Executive Summary

Every title agent and settlement agent should care about abstractor error. It affects the industry, your business and your pocketbook. This presentation focuses on several “lines of defense” in the war against abstractor error, including using qualified and insured examiners, knowing how to evaluate the process and product of the title examination, maintaining adequate E&O, and what to do when a claim occurs.

I. Why Should We Care About Abstractor Error?

A. That’s what title insurance is for, right? (Well . . . yes and no.)

B. Reason No. 1: Abstractor error affects the industry as a whole

1. Abstractor error is the Number 1 cause of claims

2. Although claims are a reality, they are still “bad”—they tarnish the perception the public has of us. A claim suggests that someone didn’t do his or her job, was cutting corners or was incompetent. Worse yet, a claim suggests that somehow the system is broken. A claim is disruptive to lives and business. Claims also raise the costs of insurance—E&O as well as title insurance. To some extent, these costs are passed along to the ultimate consumer in the form of higher fees and rates.

C. Reason No. 2: Abstractor error can cost you money directly

1. Abstractor error is imputed to the title agent per the Agency Agreement

2. It is irrelevant if the agent conducts the search or hires an independent searcher

3. Sample language:

   Paragraph 7. Responsibility for Loss: A. Agent is responsible for losses caused by or attributable to the following: . . . 5. Negligent errors or omissions in: a. the search . . . .

4. The E&O policy of the abstractor may not protect you (more about this later)

5. Your own E&O policy may not protect you (more about this later)

D. Reason No. 3: Abstractor error impacts your day-to-day operations
1. Have you ever spent time resolving a “problem” on a title search, only to discover later that this “problem” was never a problem at all but was just erroneously reported on your title work?

2. When a claim occurs, you have to retrieve the file from archives, scour the file for exculpating data, make copies, send the file to claims, interrogate employees, draft responses, etc.

3. Sometimes claims happen at the end of the month, and they are very time sensitive, such as when something is discovered to be not of record.

E. Reason No. 4: Abstractor error impacts your future business

1. If you are the settlement agent, the client may blame you, regardless of whether you conducted the exam yourself or if you hired someone else to do it because, in the end, you are the one who chose the examiner. Will this client come back and settle at your company or refer others to do so?

2. If the consumer is upset because they are not having a title issue, then this might have ramifications on the realtor or loan officer involved. This might, in turn, have an impact on whether that realtor or loan officer continues to send you the business. Will this source of business be tempted to try another settlement company?

F. Reason No. 5: Abstractor error impacts your relationship with your underwriter

1. Abstractor errors are covered by title insurance
   a. Owner’s policy
      See all of the Covered Risks in sample Owner’s Policy, Appendix A.
   b. Lender’s policy
      See all of the Covered Risks in sample Lender’s Policy, Appendix B.
   c. **Point:** everything that is insured is contained in the Public Records. That is what the title examiner looks at, and so what the examiner does (or doesn’t do) can trigger liability under all of the Covered Risks of both the owner’s and the lender’s policies.

2. Because abstractor errors are covered by title insurance, abstractor errors can cost the underwriter money in claims.

3. The Underwriter-Agent relationship is a business relationship
a. A cost-benefit analysis may cause the Company to terminate the relationship if claims are too high relative to agency revenue.

b. In making this determination, many underwriters will recognize that claims only become apparent 5 to 7 years after a transaction occurs when that same property is now subject to a new (now, more competent) title examination to reveal the error. And so one claim, by itself seemingly insignificant, may be viewed by the underwriter as the “tip of the iceberg”.

c. For Old Republic, whether or not to terminate an agency relationship is a very fact-specific determination, not a knee-jerk one. We strive to keep and rehabilitate a relationship that has problems, not terminate one to “cut our losses”. With respect to claims caused by abstracting errors, we might look to the following factors:

1) cost of the claim relative to agency revenue
2) whether the cost of the claim to the Company has been mitigated through recovery elsewhere, such as from an individual, the abstractor’s E&O or the agent’s E&O
3) the procedure used by the agent in selecting the culpable abstractor
4) whether the agent shares in the culpability for the abstracting error in the review of the abstractor’s work
5) the procedure used by the agent in monitoring the overall relationship of the abstractor
6) changes in procedures as a result of the claim

