AVOIDING TITLE CLAIMS

Presented by:
LEGAL EDUCATION DEPARTMENT
of
Attorneys' Title Fund Services, LLC

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Avoiding Title Claims In Your Real Estate Practice

Attorneys' Title Fund Services, LLC

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AVOIDING TITLE CLAIMS IN YOUR REAL ESTATE PRACTICE

Most title claims can be avoided by possessing a strong understanding of the law and underwriting principles, paying close attention to detail, monitoring the closing process from start to finish, and by applying common sense. Where claims do typically arise, they are quite often correctable, although the time involved and cost of correction widely varies. Following is an examination of the types of claims typically seen, how they arise and the issues that they present in terms of their administration and resolution, and methods that can be utilized to protect against their creation.

I. TITLE CLAIMS: AN OVERVIEW

A. Claim Prevention

No one claim is identical to another, although they do tend to repeat themselves in ways that can be broadly categorized. From an underwriter's standpoint, of course, no claim is a good claim, as even the easiest one to resolve will cost time and money. Florida's title insurance industry offers enough by way of underwriting assistance and education that *most* claims can be eliminated – or at least be reduced to those risks that the underwriter might willingly agree to assume up front. Not surprisingly, it is usually a question of the agent's commitment to avail himself of the help and information that is available in order to "just do it" the right way. Oftentimes, however, the right way is not the easiest way, and cutting-corners *just to get it closed* leads to a sloppy atmosphere that fosters claims.

In the course of a career, even the best-intentioned practitioner will be presented with a claim. This is due to many factors, not the least of which is human and technological error. Innocent mistakes, like misreading a payoff or scrivener's errors in

the preparation of instruments, do happen. In hindsight, of course, the temptation to ask, "Why didn't you look more carefully?" is a powerful one, but underwriters are usually resigned to acknowledge these types of errors as a cost of doing business. Some claims just cannot be avoided, like matters recorded in the gap, and it is helpful to remember that this is insurance we are dealing with. Nevertheless, experience shows that the majority of claims could have been avoided had the agent followed the law, the lender's written closing instructions, and well-established underwriting principles. It is these types of claims that will be the primary focus of this article.

B. Claim Initiation: Matters Considered

When reviewing a given claim, the following is typically analyzed: Is the claim covered or excluded? Is there an exception from coverage? Should the defense be afforded under a reservation of rights? Has there been any prejudice as a result of the insured's actions or inactions? Who is presenting the claim and in what posture? Does the claim involve the agent's misfeasance or malfeasance, and should the agent be put on notice to involve its errors and omissions carrier? Is there pending litigation that must be immediately responded to or will suit have to eventually be brought to challenge or clear the title? Can the defect be immediately dealt with by way of an indemnity and/or undertaking or is action now required? Owner or lender insured? Or both? Is the matter covered by the Mutual Indemnification Treaty? Are there third parties, particularly grantors under Warranty Deeds or other title insurance underwriters, potentially liable to cure the defect or contribute to the loss? How much to budget?

C. Retention of Outside Counsel and the Tripartite Relationship

As with other forms of insurance coverage, the retention of outside

counsel to represent the interests of the insured will invoke the "tripartite relationship" and the concerns attendant with same. Rule 4-1.7 of the Rules of Professional Conduct specifically addresses the "unique tripartite relationship of insured, insurer, and lawyer [which] can lead to ambiguity as to whom a lawyer represents." In most cases, outside counsel will be retained for the insured and will not concomitantly represent the insurer. Outside counsel has an ethical duty of loyal and competency to the insured, notwithstanding being paid by the insurer, and must not share confidential information with in-house counsel that may prejudice an insured's coverage. Outside counsel must make clear to the insured the nature of counsel's retention and often must overcome the natural suspicion that counsel is looking out for the interests of the insurer, since it's the insurer that is paying for counsel's services. In more rare situations, outside counsel may be retained to represent the insurer and separate outside counsel retained for the insured. This is most commonly seen where the insurer has a duty to defend but questions whether coverage may be denied; in that circumstance, the insurer may issue a reservation of rights letter and might engage separate outside counsel to represent the insurer and take an Examination under Oath, i.e. a sworn statement of the insured, pursuant to Condition 6 of the Policy.

Under Condition 5 of the Policy, the selection of outside counsel is for the insurer to make (subject to the insured's reasonable objection for cause), and there is no obligation for the engagement of a "mutually agreeable counsel." There is no language in the Policy that precludes the insured from retaining its own counsel, but the costs associated with that attorney will be solely borne by the insured. While retained counsel may be expected to give professional courtesies to the insured's private counsel, the administration of the claim will be directed by retained counsel and the insurer.

D. Common Claims

The following is a list of the type of claims most commonly reported:

Bad legal descriptions	Defective instruments
Superior mortgages	Easements
Ad valorem taxes	Corporate defects
Non-joinder	Judgments
Ingress/egress and access	Foreclosure defects
Code liens and assessments	Restrictions and reservations
Breaks in chain of title	Undisclosed heirs
Survey-related	Homestead
Homeowner or condo liens	Federal tax liens
Construction liens	Probate defects

Shamefully, Broward and Miami-Dade Counties are the runaway leaders in the manufacture of statewide claims. A recent report shows that, together, Broward and Miami-Dade generate more claims *than the next 10 Florida counties combined!*

E. Causes for the Common Claim

Claims occur due to four basic reasons:

(1) *Simple Negligence:* Including human and computer error.

