

Top Ten Claims in the Title Industry

Description



Everyone loves top 10 lists right? Well here you go, the top ten claims in the title industry. Before we get started, a few disclosures. Names and some identifying facts have been changed for privacy reasons. In several cases the claim details have been simplified to save readers from the doldrums of extensive legal maneuvering. We will focus primarily on Virginia claims but give national context as well.

There are several ways to measure claims. We could measure by the number of claims received in the year received; by the number of claims made per policy year; or by claims payments made in the year the payment is made. In this article we are judging our top claims by net payments made in 2017. That is, by loss and expense paid, less recoupment received, in 2017 regardless of the year the policy was issued, and regardless of whether one claim generated the payment, or 20 different claims were the cause.

10. Mechanics's Liens.

We have come a long way, folks. In 2008 mechanics's liens were villain #1. Tight underwriting by insurers and serious oversight by lenders have brought mechanics's lien claims into tenth position in Virginia and nationally. But remember, Virginia has a "hidden" lien statute with nuances that must be handled carefully. While the period to enforce a mechanics's lien is limited to six months, or sixty days after the completion or termination of work, that period is stayed if one of the parties filed a

bankruptcy proceeding. A title examiner reported a memorandum of mechanics' lien but it was disregarded by the underwriter as being outside the enforceability time period. In fact, the property owner had filed for bankruptcy after the memorandum was filed. As soon as the owner emerged from bankruptcy the contractor filed suit to enforce its lien and the title company made a five figure settlement with the contractor on behalf of its Insured, a purchaser from the bankrupt prior owner. Be sure to check PACER in the name of the contractor and the property owner for bankruptcy before eliminating a recorded memorandum of mechanics' lien.

9. Defalcation.

In recent years the title industry has employed numerous controls to avert defalcation of escrow and premium funds by its agents and others. The ALTA Best Practices, on-line premium and policy remittances, more frequent auditing, and other directives have curbed the ability of those with criminal intent to successfully abscond with escrow funds. Bonding requirements in many states, including Virginia, allow title insurers to recoup their payments in the event funds are taken. All of these efforts have led to a decline in net loss from defalcations in Virginia and nationally. But do not become complacent. There is someone near you, a trusted employee, a long-time colleague, or a family member, who has been wooed by greed (or perhaps an internet love interest) and is eying your escrow account right now. Be alert.

8. Underwritten Risk.

An underwritten risk is a defect that cannot be eliminated even with the best search and underwriting. These are true title issues such as missing heirs, adverse possession, errors in the land records, and defense costs for claims against the Insured by others. An excellent example of an underwritten risk is fondly known as the Captain Bligh claim. An owner's policy insured property lying adjacent to a tidal river and included all the appropriate water rights exceptions. Years after policy issuance a neighbor sued the Insured under admiralty principles claiming title to a boat moored at the property's dock. During the admiralty proceeding the neighbor added a count of adverse possession to the dock itself. The title insurer is defending its Insured on the adverse possession count. Traditional underwriting could not have prevented this claim. No survey would disclose a boat, and even a site visit would show only a boat tied to a dock on the property, raising no red flag of an adverse possession risk.

7. Local Law Issues.

Local law issues include claims made under zoning and subdivision endorsements, and building permit claims under enhanced policies. Local law issues jumped up to number seven (from number 13 in 2010) as insurers began regularly issuing the ALTA Homeowner's Policy of Insurance (the "Homeowner's Policy"). The Homeowner's Policy provides coverage in the event the Insured is required to remove or correct certain structures because they were built without obtaining a building permit. This building permit coverage has resulted in numerous claims where the seller made improvements without pulling a building permit and conveyed the property to the Insured, who must correct the unpermitted work. Wondering whether to encourage your clients to spend extra premium dollars on a Homeowner's Policy? A memorable claim letter from an Insured read in part "As methane gas was leaking into the house from the main level bathroom and raw sewage was entering

the shower and garage, we were forced to remedy the problems and make necessary repairs as soon as possible for health and safety reasons . . . Truly, the extra premium is worth the added coverage.

6. Missing Interests.

Nothing will send claims counsel scurrying faster than an authority claim on a major metro office building. It happened last year in Virginia. The wrong entity signed a deed two links back in the chain of title. Fortunately that claim was resolved quickly with all players cooperating. However, authority issues continue to be serious business for title insurers and represent the bulk of missing interest claims. Be sure to review all good standing and authority documents prior to insuring a conveyance from a corporation, limited liability company, partnership or other entity. Contact your underwriting advisor for any needed training.