G. Conclusion

Every title agent and settlement agent should care about abstractor error. It affects the industry as a whole. It is fundamental to the title insurance policies that form the bread and butter of your business. It can have a devastating impact on your pocketbook and your business, including your day-to-day operations, as well as your clients and sources of business. However, the risk of such an impact can be largely manageable, which is the fundamental purpose of this outline and presentation—what you can do about abstractor error.
II. First line of defense: Use Qualified Examiners

A. General comments

The quality of the title report is fundamental to the real estate closing and resulting title insurance—everything hinges upon it. Consequently, due consideration should be given to the selection of your title examiner.

B. Selecting an Examiner: Factors to consider

1. Speed
2. Accuracy
3. Cost
   a. Cancellation policy
   b. When does the examiner get paid? How long will they wait?
      1) REO transactions and short sales take months
4. Areas covered
   a. Who do they use for outlying areas? Do you need to research them?
5. Special services
   a. “rush” searches
   b. Pick-up and deliver recordings
   c. Special requests
      1) Check for a release
      2) Get full copies of documents

C. Selecting an Examiner: the process to consider

1. Use on a trial period or on just a couple of transactions and scrutinize the work and service
2. Recommendations from others
3. References
   
a. Recognize that these are self-serving. Look for long-term, rather than short-term references.

4. Credit and criminal background check
   
a. Would it concern you to know that your title examiner has 5 DUI’s? Reckless driving conviction? Served some jail time? Drug possession? Felon? What is your tolerance for risk? The traits of a good title examiner are someone who follows the rules, is thorough and dependable.

5. Education and training
   
a. Title examination is one of the last trades that currently operates like a guild or apprenticeship. There is no requirement for licensure, pre-licensing education or continuing education.

b. It is shocking to think that one needs a license to cut hair in Virginia but does not need a license to create a report that will serve as the basis for a million dollar home and resulting title insurance policies. Anyone—anyone can just wake up one day and say, “I want to run titles today” and begin doing so—right now.

c. Remember what is at stake with the title examination, how it impacts the industry, your pocketbook, your day-to-day operations, your future business and your relationship with your underwriter.

d. VLTA CTE Program
   
   1) General description: The Title Examiner Certification Program sponsored by the Virginia Land Title Association provides standardized licensing, pre-licensing education and continuing education for title examiners in an effort raise the competency of the profession and thereby reduce the number of claims for the good of the entire industry.

   2) Visit www.vlta.org for complete information. Be sure to click on the link entitled "Frequently Asked Questions."

   3) See Appendix C, “VLTA Title Examination Certification”

   4) What it is
a) The certification is voluntary.

b) The cost is $375 for VLTA members and $475 for non-members for 16 hours of education.

c) Discounts are available when 3 or more register from the same company.

d) Payment plans are available.

e) The instructor will come to you for groups of 12 or more.

f) The certification is available for out-of-state examiners and for those who just do bring-downs.

5) What it is not

a) The certification is not an effort by the VLTA to generate revenue. While the fees for the certification certainly offset the cost, the actual cost far exceeds what little revenue the program will generate.

b) The certification is not mandatory. Some underwriters may choose to make it mandatory for their own agents, and it is certainly possible that at some point the Virginia legislature may adopt something like this certification program as a mandatory licensure requirement. The VLTA is currently pursuing this licensing initiative.

6) Position of Old Republic

a) OR supports all efforts to raise the standards of the industry, including this one.

b) OR does not make it mandatory at this time.

III. Second line of defense: Use examiners with adequate insurance

A. General comments
When the proverbial you-know-what hits the fan and a claim occurs, whose E&O do you want to be triggered: yours, through the imputed liability provisions of your Agency Agreement, or your abstractors, since your abstractor is the one who made the mistake?

B. No statutory requirement

1. Unlike the requirements for a settlement agent, there is no requirement for an abstractor to maintain an E&O policy, let alone a statutory minimum.