(2) *Gross Negligence:* Reckless indifference to closing instructions and sound underwriting principles.

(3) *Fraud & Illegality:* From misuse of notary seal, to preparation of false conveyance documents, to participation in criminal acts.

(4) *Unavoidable Risks:* Such as the gap and back chain defects.

F. Cures for the Common Claim

Depending on the nature of the claim, the response might include obtaining corrective instrument(s); filing suit to quiet title; filing suit for reformation of instrument; amending the pleadings to raise equitable and legal principles, some of which are peculiar to title litigation, such as equitable subrogation and re-foreclosure.

II. CLAIMS ARISING FROM NEGLIGENCE: IS AN UNDERWRITER LIABLE FOR ITS AGENT'S NEGLIGENCE?

Oftentimes, an aggrieved insured, be it the owner or lender, will seek to impose liability on the underwriter for the negligent acts of the authorized agent. Generally speaking, however, a title insurance underwriter will not be held liable for a mishandled closing unless the underwriter, itself, conducted the closing.

In the seminal decision of *Sommers v. Smith and Berman, P.A.*, 637 So.2d 60 (Fla. 4th DCA 1994), the buyers obtained a clean title policy from their lawyer, who wrote the policy on Chicago Title. The buyers were led to believe by the sellers and realtor that the land conveyed was actually larger than it was, and the survey seemingly confirmed the seller's misrepresentations. The buyer sued the seller for fraud and the attorney-closing agent on grounds that he knew of the misrepresentations and failed to disclose them. The buyer also sued Chicago Title on grounds that the attorney "acted as a representative" for Chicago Title and that the acts of the lawyer were conducted within the course of the agency relationship between the lawyer and Chicago Title. The appellate court affirmed the trial court's dismissal of the claims against Chicago Title, holding that where there was no defect in the title, the underwriter cannot be liable for the acts of the agent if the underwriter did not act as the "closing agent." The holding in *Sommers* has been repeatedly affirmed. See e.g. *Security Union Title Ins. Co. v. Citibank (Florida), N.A.*, 715 So.2d 973 (Fla. 1st DCA 1998); *Bank of America, N.A. v. Zaskey*, 2016 WL 2907732 (S.D. Fla. 2016).

III. AVOIDING ACTS OF NEGLIGENCE: 10 TIPS TO CONSIDER

Most claims arising from the agent's simple negligence can be avoided. Here are some tips and reminders:

1. ***Narrow the gap and record promptly***. A significant amount of claims arise as a result of instruments that are recorded between the effective date of the title commitment and the date of the recordation of the insured deed or mortgage. Sec. 627.784, F.S., states that the standard gap exception set forth in paragraph 1 of Schedule BII of the Title Commitment is to be deleted if the title insurer or its agent "disburses settlement or closing funds." To protect oneself and the underwriter, the proceeds should never be disbursed unless and until a "day of disbursement" update is obtained and reviewed. The significance of promptly recording the insured instruments cannot be over-emphasized, as Florida law protects the subsequent bona fide purchaser who has no notice, actual or constructive, of the earlier delivered instrument. Thus, for example, if the agent fails to timely record a deed from grantor to A, and the same grantor then delivers a deed to the same property to B, if the deed to A is not recorded on the day B pays value without notice, B prevails over A, *even if A subsequently records first.* Sec. 697.01, F.S.; *McCahill v. Travis Co.*, 45 So.2d 191 (Fla. 1950).

2. ***Know how to read the title search and review the exceptions.*** Simply ordering a title search is not enough. Reviewing it and understanding what it reveals is paramount. Sometimes, for example, the report will give a "Replat Warning." This means, in simple terms, that by virtue of a replat of the property, the legal description has changed, thereby mandating that an additional search of the "new legal description" be ordered and reviewed. Also, do not rely on the import of abbreviations and shorthand codes stated in a computerized data report. An underwriter was recently obliged to pay-out a significant

sum in settlement of a title claim where the agent ignored what appeared to be an innocuous "AFF" (affidavit) in the search report. It turned out that the AFF was an Affidavit of Reinstatement recorded by a mortgagee who claimed that an earlier filed Satisfaction of Mortgage was recorded erroneously. In another case, an insurer was similarly liable on a claim submitted on a mortgagee policy where the agent similarly ignored an "AFF" code – in that case, the Affidavit was that of the grantor to the mortgagor disclaiming and denying his signature on the deed into the mortgagor/owner.

Take the time to actually review the exceptions. Do not blindly copy exceptions from a prior policy into your Title Commitment without first noting the significance of each instrument and whether the exception still applies. Understand that the exceptions may have a large impact on the property. Beware in particular any exception that references the term "reservation." Explain to your insured what has been reserved and to whom.

