranty owners their rights, the only

thing it does is giving the unregistered documents less legal power than those registered.

That is why state registration system is logically supplemented by the institution of specialized title insurance companies which carefully investigate the legitimacy of concluding an agreement for the real estate and absence of the rights of third parties. In case there are justified claims for the real estate, an insurance company pays the insurance damage cover after the corresponding juridical procedure.

The necessity of title insurance is obvious, as it is rather difficult to provide the clean title of the previous agreements on real estate market in our country. Thereafter, the level of raiding permits speaking about applicability of insurance of property right forfeiture.

It is necessary to mention that only the most conscious members of the market take to the title insurance, since they are forced to evaluate and minimize their risks due to completed practice and inner standards.

Title insurance is the most efficient way to protect your property interests. This type of insurance provides the warranty of cost recovery shall the purchase transaction be rendered ineffective.

The content of title insurance is: it provides protection from the effects of events having happened in the past. This refers to the following: sale with forged documents, exceeding of authority of the bargain participant representative, incapacity or impossibility to realize the meaning and value of their actions by one of the parties, partition of a succession breaking the interests of inheritors, effecting a deal with the common property of conjoints without the agreement of one of them, et cetera.

Title insurance subjects are property interests of insurant concerning: damage to their property rights as a result of divestment by virtue of court decision having come to its legal force; its court expenses for proceedings, in juridical institutions, contentious cases of the right of property.

Object matter of title insurance contract is: immovable property subject to real estate mortgage; residential premises (residential houses and/or their parts, apartments, rooms, cottages, garden houses,

country houses, isolated/detached rooms); non-residential premises (constructions, buildings, premises/their parts, isolated premises, garages, industrial, business, social/welfare and other premises, located in separate land property); uncompleted, preserved/abandoned permanent structures; enterprises as property complex; land property.

The fact of damage for an insurer is admitted by insurance case as a result of the property right forfeiture in accordance with the court decision coming to its legal effect.

The recent tendency of re-privatization of vast iron and steel companies and their return to state property has assured that the property right is not as absolute as it is represented and declared in legal studies, therefore the fair purchasers have been forced to think of title insurance which is legal and efficient warranty of the real estate ownership.

In our opinion, it is necessary to adopt the corresponding legal framework, make the legal mechanism of this service more detailed and define the criteria and methods of insurance risk evaluation in title insurance for more rapid implementation of title insurance institution in Ukraine. Thereafter, it is sensible to inform the citizens about the juridical practice concerning annulling of these agreements. Large number of raiding attacks for the big enterprises makes us think of the gradual growth of trust level of owners to the title insurance.

Furthermore, it is necessary to remark that fast development of this institution is to become a sustainable financial warranty of the property right protection, and will also encourage stability and confidence of real estate market transactions.

Special attention should be paid to the agreement duration of title insurance. It is usually concluded for the terms from 3 to 10 years (that is also the terms of legal limitation for sale-purchase transaction for the immovable property). This means that the insurance contract concluded 10 years after the agreement does not provide any insurance protection, as the court decision on annulling the agreement can not be taken.

It is necessary to make a list of factors restricting active development of title insurance in Ukraine:

1) rather serious possibility of annulling the agreements concerning the alienation of land property;

2) carefulness on insurance companies concerning this type of insurance due to its relative modernity, and, as a result, high risk;

3) imperfection of documentation and registration of law-enforcement documents for the land properties;

4) difficulty of receiving information concerning the land property rights and research and evaluation of risks of their appeal;

5) presence of certain categories of people in Ukrainian legislation who have property rights, common with the real estate right owners;

6) juridical and organizational difficulty of title insurance comparing to common property insurance;

7) imperfection of land legislation which sufficiently increases title risks of land property owners; as a result, insurance companies are forced to establish the high value for insurance, thereby cutting its demand;

8) absence of insurance culture as the majority of citizens does not realize the profitability of property risks insurance;

9) realtors' ignorance, as well as ignorance of their customers and insurers themselves concerning the basics of title insurance, its advantages and mechanisms of implementation.

Conclusions. We may affirm that the potential need in implementation of title insurance in Ukraine is high enough, as long as it is rather difficult to supply the juridical clarity of previous agreements on real estate market and land properties in Ukraine.

A reliable economical and legal instrument which is functioning successfully in the world leading countries and protecting the rights of market relations subject is title insurance. For more rapid implementation of title insurance institution in Ukraine it is necessary to come to an active development and quick adoption of legal framework, as well as specify and assign economical and juridical mechanisms of implementation of this service; justify the criteria, scientific and methodological basis of title insurance risks evaluation.

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