C. Evaluating your risk

1. What is the liability of transactions in your area?
2. Do you ask your abstractor for a copy of the policy when it is renewed?
3. Be aware that one claim can reduce the coverage on a policy.
4. Look for retroactive coverage on renewals.

IV. Third line of defense: Know the process of the title exam

A. General comments

If you don’t know what is searched or how a search is performed, how will you know whether the examiner has handed you a complete report or an imperfect one that may give rise to a claim?

B. What is searched

1. Statutory basis in general
   a. General Index: Va Code § 43-4.1

   Notwithstanding the provision of any other section of this title, or any other provision of law requiring documents to be recorded in the miscellaneous lien book or the deed books in the clerk’s office of any court, on and after July 1, 1964, all memoranda or notices of liens, in the discretion of the clerk, shall be recorded in the deed books in such clerk’s office, and shall be indexed in the general index of deeds, and such general index shall show the type of such lien.

   b. Deed Book: Va Code § 8.01-251(A)
All deeds, deeds of trust, deeds of release, certificates of satisfaction or certificates of partial satisfaction, quitclaim deeds, homestead deeds, grants, transfers and mortgages of real estate, releases of such mortgages, powers of attorney to convey real estate, leases of real estate, notices of lis pendens and all contracts in reference to real estate, which have been acknowledged as required by law, and certified copies of final judgments or decrees of partition affecting the title or possession of real estate, any part of which is situated in the county or city in which it is sought to be recorded, and all other writings relating to or affecting real estate which are authorized to be recorded, shall, unless otherwise provided, be recorded in a book to be known as the deed book.

c. Will Book: Va Code § 17.1-231

All wills, inventories, appraisements, lists of sales and settlements of accounts of executors, administrators, curators, trustees or other fiduciaries shall be recorded in a book to be known as the will book.


Abstracts of all judgments authorized or required by law to be docketed or recorded shall be recorded in a book to be known as the judgment docket.

e. Marriage Register: Va Code § 17.1-233

All marriage licenses and all matters relating to marriages required or authorized to be recorded under § 20-20 shall be recorded in a book to be known as the marriage register.

f. Plat Book: Va Code § 17.1-236

All plats and maps may in the discretion of the clerks of the several circuit courts be recorded in a book to be known as the plat book.

g. State Highway Plat Book: Va Code § 17.1-238

A loose-leaf book known as “state highway plat book,” which shall be provided by the Department of Transportation, shall be installed in the circuit court clerk’s office of each county of this Commonwealth and in the clerk’s office of the circuit court of any city wherein the Department of Transportation has acquired any interest in land, and all highway plats pertaining to the primary and
secondary highway systems, and all plats in connection therewith, shall be filed therein by the clerk.

h. Combining Books in Electronic Format:

Va Code § 17.1-240:

A procedural microphotographic process, digital reproduction, or any other micrographic process which stores images of documents in reduced size or in electronic format, may be used to accomplish the recording of writings otherwise required by any provision of law to be spread in a book or retained in the circuit court clerk’s office, including, but not limited to, the civil and criminal order books, the Will Book or Fiduciary Account Book, the Juvenile Order Book, the Adoption Order Book, the Trust Fund Order Book, the Deed Book, the Plat Book, the Land Book, the Judgment Docket Book, the Partnership or Assumed Name Certificate Book, marriage records, and financing statements. Any such micrographic, microphotographic or electronic recording process shall meet archival standards as recommended by The Library of Virginia.

Va Code § 17.1-244:

Any court of record or, if so designated by the judge, the clerk thereof may cause any of the books or records in the clerk’s office which may be in need thereof to be rebound, transcribed, microfilmed or digitally reproduced. The same faith and credit shall be given to such transcript or reproductions from the microfilm or digitally reproduced record as the book or record transcribed would have been entitled to.