3. ***Ensure proper preparation and execution of the closing documents***. This seems elementary, but the number of claims emanating from improper execution and faulty legals is truly astounding. While you, the lawyer, may be fully cognizant of joinder issues, is your staff sensitive to the concerns? Take the time to educate your para-professionals of homestead-execution issues. Spend the few extra moments to cross-read that lengthy metes-and-bounds legal description. Confirm that if the deed is intended to read Lot 11, Block 1, that the instrument you are recording does not instead state Lot 1, Block 11.

4. ***Terminate lines of credit and home equity loans properly***. A large number of substantial losses is regularly presented due to agents who properly remit funds in pay-off of credit line mortgages but fail to ensure that the credit line is actually terminated. Unscrupulous sellers have been known to take advantage of such mistakes by running up the line post-closing. Carefully adhere to the lender's payoff instructions.

Typically, the lender will require that its borrower execute a special form electing to close the credit line. Moreover, insist that the credit line borrower surrender the credit card or checks that usually accompany the credit line account. Amend your Seller's Affidavit to specifically reference the credit line and add language by which the seller attests that she will no longer avail herself of the credit line.

5. ***Be sure you're satisfying the right loan, confirm the estoppel letter and obtain the Satisfaction of Mortgage***. Where possible, do not rely on the seller (in a purchase and sale) or the owner (in a refinance) to obtain the payoff letter. It is always preferable that the agent, himself, obtain the estoppel letter. Carefully compare the legal description and/or loan number of the mortgage to the payoff letter. Do <u>not</u> assume that is impossible or improbable that the seller has two different loans with the same lender. The payoff letter may reflect a "mailing address" for the borrower/seller – do <u>not</u> assume that that address is the *property address.*

A particularly vexing issue concerns the lender who, in essence, "disavows" its payoff letter. This typically involves a poorly prepared estoppel letter which fails to include an item, say, a prepayment penalty. After closing and remittance of the payoff check, the lender returns the payment with a letter insisting that the payoff be re-calculated to include the prepayment penalty. By this time, the seller is long gone. The lender snidely points out that it was the agent's duty to follow its estoppel letter instructions, which upon careful examination does state that the agent cannot rely on the accuracy of the estoppel letter unless the agent "re-verifies" the payoff information by requesting an update immediately prior to closing.

To avoid this scenario, the safest practice would be to do as the lender requires and re-verify the payoff information immediately prior to the closing. Also, review the mortgage that you are satisfying. Does it mention a pre-payment penalty? If so, and

assuming the payoff falls within the penalty period, does the estoppel letter likewise reflect a pre-payment penalty? If not, inquire why.

Lastly, follow up on obtaining the Satisfaction of Mortgage. Under Florida law, a lender must deliver a Satisfaction or Release of Mortgage within 60 days of receipt of the correct payoff, and in an action to enforce deliver, fees may be awarded. Sec. 701.04, F.S. Mention or even cite the statute in your form letter enclosing the payoff check. More importantly, have a system in place reminding you to follow up for the Satisfaction. Don't just assume that the institutional lender will eventually record one. Many a title claim involves chasing after a Satisfaction. What with the failures, takeovers and mergers in the lending industry, it is often very difficult to obtain a Satisfaction for a loan that was paid-off years earlier.

6. ***Take extra precautions when insuring title out of small lien foreclosures***.

All too many title claims involve poorly conducted foreclosures. This might mean a foreclosure where invalid or no service was obtained or a junior lienor was altogether omitted from the action. When insuring a purchaser out of foreclosure, a careful review of the foreclosure file is necessary. Determine that all appropriate persons were joined as defendants in the suit and be certain that all such defendants are shown to have been properly served. Was personal service effected? Be extra cautious of substituted service. And, where service is by publication, does the Affidavit of Diligent Search and Inquiry meet the basic requirements?

The potential for loss in this context is staggering, particularly where the agent issues an owner's policy out of a small lien foreclosure. Bear in mind that most all trial judges will bend over backwards not to deprive an owner of his property when the lien amount is small. The risks here are so dramatic that many underwriters will require that the agent receive specific underwriting approval before the policy may be issued. Consider:

Case Study: Small Judgment, Big Loss

Facts: Homeowner's Association forecloses against Homeowner, Smith, for unpaid assessments. Verified return shows s*ubstituted service* made at the home "by serving Jim Jones (brother)." Final Default Judgment is entered for $5,000.00, the unpaid dues, plus fees and costs. The property is sold at public sale to third-party Buyer, Cohen, who is the high bidder at $30,000.00. The property remains encumbered by Smith's old mortgage for $175,000.00, which Buyer takes subject to. After the Certificate of Title issues, Cohen pays for and obtains an Owner's Policy for $275,000.00 in coverage, presumably the value of the property.

From out of the blue comes Smith, who claims no notice of the foreclosure; that he was living elsewhere at the time and was not home to be served; that Jones is not his brother, and that Jones resides elsewhere and was just checking on the house when the summons was served.

Procedure: Smith files suit against HOA and Cohen for declaration that foreclosure judgment is void. Buyer, now an insured for $275,000.00, makes claim on his owner's policy.

