



CHICAGO TITLE INSURANCE COMPANY

Sources of Malpractice Cases, Title Insurance Claims and State Bar Grievances

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Basic rules:

- **AVOIDANCE AND PROCRASTINATION ARE YOUR WORST ENEMIES!** (It is broke or you wouldn't be asking the question – so it does need “fixin!”)
- **Act quickly to respond**
- **Get information into the right hands!**
- **NEVER admit liability!**
- **Understand that your client may not be able to think independently because they are in the middle of the problem!**
- **Do not encourage attorneys to commit, admit or worsen potential malpractice exposure and pay the price *tomorrow* by shirking rules you know apply just to make *today's* closing “easier”!**

“Insuring over” is not automatic:

For example, the following are just a few key times when it is probably *totally inappropriate* to assume we will continue coverage. Instead the file may be more appropriately administered as a claim – or at least should require remediative action immediately:

- a. You asking the title insurer to increase the policy coverage, when it may not have been enough to cover the potential loss to begin with – especially when coupled with b below . . .
- b. The prior coverage is a lender policy only. (That policy and coverage disappears as soon as the loan is paid off, whether by refinance or sale.)
- c. The outstanding issue is one that won't expire or go away with time, such as:
 - (1) A missing signatory (such as a spouse or missing heir).
 - (2) A minor or an incompetent.
 - (3) A prior outstanding (missed) deed of trust or recent judgment.
- d. The outstanding issue is for a judgment, deed of trust or other lien that has *not* been paid and exceeds the outstanding coverage.
- e. Improvements violate restrictions (such as against mobile homes or setbacks), especially if they were post-policy (if the prior loan was for construction, especially) or known by the owner but not disclosed to us or covered in their prior *owner's* policy.
- f. Mechanics' liens for construction contracts entered into by the *current owner* or *post policy*.
- g. Mobile home titles not having been canceled.
- h. The outstanding issue is for an outstanding unpaid judgment or deed of trust that was the obligation of the *current owner*. (This may have been insured over because the earlier deed of trust was a purchase money or because a payoff was submitted but was short and *this owner* refused to make up the shortage.)

Some specific Sources of Claims:

Closing Process:

- Not adequately supervising non-lawyers
- Using unfamiliar non-lawyers
- Not following “Standard Operating Procedure”
- Attorney not attending closing, checking for last minute corrections, explaining transaction appropriately to client
- Not adequately reviewing and analyzing all documents of chain of title and encumbrances
- Working in unfamiliar counties and cities or towns
- Not checking owners’ association dues and assessments
- Not disclosing proration of ad valorem taxes
- Not checking tax appraisal versus property price to assure all improvements have been listed (to avoid later “discovered” taxes)
- Improper or inadequate notary
- Check not endorsed
- Not following closing instructions (or obtaining written verification of changes in closing instructions)
- Not obtaining “Good Funds” – or more reliable funds, if you are unable to provide “provisional credit” under RPC 191
- Not explaining or understand HUD-1 Settlement Statement and how it works – and adequately explaining to clients
- Inconsistent dates on documents
- Escrow arrangement without written escrow agreement
- Indicating property appropriate for planned use, which would be zoning or subdivision violation (such as acreage without fee access or proposed “mother-in-law” apartment over garage)
- Failing to be alert to issues that come up at closing – such as septic tank on neighbor’s yard, private dirt road, mobile home on property, etc.

Access:

- Overburdened because our tract was subdivision of the original benefited tract
- Property easement crosses is being condemned or foreclosed or sold to satisfy judgment
- Doesn’t include utility rights
- Not clearly defined – too narrow
- Shared with others and crosses our property, preventing the improvements location planned

Deeds of Trust (prior to closing):

- Failure to cancel loans paid at closing (**99 FEO 5**) – marketability problems
- Not getting payoff or release terms in writing
- Not following requirements for payoff or release (especially internal lender requirements on equity lines)
- Not obtaining updated payoff amounts when closing delayed (especially if loan in default or loan involves an FHA payoff after the end of the month)
- Failure to obtain subordination
- Short payoff
- Failure to send payoff letter with instructions to apply and contact immediately regarding shortage
- Failure to follow up on cancellations – short, equity lines, subordinations, releases, full cancellation payoffs
- Failure to “freeze”, terminate and obtain cancellation of equity line deed of trust
- Subordinated or paid off wrong deed of trust