2. Particular records to be examined (and why)

a. Grantor/grantee index to deed books

   1) Used to establish the “chain” of title

b. Grantor/grantee index to will books

   1) Used to establish the “chain” of title

c. Indices to lists of heirs

   1) Used to establish the “chain” of title
2) Recording a list of heirs is now mandatory, regardless of whether the decedent died testate or intestate. Va Code § 64.1-134.

d. Fiduciary account books

e. Plat or Map books

f. Judgment lien dockets

1) A judgment docketed in the land records becomes a lien on all real property owned or subsequently acquired by the judgment debtor. Va Code § 8.01-458.

g. Indices to financing statements

1) The filing of a UCC Financing Statement perfects the lien and is enforceable for 5 years from the date of filing. By filing a Continuation Statement (can only be filed in the final 6 months of the 5 year period) the period of effectiveness is extended for an additional 5 year period (from the date of expiration of the initial period). Va Code § 8.9A-515.

h. Delinquent tax records

§ 58.1-3341. Liens for taxes delinquent twenty years or more released; lands purchased by Commonwealth; pending suits.

No lien upon real estate for taxes and levies due and payable to the Commonwealth or any political subdivision thereof which has been, or shall hereafter become, delinquent for twenty or more years shall be enforced in any proceeding at law or in equity and such lien shall be deemed to have expired and to be barred and cancelled after such time.

i. Land book (current real estate tax)

§ 58.1-3340. Lien on real estate for taxes and levies assessed thereon; responsibility of purchaser or trustee at sale; lien on rents.

There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance. The lien shall continue to be such prior lien until actual payment shall have been made to the proper officer of the taxing authority. The purchaser at a sale, or trustee in the event of a foreclosure sale,
shall cause the proceeds to be applied to the payment of all taxes and levies assessed on real estate.

j. Daily indices

1) These indices provide information on recently filed documents that are waiting to be incorporated into a Deed Book or online database.

k. Unindexed deeds, judgments and financing statements

1) These documents are even more recent than the daily indices. They are so recent that they haven’t even been indexed. Often these documents amount to nothing more than a “pile” to be sifted through at the clerk’s office. However, with the advent of documents online, such piles are becoming a thing of the past.

l. Charter and partnership books

1) Does the entity exist? Who are the members?

m. Law and Chancery files

1) Sometimes, documents recorded in the land records reference cases filed in the law or chancery division of the courts, requiring even further research into court dockets and case information. Or sometimes a recorded document suggests that a case might be filed. For example, Va Code 43-17 states generally that a mechanics lien will expire within 6 months unless the claimant files suit. A prudent title examiner, therefore, upon finding a 7 month old Memorandum of Mechanics Lien in the chain of title would also research the court docket to determine if the claimant filed suit.

n. Supervisor’s order books

C. How the search is performed

1. Determine the current owner

   a. Compare the sales contract, vesting deed and tax info
   b. Determine the reasons if there are discrepancies

2. Establish a “chain of title” backwards
a. How do you establish the chain?

1) Derivation clauses (a/k/a “and being” clauses)
   a) Not a good idea to use this approach exclusively. Derivation clauses can be wrong or missing altogether. Furthermore, sometimes the legal description of the current deed will incorporate the derivation clause of the prior deed as if it were part of the legal description. Other times derivation clauses skip over intervening deeds that would be missed altogether if the derivation clauses were followed. A far better approach is to utilize the derivation clauses in conjunction with research into Grantor/Grantee indices.

2) Grantor/Grantee indices

3) Property cards (tax assessment information)

b. How far back do you go?

1) Traditional rule: at least 60 years for everything
   a) **Rationale**: most title issues expire within this period.

2) Modern Rule: something less
   a) **Rationale #1**: We want it done quicker and are willing to take a risk.
   b) **Rationale #2**: Some transactions are less risky than others
   c) Some examples:
      i) 40-yr search
      ii) 2-owner search for refinances
      iii) current owner search for refinances
   d) Advantages
      i) Faster
      ii) Cheaper
      iii) Simpler to evaluate
   e) Disadvantages
i) Claims

f) Current trend: less shortcuts, longer searches are now more favored as underwriters have experienced devastating claims

c. Search should not end with deed from fiduciary or commissioner

d. Special problems: the “missing link”

1) Name change

a) Solution: consult marriage register, court orders

2) Name variation

3) Property acquired through inheritance or devise

a) Solution: consult will books
b) Remember: recording a list of heirs is now mandatory, regardless of whether the decedent died testate or intestate. Va Code § 64.1-134.