Arguments: Was service good? If not, is judgment *"void" or "voidable."* Contrast attack on service due to defective *substituted service* vs. defective *constructive service*. See *Floyd v. Federal Nat'l Mortgage Ass'n*, 704 So.2d 1110 (Fla. 5th DCA 1998) (a judgment is void when service of process is so defective that it amounts to no notice of the proceedings) and *Demars v. Village of Sandalwood Lakes Homeowner's Ass'n,* 625 So.2d 1219 (Fla. 4th DCA 1993) (a factually insufficient affidavit submitted in support of service by publication, renders the judgment voidable, not void).

Point: If Judgment is void and vacated and Smith redeems on re-foreclosure, Cohen may look to policy to recover upwards of $130,000.00 – the loss of his investment plus equity.

To avoid this scenario, limit writing policies out of small lien foreclosures (e.g. HOA and condo liens, small judgments, municipal liens) to only those instances where personal service was made on the owner. Be sure to follow your underwriter's guidelines, particularly where service is by publication and defendant's whereabouts were unknown, See Fund Title Note 22.02.12. Try to stand clear of substituted service.

7. ***Review the survey and make specific exceptions.*** An immeasurable amount of claims occur because the title agent failed to review the survey or, having looked at it, did not understand its import. While survey defects do affect platted residential closings, it is far more common that they will come back to haunt commercial, vacant land, and unplatted property closings.

The Florida title insurance underwriters all offer courses in how to read surveys -- take a class or two, it's that important. If nothing else, understand that your surveyor, in rendering a boundary survey, will only pick up easements that appear on the plat. If it is not a platted easement, the surveyor will not learn of the easement's existence UNLESS YOU DELIVER A COPY OF THE TITLE COMMITMENT TO THE SURVEYOR TOGETHER WITH HARD COPIES OF THE EASEMENTS. Only then will the surveyor know to plot the easements on the boundary survey. Share the survey with the buyer early on - not at the closing table - and consider having the buyer initial by all encroachments and other survey defects. Delete the standard exception once a valid survey is obtained and add specific survey exceptions to Schedule B of the Policy – this is typical the practice where a "clean" Form 9 Endorsement is being issued.

8. ***Watch out when paying off PACE liens***. Recent reports from the field have revealed that PACE lien payoff statements may not include the current year's non-ad valorem assessment, particularly if the payoff letter is issued after June 1st. The TRIM notice will not reflect the assessment, as it's a non-appealable item. Be prepared to

collect and escrow that year's assessment or add language to a Re-Proration Agreement that specifically covers the upcoming year's assessment.

9. ***Parking spaces are not typically insurable***. Most parking spaces are limited common elements and are not insurable. Many, many dollars have been paid out to owner insureds whose title policies erroneously included the parking space.

10. ***Be sure to follow the lender's closing instructions.*** Lenders have repeatedly asserted, successfully, Closing Protection Letter claims on grounds that the closing agent failed to adhere to the written Loan Closing Instructions. For example, an underwriter was recently sued, post-foreclosure and liquidation of the property, for the resulting deficiency on grounds that the agent failed to follow the lender's closing instruction requiring that the borrower's cash to close come from a certain bank account. The cash to close came from the borrower, albeit from a different bank account.

IV. FRAUD IN THE CLOSING PROCESS

Unfortunately, mortgage fraud is a major problem in Florida. In the past several years there have been well-publicized reports of arrests, indictments and convictions involving Florida attorneys caught up in all manner of mortgage fraud. Lawyers are targeted for arrest even where it is shown that the lawyer did not share in the illicit gains – it may be enough that the lawyer was willing to look the other way in exchange for doing the closings.

A. Claims Arising under the Closing Protection Letter. Most practitioners understand that the Closing Protection Letter (CPL) protects the lender against the outright defalcation by the closing agent of loan proceeds. However, the CPL does more than that. In situations where, for example, the lender forecloses on its second mortgage and the defendant/mortgagor counterclaims, asserting that he was not given notice of his right to rescind in violation of Reg. Z, the lender may be able to look to the underwriter under the terms of the CPL to defend against the counterclaim. And, as above-noted,

lenders are increasingly asserting that an agent's failure to strictly comply with the terms of the Loan Closing Instructions gives rise to liability under the CPL. Thus, even in the absence of a title defect, an agent who fails to disclose a "secret second mortgage" or of the seller's improper "contribution" to the buyer's-borrower's cash-to-close may expose the insurer to liability under the CPL.

Obviously, the easiest way to avoid implicating oneself and one's underwriter is to simply not participate in or countenance such under the table machinations. Nevertheless, even the best-intentioned agent can still get caught up in a fraud. Key is taking the necessary steps to avoid being a victim. Common sense and a healthy dose of skepticism (if not cynicism), will go a long way in protecting oneself.

B. Ways to Avoid Fraud/Forgery Claims

1. ***Beware the intra-familial quitclaim deed.*** All too often claims arise from the agent's willingness to accept unrecorded quit-claim deeds by which the property is transferred from one family member to another, typically from the parent to one child. In this scenario, title is reviewed in connection with a proposed refinance loan. The review shows that the record owner is A. The proposed mortgagor, however, is B, A's daughter. The agent tells B that title is in her mother. Suddenly, B presents to the agent the original, unrecorded quit-claim deed from A to B dated two years earlier. B claims that she has long been in possession of the original because no one told her that it needed to be recorded. The agent accepts this story and records the quitclaim deed into B and then closes on new mortgage loan between B and the insured lender. When the loan goes into default, A or B's siblings comes out of the woodwork claiming that B forged A's name on the quit-claim deed.