5. Access/Easements.

Carefully review search notes to confirm the property has access and that any insured access easement has been searched. In a recent claim the examiner reported that he had searched title to a three acre parcel, but made no comment about access. The underwriter did not notice that tax maps show the three acre parcel is land locked. Purchaser's counsel requested the underwriter add to the legal description an access easement for a driveway that had been included in the seller's vesting deed, a trustee's deed of foreclosure. The underwriter did so without sending the file back to the examiner for a search of the easement. An owner's policy was issued insuring the three acre fee parcel together with the access easement. On moving day the Insured found his driveway blocked by a locked gate. Guess what? The foreclosed prior owner was the daughter of the neighbor over whose land the driveway ran. There was no granted easement for the driveway. The daughter had used the driveway for access but after her foreclosure the parents locked their gate and denied access to the Insured purchaser. The title insurance company was able to buy an access road to the three acre parcel through another neighboring property for a hefty sum. Lessons learned: Always confirm that insured property has access to a public road. This can be done by review of tax maps and plats of record. And of course, never add any type of property interest to a title commitment or policy until it has been searched.

4. Post-Closing/Recording.

Settlement agents must assign sufficient staff to the back end of a transaction, properly recording deeds, deeds of trust and releases. Restoring the intended priority of documents when one document is recorded out of order is time-consuming and expensive. Failure to record documents is typically inadvertent and attention to detail will solve the problem, but occasionally we run into real recording problems. Imagine the surprise of an agency representative who arrived at her agent's office for an unexpected audit. The agency representative found every closed file for the last few months contained original unrecorded documents, but there were no funds in the escrow account to pay recording tax. After the title insurer used its own funds and resources to record all documents, the agent agreed to mortgage her personal residence to secure her debt to the title insurer's parent company. Counsel for the title insurer's parent company properly recorded the mortgage. Two years later the title insurer received a claim from a lender who had refinanced the agent's personal residence. Turns out the agent had conducted the refinance settlement on her own property just prior to the surprise

audit, had not recorded the lender's mortgage, and had not given the title insurer the refinance file on her own property. The end result: The insurer's parent company mortgage was in first lien position over the refinance mortgage that was insured as being a first lien. Easy to fix with a subordination agreement, right? Did I mention the title insurer's parent company was in bankruptcy by the time the claim came in? Not so easy to fix.

3. Fraud/Forgery.

Unfortunately fraud and forgery claims have held second or third position nationally since 2010. Every day we receive tips for avoiding fraud and every day the fraudsters come up with new schemes. Our best advice is to look for red flags and if you see one, dig deeper before proceeding with the transaction. A claim that could have been avoided with more attention to detail involved a developer who forged a release of its first lien deed of trust in conjunction with obtaining a second loan. A policy was issued insuring the second deed of trust in first lien position. When first lender foreclosed, the title insurer suffered a full title loss under its policy. But there was a red flag to this forgery. The first lender recorded an appointment of substitute trustee before the second transaction closed. Had the underwriter wondered "why would a paid-off lender record a substitution of trustee?" and investigated further, the claim could have been averted.

2. Settlement Procedures.

Failure to follow proper settlement procedures has been a top claim area in Virginia and nationally since 2010. It is imperative that closers satisfy every commitment requirement and document the file with evidence that the requirement was satisfied. A title insurer's company office closed the sale of a property that had a right of first refusal in favor of Mr. White set out in a prior recorded instrument. The closer gave notice of the sale to Mr. White as required by the terms of the recorded instrument. Five years after the closing Mr. White sued the title insurer for intentional interference with contract and negligence, alleging that the insurer had not given Mr. White proper notice of the sale. The company's file did not include a copy of the notice given to Mr. White or evidence of delivery of the notice. The title insurer is defending itself with a number of arguments, including that it owes no duty to Mr. White, but having a copy of the notice sent to Mr. White in the file would have made for an easy defense. Always document your settlement file with evidence showing how commitment requirements were satisfied.

1. Search/Exam.

The number one claims category in 2017 and every year since 2010, in Virginia and nationally, is search and exam. Title companies paid on average 25% of all claims dollars on search and exam issues in 2017. Search claims are very expensive to resolve. For instance when a title examiner missed restrictions prohibiting development of the property, the title insurer paid its Insured a six figure loss. When a title examiner reported fee title vested in the borrower, who in fact had only a life estate, the lender was unable to foreclose and title insurer paid lender six figures for its loss.

A few tips to avoid search and exam claims

- Hire a Virginia Certified Title Examiner;

- Collect the declaration page from the title examiner's errors and omissions policy, and verify that the examiner has sufficient insurance to cover the transaction;
 - Understand the property to be searched before placing the search order;
 - Accurately and adequately explain the needed search to the examiner;
 - Carefully examine the search report and search notes;
 - Resolve all matters raised by the examiner or show them as policy exceptions; and
- erty to be insured was searched for the required period.



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Lisa speaks regularly to title insurance industry groups and real estate attorneys on real property and title insurance issues. She is a member of the Virginia State Bar, the Richmond Bar Association (Real Estate Section Executive Committee), CREW Richmond, Greater Richmond Association for Commercial Real Estate, and is a former director of the Virginia Land Title Association.

Category

1. Underwriting

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