4) More solutions:

a) Consult land books (tax assessment info), which may have the chain of title recited
b) Consult index to chancery suits/orders
c) Run chain of title on adjacent properties

3. “Adverse” each owner in the chain to discover all items of record that affect the property

a. May need to adverse more owners than the chain reveals

1) E.g., 20-year search for judgments, regardless of chain

b. More special problems:

1) variations in the legal description
2) Misindexing errors
3) Spelling errors
4) Transposition of names

a) Interchangeable first and last names
b) Names with more than 2 words: which is the last name?
c) Foreign names

c. Some solutions

1) Be creative—think out of the box.
2) Research adjacent lot
3) Find back title

V. Fourth line of defense: Evaluate the product of the title exam (basic search requirements)

A. General comments

If you do not remain familiar with these requirements, how will you know whether your abstractor searched for everything that you need? Sending the examiner a copy of these requirements at the beginning of the relationship and then forgetting about them is not sufficient. Examiners search for more than one company and may have to juggle a variety of search requirements. Are they still using yours for your searches. Examiners get new employees. Has the new guy been briefed on your search requirements?

D. Simple bright line rule v. rule riddled with exceptions

1. Example of bright line rule: All cases, search for 60 years.
   a. Easy to administer and remember, but can we cut corners?

2. Cutting corners with exceptions make the rule increasingly complex.

E. Rule for Sales

1. If the lot is 20 acres or more (no subdivision), perform a 60-year search back to a general warranty deed.
   a. Alternatively, you may search back to an “on point” standard Owner’s Title policy. An “on point” policy is defined as an Owner’s policy insuring the identical real estate to be insured which outlines the easements and other exceptions to title in specific detail in Schedule B.
   b. Be sure to check all items listed on Schedule B of the policy to determine that deed book and page numbers are accurate.

2. If the lot is in a subdivision, or is less than 20 acres, perform at least a 40-year search back to a general warranty deed.
a. Alternatively, you may search back to the subdivision plat, whether or not less than 40 years old, IF a “helper” Owner’s policy is available to provide other easements, etc. [A “helper” policy is defined as an Owner’s policy that covers the same block and section of the subdivision, but not the same lot, as that described in the legal description to be insured.]

b. As an additional alternative, you may search back to an “on point” Owner’s Title policy less than 40 years old.

c. Be sure to check all items listed on Schedule B of the policy to determine that deed book and page numbers are accurate.

3. All properties require a 20 year judgment search.

   a. Search judgments on all who owned the property within the 20 years prior to the transaction you are insuring, unless you have an on point Owner’s policy on which you are relying.

4. Search a subservient access easement until a recorded access easement is found.

5. If the legal description references a recorded plat of survey, make sure it is actually recorded where referenced.

F. Rule for Refinances, Equity Lines, Second Loans

   If the property being refinanced, or having a second mortgage, or an equity line being obtained does NOT qualify for a Short Form Title Policy, then you must follow the requirements above as if it were a Purchase transaction.

   If the property qualifies for an ALTA Short Form Residential Loan Policy, then a two owner title search back to a general warranty deed PLUS a judgment search on all who owned the real estate in the last 20 years may be done. NOTE: in counting the owners of a “two owner search,” only count “bona fide purchasers for value.” Do not count transfers by will or intestate succession, nor should you count transfers by deed of gift or quitclaim deed.

   1. Property qualifies for an ALTA short form loan policy if ALL of the following apply:
a. improved residential land;

b. platted subdivision (may be a family subdivision OR may be acreage up to 200 acres); and

c. 1-4 family residence (includes townhouse, condo, manufactured housing, etc., but does not include construction in progress.)

2. Deed to the current owner and immediately prior owner must be general warranty deeds; if not, search back to last general warranty deed of record.

3. Deeds must be reviewed for possible underwriting objections.

4. Current owner, or immediately prior owner, must have or have had an institutional purchase money deed of trust. If not, search back to owner who last had an institutional deed of trust.