2. ***Be suspicious of cash-out loans on vacant lots***. Fraudsters have long shown an affinity for fraudulently conveying and borrowing against vacant lots due to the ease of accomplishing the fraud. Carefully review the vesting deed and look for red flags. See

Fund Title Note 10.03.09 for an exhaustive list of indicia of fraud. Scrutinize the borrower's identification.

3. ***Be suspicious of the naked Satisfaction of Mortgage***. Yes, it's theoretically possible that an owner has paid off her mortgage in, say, January, and then contracts to sell the premises in March. Having said that, in situations where the seller's mortgage is satisfied of record without a corresponding new loan, take the time to closely examine the Release or Satisfaction of Mortgage.

4. ***Carefully research the background of new hires and supervise them***. Sadly, young lawyers oftentimes fall prey to unscrupulous "closers" who float from one firm to another, with promises to bring a book of business in exchange for employment and a percentage of the business referred. These persons might even ingratiate themselves to the point of asking for check signing authority. History shows that unsuspecting lawyers may be victimized by persons very knowledgeable in the title business. For example, a recent claim involved a para-professional that presented her lawyer-employer bogus Title Insurance Commitments and Settlement Statements and successfully induced the lawyer to issue payoff checks to companies that the employee owned. In turn, the employee would keep the second mortgage (often a HELOC) current by making the minimum monthly payments. A best practice might mandate that the attorney insist that a copy of the Commitment issued by the underwriter go directly to the lawyer and that disbursement be made against that copy.

5. ***Be suspicious of buyer-borrowers who put little or no money down and title has just come out of foreclosure.***

6. ***Be suspicious of buyer-borrowers who put little or no money down and seller is not yet in title.***

Experience teaches us to be extremely wary of these situations, particularly where there is no real estate salesperson involved in the transaction. These deals usually involve

a seller looking to get in and get out quickly. Conspiracies among sellers, buyers, and mortgage brokers involve what is termed "fraud for housing." A seller may induce a sale on the promise of paying all of buyer's costs and, with the mortgage broker's assistance, will prepare and submit a bogus loan application in the "buyer's" name. The sales price is often inflated and justified by an ill-prepared appraisal. When the insured-lender foreclosures, the buyer, who hasn't invested anything and who doesn't care about her credit score, typically resists, all the while living "rent-free."

7. ***Be cautious with mail away closings***. A mail away closing refers to those occasions when a party to the transaction is unavailable to physically attend the formal closing and the paperwork is sent out of town to that party with instructions that they be signed before a local notary public. This, of course, invites notary fraud, a major problem for the title insurance industry. To minimize the inherent risks associated with entrusting that the proper parties are signing the documents before a notary public and witnesses, have the signing parties visit an office of a trusted lawyer or title agency in their town. If you don't know anyone, odds are that your underwriter does. Have the local notary complete a Notary's Certificate.

8. ***Never assume someone's capacity; beware the caregiver***.

Claims frequently arise when a closing agent does not make reasonable inquiry into the capacity of a party to sign a deed or mortgage. This issue often comes into play when a crooked "caregiver" or "friend" sees an opportunity to swindle an elderly person's real estate. The lawyer is asked by the caregiver to prepare the deed and the preparer does not make sound inquiry into the elderly person's mental capacity. Real estate attorneys are not trained mental health professionals. Remember that litigators love asking "what professional training did you receive in order to sufficiently gauge the grantor's capacity"?

Do not blindly prepare a deed for an elderly or seemingly confused person, particularly where the proposed grantee is the party asking you – and paying you – to

prepare the instrument. This is all the more true where the grantee refuses to leave the side of the grantor.

9. ***Avoid doing closings in hospitals, nursing homes, and senior centers.*** If you must do so, take along trustworthy witnesses who can later testify as to the grantor's capacity. Consider videotaping the signing.

8. ***Be alert when title is coming out of a divorce.*** A high volume of claims are generated in this area. The motivation to lie, cheat and steal seems extra high in these cases.

10. ***Be sensitive to recent changes to SunBiz filings and corporate documents.*** Underwriters have seen a rash of claims involving business identity theft, e.g. unauthorized on-line changes to managers of LLCs. Look carefully at an entity's SunBiz page and check to see if there was a recent change; is the person you are dealing with for that entity new to the company? Is he preventing you from speaking with other persons whose names were long associated with the entity, per SunBiz? Does the Operating Agreement look fishy? Are you being told there is no OA?

V. CONCLUSION

As can be seen, avoiding title claims is no easy task. Attention to detail will help avoid the common claim, while a healthy dose of skepticism will go a long way in ferreting out the possibility of being ensnared in a fraud scheme. Do educate your staff what to be on the lookout for. Don't look the other way and ignore the lender's written instructions no matter how onerous they may appear. Do take advantage of the legal education programming and underwriting assistance made available to you. Don't take the easy way out and hope for the best. With luck, you can avoid being a statistic … and you will undoubtedly sleep better at night.