Deeds of Trust of the current closing to be insured:

- Wrong legal description on deed or deed of trust or both
- No legal description on deed or deed of trust or both
- Not from all owners
- Refer to “borrower” as all owners, when only some or other parties are borrowers (In re Enderle)

- Inconsistent dates from deed of trust to note (so cannot be foreclosed)
- Inconsistent amounts
- Originals not being returned to lenders timely
- Recorded in wrong county

Estates –

- Missing heirs
- Creditor claims
- Dissent from will by disinherited spouse
- Minors as heirs
- Caveat proceeding filed because will did not include all “natural objects of the decedent’s bounty”

Forgeries:

- Power of attorney forged
- Actual instrument forged

Insured Closing:

- Failure to obtain final policy, send in loan package, get funding number, etc.
- **Flipping –**
 - Owner: Property conveyed multiple times within last year, or even at closing!
 - Lender: Repeated refinances and costs
- Be careful about *relations between attorneys, their paralegals and lenders*. Don’t change substantive items unless written certification! Make sure the attorney understands the transaction and looks behind the “face” of the change to make sure he/she is comfortable with *why* the lender is changing – especially with B-C-D lenders!

Judgments

- Against co-tenants
- Buyer judgments

Legal Description

- Missing or erroneous calls
- Wrong property
- Not include all the property
- Including too much property (i.e. entire subdivision tract rather than just the particular lot being sold)
- Referring to wrong plat (and therefore wrong “dirt”)
- Not attached to recorded documents

Marital Rights

- Spouse not joined
- DEED FROM ONE SPOUSE TO ANOTHER IS NOT ENOUGH to waive contingent statutory marital rights
- Dissent by spouse who was purportedly disinherited by will
- Judgments against one spouse and they don’t sever tenancy by the entireties until after divorce

Mechanics’ and Materialmen’s Liens:

- Signed only by seller (who is also developer or contractor), and not by the “contractors” who dealt with owner/seller (as required by NCGS 44A)

Mobile home claims -- the *problems*:

- (1) Under pre-1/1/02 procedures, MCO is not sent in to DMV to issue (and cancel) title; after 1/1/02, failure to file Declaration of Intent appropriately
 - Mobile home is personal property, not covered by deed of trust, and must be attached separately
 - Duplicate MCO is issued and DMV Certificate of Title obtained
 - By owner (without lender's lien)
 - By another party, possibly even an innocent purchaser
 - Inconsistent estate treatment of the land (real property) versus the home (personal property)
- (2) DMV Certificate of Title issued but not canceled with DMV (either pre-1/1/02 procedure or by filing and recording MVR-46G for transactions after 1/1/02)
 - Mobile home is personal property, not covered by deed of trust, and must be attached separately
 - Unless done appropriately at closing, may not have lender's lien, so home is free and clear
 - Another person may hold title, perhaps an owner three steps back in the chain of title of the real estate – probably unlocatable or unwilling to cooperate
 - Dual property taxation since the local city or county property tax administrator will issue a bill based on the owner or attorney saying the home is affixed (whether or not real property) and DMV assessments are based on Certificate of Title (irrespective of the local treatment).
 - Inconsistent estate treatment of the land (real property) versus the home (personal property)

What are *possible results* for attorney, title insurer, purported owner and lender?

- **Title insurer:** An ALTA Endorsement Form 7 provides that the mobile will be treated as “land” under the policy. If the ALTA 7 is issued on the loan policy (or closing instructions under an insured closing require an ALTA 7), it may bind the title company to issue the endorsement to the lender. This gives the lender (not necessarily the owner) the right to file a claim if the mobile home title has not been canceled (since the home would still be personal property and not subject to foreclosure under a deed of trust).
- **Lender:** Typical cures for an uncanceled title might include:
 - Trying at time of foreclosure to get the MCO and the Certificate of Title canceled with DMV (converting the home to real property). This requires the original affidavit of the now defaulted borrower – obtained either at the time of closing (when it could have been sent to DMV) or after the borrower is in default (when they are not usually so cooperative).
 - A reformation action in Superior Court that the parties *intended* for the home to be real property but did not complete the procedure required. If successful, then the lender could go back to proceed with its normal foreclosure. If unsuccessful, the lender must try to attach the home as with any other personal property. In either event, the lender may suffer a year or more of additional interest accrual, costs and losses, as well as substantial additional attorneys' fees (which may be covered by title insurance *if* an ALTA 7 was required or issued).
- **Owner:** Typically the owner has no coverage at all. If the MCO is not submitted and the DMV title not canceled, loss of their home may come from:
 - DMV title still being in a prior owner's name. They may not be locatable or may be unwilling or unable to cooperate in the transfer.
 - DMV title may be in another owner's name entirely, who has never had an interest in the real property – whether by mistake or fraudulent action.
 - Bottom line: An unfiled DMV title is no better than an unrecorded deed. It is assurance of ownership as against third parties.
- **Attorney:** When a former client transfers property or the loan closed goes into foreclosure and any of the above result, the possible ramifications include:
 - An unhappy client who tells everyone they know that the attorney did not assist them adequately in getting good title to their home and possible loss of other business from other would-be clients – owners and lenders.
 - A malpractice claim for losses not covered by title insurance which may include all of the owner's losses, and potentially some of the lender's.