5. Run judgments for 20 years on all who owned the real estate in the last 20 years, and financing statements for 5 years on all who owned the real estate in the last 5 years. NOTE: Judgments filed after an owner deeded out the real estate do not attach and may be ignored.

G. Rule for Commercial transactions

Search at least 60 years, back to a general warranty deed. In some cases you may need to search back to the land grant from the Sovereign. Lender’s counsel typically will want copies of at least all easements, restrictions and the vesting deed. In some cases they may ask for copies of all documents in the chain of title. Generic exceptions are not acceptable in commercial transactions. Review lender instructions. If seller provides an on point Owner’s title policy, your examiner may use it as a guide, but should still do an independent full search.

VI. Fifth line of defense: Evaluate the product of the title exam (advanced search requirements)

A. General comments

Sometimes, finding one thing in a title search means that you have to look for another. Likewise, the processing of a case can warrant another look at the title. Again, if you do not remain familiar with these requirements, how will you know whether your abstractor searched for everything that you need?

B. Looking for lawsuits

1. Mechanic’s Liens
§ 43-17. Limitation on suit to enforce lien.

No suit to enforce any lien perfected under §§ 43-4, 43-5 and 43-7 to 43-10 shall be brought after six months from the time when the memorandum of lien was recorded or after sixty days from the time the building, structure or railroad was completed or the work thereon otherwise terminated, whichever time shall last occur; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and, provided further, that nothing herein shall extend the time within which such lien may be perfected.

2. HOA Liens

§ 55-516. Lien for assessments.

* * *

E. No suit to enforce any lien perfected under subsection B shall be brought or action to foreclose any lien perfected under subsection I shall be initiated after 36 months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein the petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

3. Condo Liens

§ 55-79.84. Lien for assessments.

* * *

D. No suit to enforce any lien perfected under subsection C shall be brought or action to foreclose any lien perfected under subsection I shall be initiated after 36 months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

4. Lis Pendens (Va. Code §8.01-268, et. seq.)

a. Valid during the pendency of the suit.

C. Looking for additional names after the search is completed when . . .
1. You learn that the current owner has a new or former name not reflected on title.

2. A will is probated.

3. A list of heirs is recorded.

4. Title must be taken out of the trust for a refinance.

5. Title is fixed or fooled with by deed.

VII. Sixth line of defense: watch out for this (a hodgepodge of items)

A. Deed recites “Without benefit of title examination”

B. Title search expressly limits liability to cost of search or other amount

C. Quit claim deeds

1. Prevalent in divorce cases

VIII. Seventh line of defense: Maintain adequate E&O

A. Statutory minimum: $250,000

H. Underwriter’s requirement may be greater

1. Look at your Agency Agreement

2. What is your experience? Start-up with little experience?

3. What is your market? Million dollar homes or mobile homes?

I. What is your tolerance for risk?

1. Your coverage amount is not the limit of liability. After that, they come after the assets of the company—and maybe you.

J. Wrinkle No. 1: Independent Contractor Exclusion

1. Example

2. Old Republic will not accept this
K. Wrinkle No. 2: Requirement of E&O for independent contractor

1. Example
2. Old Republic will accept this
3. Do you want this limitation?
4. Are you going to monitor your abstractor’s E&O?

L. Revisiting your policy

1. Do you have new employees?
2. Has the volume of your business changed?
3. Has the liability of your transactions changed?
4. Have you had a claim so that your aggregate liability is reduced?

M. Renewing your policy

1. Beware of deals that drastically reduce premium
2. Make sure you get retroactive coverage!
   a. Remember that this E&O is a “claims made policy”. The policy that you will look to for coverage is NOT the policy in effect at the time the mistake was made. Rather, it is the policy in effect at the time the claim was made. For example, you start business in 2000 with ABC Carrier. In 2005 you change carriers to XYZ carrier. In 2008 a claim is made on a 2003 transaction. You will make a claim on your XYZ policy because that is the policy in effect at the time the claim was made. However, does the XYZ policy have retroactive coverage to include 2000 and following, or did your XYZ policy simply begin coverage at the time you switched carriers? If the former, you have coverage for this claim. If the latter, you do not have coverage for this claim.