Avoiding Title Claims

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Program Outline

- Matters considered in handling of new claim
- Retention of outside counsel
- Common claims and their cause
- Liability of underwriter for agent's acts
- Avoiding negligence claims – tips to consider
- Don't get trapped by fraud

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Overview

No one claim is identical to another

- Tend to repeat themselves

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Overview

No claim is a good claim

- Even the easiest claim costs time and money

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Overview

Florida's title insurance industry offers underwriting assistance and education

Assistance

Education

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Overview

Cutting corners in closing leads to a sloppy atmosphere that fosters claims

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Overview

Even the best intentioned practitioner is subject to human and technological error

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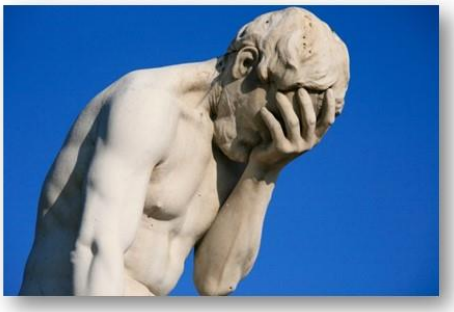
Overview

Mistakes do happen

- Underwriters are usually resigned to treat errors as a cost of doing business



"Why didn't you look more carefully?"

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Overview

Some claims just cannot be avoided but:

- Follow the law
- Follow the Closing Instructions
- Follow well established underwriting principles

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Matters Considered

Is the claim covered or excluded?

Or

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Matters Considered

Is there an exception from coverage?

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Matters Considered

Should a defense be afforded under a reservation of rights?

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Matters Considered

Has there been any prejudice as a result of the insured's actions or inactions?

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Matters Considered

Does the claim involve the agent's misfeasance or malfeasance? Should the agent be put on notice to involve its errors and omissions carrier?

Misfeasance **Malfeasance**

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Matters Considered

Is there a pending litigation or will suit have to be brought?

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Matters Considered

Can the defect be immediately dealt with by way of an indemnity and/or undertaking or is action now required?

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Matters Considered

Owner or Lender insured? Or both?

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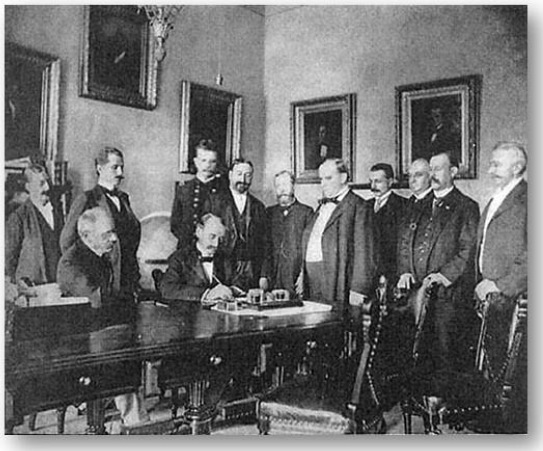
Matters considered

Is the matter covered by the Fourth Revised Florida Mutual Indemnification Agreement?



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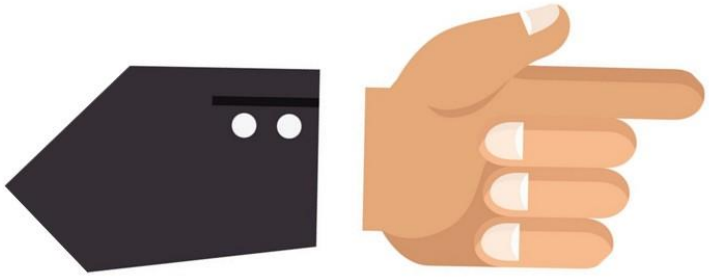
Matters Considered

Are there grantors under warranty deeds or other title insurance underwriters liable to cure the defeat or contribute to the loss?



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Matters Considered

How Much to Budget?

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Retention of Outside Counsel and the Tripartite Relationship

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Outside Counsel

- Rule 4-1.7 of the Rules of Professional Conduct: the "unique tripartite relationship of insured, insurer, and lawyer [which] can lead to ambiguity as to whom a lawyer represents."

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Outside Counsel

Outside counsel has an ethical duty of loyalty and competency to the insured

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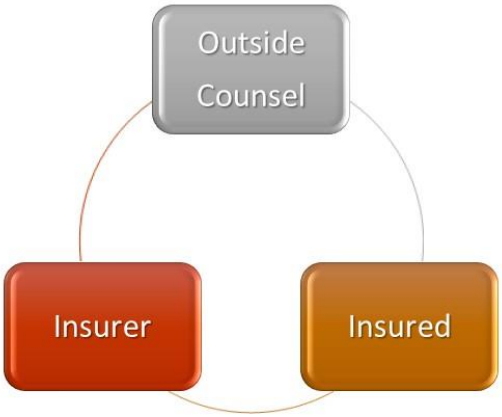
Outside Counsel