Ownership –

- Failure to check in all named, assumed names or variants of the name
- Missing some tenants in common
- Into one entity, out from another with similar but different name
- Through an estate
- Minors, incompetents with active guardianships

Power of Attorney:

- Gifts only if authorized by power of attorney and a history of such charitable gifts (violation of fiduciary duty to look after assets of the principal)
- Gifts to Attorney-in-fact only if specifically authorized by power of attorney (old common law self-dealing)
- Limited power of attorney not authorizing the particular action
- Using the property for the personal benefit of the attorney-in-fact, not the principal

Recording: Chain of title messed up

- Rerecording deed and not deed of trust
- Names wrong on documents
- Recorded in wrong order (so need subordinations)
- Recorded simultaneously: If 1st and 2^d mortgage are recorded simultaneously, they have *equal priority* or *coparity* absent specific language in the “2^d” subordinating to the “1st”. Go by time of recording, not book and page. Foreclosure of “1st” does not extinguish the “2nd” and in fact may entitle the holder of the purported “2nd” to some of the foreclosure sale proceeds.

Title Insurance: (RPC 99)

- “Updating” from policy on different property
- Inadequate search period
- Tacking to loan policy rather than owner’s policy
- Tacking without notice and permission of client
- Not obtaining owner’s coverage
- Not obtaining enough owner’s coverage (especially in commercial situation)
- Not adequately reviewing prior policy and its exceptions
- Not fulfilling requirement for necessary endorsements
- Not clearing problems with title company *prior to closing*

Title Search:

- Not checking all documents in chain of title
- Missed deeds of trust, judgments, easements or other exceptions
- Not updating when record (Clerk’s office and Register of Deeds)
- No conveyance of common areas to association
- Not checking temporary indexes
- Not fully reviewing estate and foreclosure files
- Not checking judgments on all owners, especially beneficiaries of estate

Railroad rights-of-way:

- Fee vs. easement?
- Width?

Restrictions:

- Even if old, they may still be viable, especially restricting to residential use.
- Mobile home restrictions violated

Surveys and Legal Descriptions:

- Owner not covered because no survey at closing
- Fence cuts off part of property – neighbor’s cow pasture – adverse possession claim
- Exceptions to what’s on survey – creeks, road or railroad r/w
- Encroachments into utility rights-of-way – no owner’s coverage
- Survey obtained after closing showing encroachments – post-policy, denied
- Improvements not on insured property
- Check calls – BAD DESCRIPTIONS
- Not enough property – clearly not big enough for a house
- Totally wrong property – different road, different township
- Wrong lot number on d/t (now being foreclosed)
- Wrong county
- Boundary line disputes – battle of the surveyors (and we insured both tracts)
- Boundary line along identified metes and bounds rather than referencing permanent monuments
- Description of entire base tract, not just the one lot they were supposed to be selling
- Access problem – NONE! (Was there a road shown in the legal description?)
- Rules of construction – plat, vs. metes & bounds vs. address
- DO NOT INCLUDE ACREAGE
- Multiple plats
 - Changed the property lines
 - Earlier plats had other easements, setbacks, fill area and exceptions
- Not adequately advising client (lender and owner) of risks of not obtaining survey
- Not reviewing survey against title search matters, including plats, restrictions, easements (appurtenant and exceptions)

Taxes and Assessments:

- Payable in installments
- Deferred taxes still due
- Missed a newly incorporated town and its taxes and assessments
- Taxes in bankruptcy, deferred but not waived
- Tax foreclosure missed in title search