N. Tail End Policy

1. Claims may continue once you’ve closed your business
2. Tail end policy offer’s coverage during this period, usually 3, 5 or 7 years after you have closed.
3. Premiums are usually lower

4. “If I’ve closed, what’s the risk? Why would I want to pay this?”

IX. Eighth line of defense: When a claim occurs, help!

A. Three kinds of “claims”:

1. Request for final title policy “claim” (made by lenders)

   Sometimes lenders do not receive their final title policy and/or recorded documents in the timeframe they want. Sometimes this is the fault of the agent. But there are other reasons for this delay: the courthouse is slow to record and return documents, or the lender has not provided the settlement agent with the recording fee to record the assignment, or the lender has unrealistic expectations as to what is a reasonable timeframe. Regardless of the reason, when a lender does not get what they want from the agent, they often turn to the underwriter. Nearly 100% of the time, this request for a final title policy and/or recorded documents is “cleverly disguised” as a claim. But it is not. Not receiving a final title policy or recorded documents is not one of the Covered Risks enumerated in the policy.

   I suppose if underwriters wanted to, we could deny the claim based on that observation, but we do not. We just forward the “claim” onto the agent, or if the agent is no longer in business, we create the policy ourselves. Why do lenders disguise these simple requests as a claim? I suppose it is meant to get my attention, the theory being that I’ll act quicker on a “claim” than on a simple request. Personally (and this is Kevin talking) I don’t and I wish lenders would stop behaving this way.

2. Request for letter of indemnity “claim” (made by foreclosure firms)

   Similar to lenders’ requests for final title policies, foreclosure firms (who represent lenders) often send “claims” to the underwriters that state a certain defect in title must be remedied immediately because it is holding up the trustee’s sale. Often these title defects are nothing more than the run-of-the-mill unreleased judgment or unreleased deed of trust from a prior owner. And while the term “letter of indemnity” is often absent from this “claim” made by the foreclosure firm, an LOI is usually an acceptable solution.

   Again, why do foreclosure firms disguise these simple requests as a claim? I suppose it is meant to get my attention, the theory being that I’ll act quicker on a “claim” than on a simple request. Personally (and this is Kevin talking) I don’t and I wish foreclosure firms would stop behaving this way.
3. The real claim (made by insured)

   This is what we are talking about!

B. What to do if the claimant makes the claim to you

   1. Instruct the Insured to follow the directions on the back of the policy:

      18. NOTICES, WHERE SENT

      Any notice of claim and any other notice or statement in writing
      required to be given to the Company under this policy must be given to
      the Company at 400 Second Avenue South, Minneapolis,
      Minnesota 55401-2499.

      2. If the claim is time sensitive, call your underwriter immediately.

C. Do not try to resolve the claim yourself!

   9. LIMITATION OF LIABILITY

      * * *

      (c) The Company shall not be liable for loss or damage to the
      Insured for liability voluntarily assumed by the Insured in settling
      any claim or suit without the prior written consent of the Company.

   Nobody likes to make a mistake, and when we do, we understandably want to fix
   it ourselves before anyone notices. Please resist this temptation when it comes to
   claims under the title policy. The policy prohibits it to some extent, and you
   might end up doing more harm than good!

D. Help the Claims Administrator!

   1. Return the phone call, even if it is to say you are working on it.

   2. Retrieve the file

   3. Offer to be the hands and feet

   4. Offer solutions
5. Don’t panic

6. Cooperate with nominal filings to trigger your abstractor’s E&O

X. Ninth line of defense: Notify your E&O carrier

A. Duty to disclose during renewal process

B. Remember the adage “It ain’t over ‘till it’s over!”

Sometimes agents make the choice not to disclose something during the renewal process because the exposure seems small or a solution is underway. Just remember that it ain’t over ‘till it’s over! Small items can become big ones. Solutions (like settlements) can fall through. Remember that this is the very reason why you got E & O insurance in the first place—to protect you for these kinds of items. Just because you put your carrier on notice does not mean that your premiums are going to skyrocket.