Outside counsel must make clear to the insured the nature of counsel's retention



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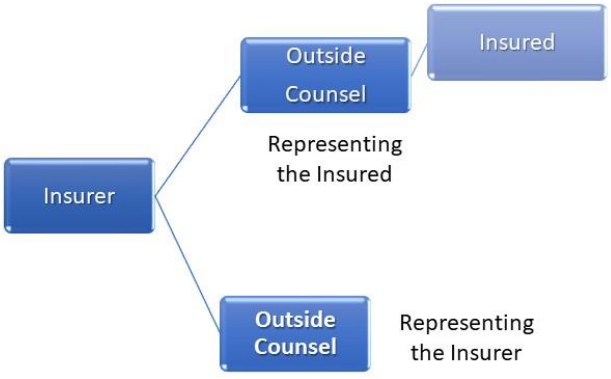
Outside Counsel

Outside counsel may be retained to represent the insurer and separate outside counsel retained for the insured



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Outside Counsel

Insurer has a duty to defend but:

- May issue a reservation of rights letter
- Might engage separate outside counsel to represent the insurer
- Require an Examination under Oath

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Outside Counsel

Selection of outside counsel is for the insurer to make:

- The insured can retain its own counsel, but costs will be solely borne by the insured

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Common Claims

Common Claims

The following is a list of the types of claims most commonly reported

Common Claims

Bad legal description
Superior mortgages
Ad valorem taxes
Non-joinder
Ingress/egress and access
Code liens and assessments
Breaks in chain of tittle
Survey-related
Homeowner or condo liens
Construction liens

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Defective Instruments
Easements
Corporate defects
Judgments
Foreclosure Defects
Restrictions and Reservations
Undisclosed Heirs
Homestead
Federal Tax Liens
Probate Defects

Common Claims

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Common Claims

Miami-Dade and Broward counties generate more claims than the next 10 counties combined

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Common Claims

Causes for the Common Claim

• Four basic reasons

Simple Negligence	• Including human and computer error.
Gross Negligence	• Reckless closing instructions and underwriting principles.
Fraud & Illegality	• From misuse of notary seal, false conveyance documents, to participation in criminal acts.
Unavoidable Risk	• Such as the gap and back chain defects.

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Claims Arising from Negligence

Negligence Claims

Is an underwriter liable for its agent's negligence?

Negligence Claims

Underwriter will **not** be held liable for mishandled closing **unless** the underwriter conducted the closing

Sommers v. Smith and Berman, P.A., 637 So.2d 60 (Fla. 4th DCA 1994)

Escrow Agent Liability

Is the underwriter liable for escrow agent's errors and improprieties?

It depends!

Sec. 627.792, F.S., imposes liability on insurer for defalcation, conversion or misappropriation by a licensed agent or agency of funds held by agent pursuant to Sec. 627.8473, F.S.

Escrow Agent Liability

Does Sec. 627.792, F.S. cover attorneys?
No!

Hechtman v. Nations Title Ins. Of NY, 840 So.2d 993 (Fla. 2003)

Reminder: CPLs can cover owner insureds!

Escrow Agent Liability

Underwriter not liable for escrow agent's defalcation where escrow agent not identified in PSA as title agent

Winkler v. Lawyers Title Ins. Corp., 41 So. 3d 414 (Fla. 3d DCA 2010)

Avoiding Acts of Negligence

10 Tips to Consider

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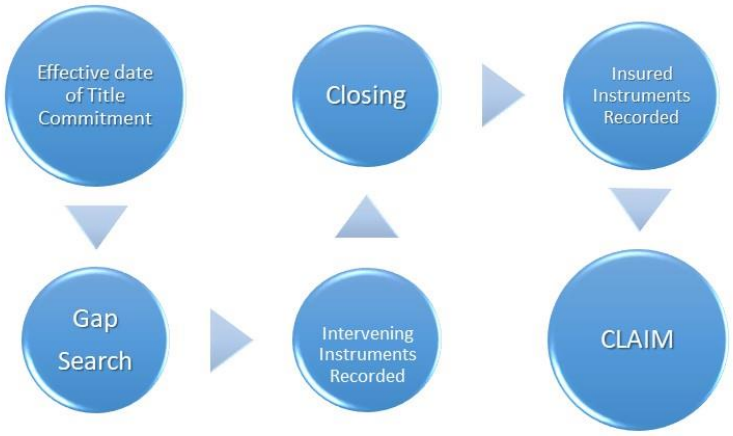
Avoiding Negligence Claims

Narrow the gap and record promptly



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Avoiding Negligence Claims

Beware parties in possession
Confirm Tenant's status and rights

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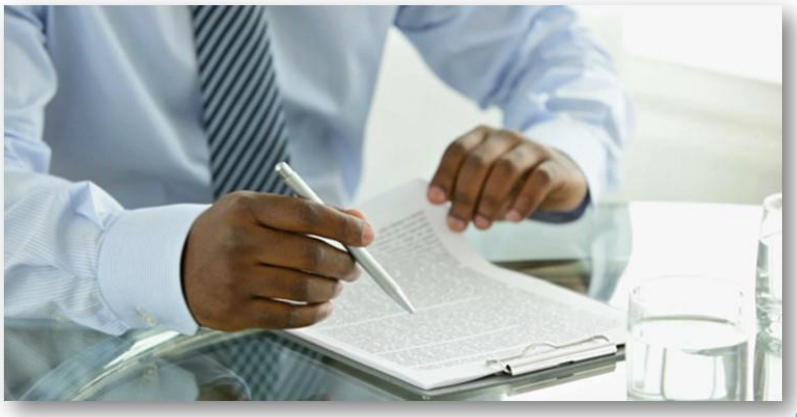
Avoiding Negligence Claims

Know how to read the title search and review the exceptions



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Avoiding Negligence Claims

Ensure proper preparation and execution of the closing documents

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Avoiding Negligence Claims

Terminate lines of credit and home equity loans properly

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Avoiding Negligence Claims

Be sure you're...

