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## The Claims Process

### Description

If you issue title insurance policies, you may dread the possibility that a claim may be made under one of them or you may have been notified that a claim has been submitted under a policy you have issued. If so, have you ever wondered what happens to that claim once it has been submitted? If you have, the following overview of the life of a claim may help illuminate what happens to a claim upon its submission.

#### Submission of a Claim

If an insured feels it has a claim under a policy, they should promptly submit such claim for review by the title insurance company. Such prompt notice is of particular importance since the policy provides that the insurer's duties are terminated to the extent that the company is prejudiced by the insured's failure to provide timely notice of a claim.

When a claim is submitted, it should be made clear exactly who the claim is being submitted on behalf of, and what is being asserted to invoke coverage under the policy. The claims attorney will also need to make sure they have a copy of the applicable policy the claim is being submitted under.

#### Determining Coverage: Qualifying as an Insured

As a preliminary matter, the claims attorney needs to make sure they know who the claim has been submitted on behalf of and determine if the claimant qualifies as the insured under the policy. If the claim is submitted on behalf of the named insured, they must make sure the claimant still retains the insured interest in title. If it is submitted on behalf of someone other than the named insured, then the claims attorney must determine if the claimant qualifies under the successor insured provisions of the applicable policy.

#### Determining Coverage: Making Sure the Claim is Ripe

Additionally, the claims attorney will need to make sure any claim that has been submitted is considered ripe at the time it has been made. Under the standard owner's policy, owners' claims are generally considered ripe upon discovery of the covered defect. In some instances, a triggering event is required to make the claim ripe. For example, the homeowner's policy contains provisions protecting against forced removal for encroachments or improvements built without permit. Such claims only become ripe when action has been taken to enforce the removal of these improvements.

Under a loan policy, claims are generally not ripe until the lender is in position to suffer a loss under the policy. The broad rule is that a lender does not suffer a loss until (1) a defect exists; (2) the underlying debt will not be repaid (i.e., is in default); and (3) the defect or lien reduces the lender's security in the property.

#### Determining Coverage: Investigating the Claim

Furthermore, the claims attorney will need to make an independent investigation as to the validity of the claim. The claims attorney will need to review what has been presented with the claim, and to determine if what has been provided is enough information to determine if the claim is covered or not. If it is not, the claims attorney must decide what additional information is necessary for them to make a coverage determination and attempt to obtain such information. Generally, the claims attorney will request the agent's file on almost all claims since it contains much information, and the claims attorney wants to make sure they have as complete of an understanding of the transaction as possible when making a coverage determination.

### **Determine Coverage: Does the Policy Cover It?**

Once the investigation of the claim has been completed, the claims attorney will have to make the determination as to whether or not the claim is covered under the policy. In deciding if the claim is covered under the policy, they must first determine if the claim falls under one of the Covered Risks listed in the policy. Even if so, it must be compared to the applicable exclusions or exceptions in the policy to see if such matter would be removed from coverage.

When analyzing coverage for a claim made pursuant to the tender of defense of a lawsuit, the claims attorney is to make the determination based solely on the allegations of the complaint and is required to assume that all facts being alleged are true. The question then becomes, if the allegations are assumed to be true, would the company have liability for the claim under the policy? Extrinsic facts, even if they are known to contradict the allegations of the pleading, are not to be considered. Furthermore, pursuant to the terms of the policy, the Company only has a duty to defend the specific counts which invoke coverage under the policy.

### **Resolving a Covered Claim: Attempting to Cure**

Once a claim is determined to be covered, the claims attorney will have to decide how to possibly resolve a claim and take such action. Usually, the claims attorney will try to figure out if a curative action can be taken to resolve the claim. Depending on the nature of the claim, this could include such actions as; obtaining a corrective deed; a release of a deed of trust still of record; or obtaining an easement in favor of the insured.

### **Resolving a Covered Claim: Settling with the Insured**

The claims attorney also has the option of trying to settle directly with the insured they wish to do so. This will usually depend on the potential loss involved and whether the claims attorney believes it is cost-effective to settle directly with the insured as opposed to other options. It is also dependent on the insured's willingness to accept what the Company believes to be a reasonable settlement.

### **Resolving a Covered Claim: Paying a Loss**

If a claim cannot be resolved by other means, a loss will need to be paid under the policy. A loss under an owner's policy is generally the diminution in value to the property resulting from the covered defect. This is equal to the difference in value of the land as insured if it were not subject to the covered defect and the value of the land insured being subject to the covered defect:

Value of the Land with Covered Defect - Value of Land with Covered Defect = Amount of Loss

Unlike most other states, which designate the date of determining the amount of loss to be the date of the discovery of the defect, Virginia case law provides the date of policy as the date of loss. Nevertheless, the policy specifies that in a situation where the company pursued litigation and failed to establish title as insured, the insured can select the date of loss as either the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

In order for a lender to suffer a loss, it must demonstrate that the loan is in default and that its security has been impaired due to the defect. For example, if there is an easement over the property covered by the policy, but the value of the property subject to the easement is still sufficient to cover the amount owed on the loan, the lender has not suffered an actual loss. The loss provision of the policy is designed to make an insured whole, not to give them a windfall.

### **Resolving a Covered Claim: Litigation**

If the claims attorney determines that it is necessary to retain litigation counsel on behalf of the insured to resolve a claim, the claims attorney will need to retain such counsel to act on behalf of the insured. However, even after litigation counsel has been retained on behalf of the insured, the claims attorney will continue to act as managing counsel overseeing the case. The claims attorney and retained counsel should discuss and agree on the litigation strategy and remain in contact throughout the litigation to determine if any changes to such strategy should be made. The claims attorney should also be provided with all pleadings and filings to review and approve before filing. Ultimately, the claims attorney will be the one who needs to obtain any settlement authority it believes is warranted to resolve the case.

### **The Aftermath of Claims: Recoupment**

The Company will generally attempt to recover any loss it pays from the responsible third parties. While recoupment is generally handled after the resolution of the claim, the claims attorney will try to determine the potential sources of recoupment, which may include the policy-issuing agent, prior to paying any loss.

### **Avoiding Claims if You Can Help It**

While some claims may be inevitable and simply cannot be avoided (after all, if all claims could be avoided there would likely not be a need for title insurance), most claims can be avoided by exercising the following: paying close attention when examining documents; making sure all necessary documents are signed by all necessary parties; and making sure documents are recorded in a timely manner. Hopefully these tips can help you avoid claims in the future, but, if not, hopefully you will now at least have a better idea of what is happening with those claims.

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I am a native of Wellsburg, West Virginia, where I grew up. I attended West Virginia University where I graduated in 2002 with a Bachelor of Arts in Political Science and a Bachelor of Science in Journalism. I then obtained my law degree from Florida State University in 2005. I moved to Jacksonville at that time and worked in private practice for two years before joining the Fidelity in 2007, where I worked in the claims department for the past 15 years until I began working in underwriting in June of 2022.

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