- Satisfying the RIGHT loan
- Confirm the estoppel letter
- Obtain the Satisfaction of the Mortgage

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Avoiding Negligence Claims

Take extra precautions when insuring title out of small lien foreclosures

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Avoiding Negligence Claims

Review the survey and make specific exceptions:

- Failure to review the survey
- Failure to understanding its import

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Avoiding Negligence Claims

Watch out when paying off PACE liens

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Avoiding Negligence Claims

Parking spaces and other LCE's are not typically insurable

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Avoiding Negligence Claims

Follow the lender's closing instructions

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Fraud in the Closing Process

Avoiding Fraud

Unfortunately, mortgage fraud is a major problem in Florida

Avoiding Fraud

Closing Protection Letter (CPL) protects against:

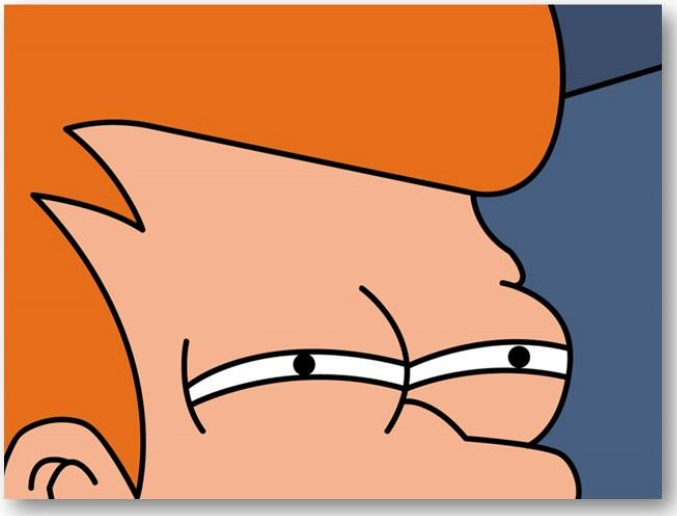
- fraud and dishonesty in handling of funds and documents
- failure to follow written loan closing instructions

Avoiding Fraud

Beware the intra-familial quitclaim deed

Avoiding Fraud

Be suspicious of cash-out loans on vacant lots



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Avoiding Fraud

Be suspicious of the naked Satisfaction of Mortgage

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Avoiding Fraud

Carefully research the background of new hires and supervise them

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Avoiding Fraud

Be suspicious of buyer-borrowers who put no money down and title has just come out of foreclosure

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Avoiding Fraud

Be cautious with mail-away closings

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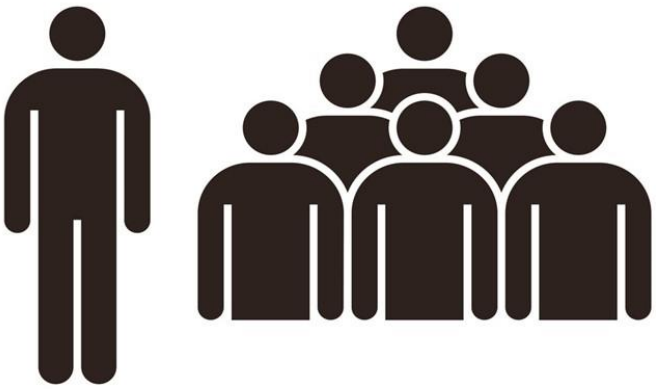
Avoiding Fraud

Beware the caregiver

- make inquiry into the capacity of a party to sign a deed or mortgage



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Avoiding Fraud

Avoid doing closings in hospitals, nursing homes and senior centers

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Avoiding Fraud

Be alert when title is coming out of divorce

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Avoiding Fraud

Be sensitive to recent changes to SunBiz filing and corporate documents

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Conclusion

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Conclusion

Avoiding claims is no easy task

- Attention to detail
- Healthy dose of skepticism
- Educate yourself and staff
- Don't ignore lender's written instructions
- Take advantage of legal education and underwriting assistance
- Don't take the easy way out and hope for the best

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The Florida Bar

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April 17, 2018

Reference Number:	1802742N
Title:	Avoiding Title Claims in Your Real Estate Practice
Level:	Intermediate
Approval Period:	04/11/2018 - 10/11/2019

CLE Credits

General	1.0
Ethics	0.5

Certification Credits

Real Estate	1.0

NALA – The Association of Paralegals, Inc.
7666 E. 61st, Suite 315, Tulsa, OK 74133
Phone: 918-587-6828
FAX: 918-582-6772
http://www.nala.org

CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to submit evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate should be completed and submitted with relevant documentation for the event. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at http://www.nala.org/CPinfo.aspx.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0 General	Avoiding Title Claims	MR

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