

OVERVIEW OF TITLE INSURANCE CLAIMS AND LITIGATION

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This article was originally prepared by Don P. Foster and presented at the National Business Institute Seminar entitled Mastering Real Estate Titles and Title Insurance in Pennsylvania, February 4th, 2003. It has been updated and supplemented with additional case law and references to the 2006 ALTA form policy. Mr. Foster is a principal in the Philadelphia office of Offit Kurman, P.A. He practices in the areas of complex business and commercial litigation, including title insurance litigation. He has represented, *inter alia*, real estate developers, lenders, title insurance companies and bankruptcy trustees in litigation related to debt restructuring and the work-out of troubled real estate loans. He received his B.A. degree, cum laude, from the University of North Carolina and his J.D. degree from Dickinson School of Law. He lectures for the Dickinson School of Law Trial Advocacy Workshop, the National Business Institute and the Philadelphia Bar Education Center. Mr. Foster is a member of the Board of Directors of Highmark, Blue Cross/Blue Shield, and a member of the Philadelphia, Pennsylvania and American Bar Associations and the Philadelphia, Pennsylvania and American Trial Lawyers Associations.

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OVERVIEW OF TITLE INSURANCE CLAIMS AND LITIGATION

A. How to Submit a Claim

1. Notice of the claim:

A title insurance policy is a policy that indemnifies an insured against an actual financial loss up to the value of the property or the policy limits, whichever is less, caused by a defect in title covered by the policy (*i.e.*, not excluded or excepted from coverage). 2006 ALTA Policy, Condition 8; *Sattler v. Philadelphia Title Insurance Co.*, 192 Pa. Super.338, 168 A.2d 22 (1960). 2006 amendments to the form ALTA policy expand coverage to include some post-policy coverage (*i.e.*, creditors' rights coverage).

The title policy also commits the title insurance company to defend the insured against any claim adverse to the title that has been insured as, for instance, when a neighboring landowner claims an easement over an insured's property that has not appeared of record (or is missed in the search), and, therefore, is not a scheduled exception. This duty to defend is broader than the duty to indemnify, and it is not unusual for a title company to defend an insured's title while reserving the right to deny coverage if, for instance, it is determined at a later date that a policy exclusion applies as when an off-record lien or other defect is known to the insured pre-commitment and is not disclosed. *See*, 2006 ALTA Policy Exclusion 3(b); Condition 1(f)); 1966 ALTA Commitment Conditions and Stipulations Clause 2, sentence 2; *Anno.*, 75 ALR3d 600 & 17 ALR4th 1077; *Kirwin v. CTIC*, 2000 WL 781109 (Neb.App.); *Contra: Archambo v. LTIC*, 466 Mich. 402, 646 NW2d 170 (2002) (applying 1992 Owner's Policy Integration Clause C&S 15), *Kirwin, supra*.

The title insurance policy requires in the first instance that an insured "promptly" notify the company of any liens or defects in title.¹ If the insured fails to promptly notify the company, the company may deny coverage if the delay has prejudiced its ability to defend against the claim, or otherwise cure the defect. ALTA Condition 3; *Costagliola v. Lawyers Title Insurance Co.*, 234 N.J. Super. 400, 560 A.2d 1285 (Ch. Div. 1988). If the delay makes the cure more expensive, the title company may pass the added expense on to the insured.

A person submitting a claim is best advised to follow strictly the provisions of the policy, which requires written notice. If the company is unable to determine the amount of the loss, it may require a proof of loss signed by the insured. ALTA Condition 4. The 2006 policy requires:

¹ Condition 3 of the Policy. All references are to the 2006 ALTA Owner's and Lender's Policies of Title Insurance. The practitioner is advised to refer to the form policy approved in the State in which the real estate is located.

Notice of Claim to be Given by Insured:

The insured shall notify the Company promptly in writing (i) in case of any litigation...(ii) in case Knowledge shall come to an Insured hereunder of any claim of Title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

Prejudice is the key. It is unusual that a claim or defense will be denied outright by the title company due to late notice, because typically the Company is notified of a claim long before there is any calculable prejudice. If, however, an insured permits a competing lien to be foreclosed, or enters into some kind of settlement with a competing interest-holder before notifying the title company, it is likely that a *prima facie* finding of prejudice will be made, forcing the insured to prove that the result would have been no different had notice been timely.

It is important to appreciate that there is no insurance unless there is a loss. So, for instance, if a homeowner has actual notice of an easement that is not used, and which has not caused him to suffer financial loss (as when he goes to sell the property and the now-disclosed easement results in a lower sale price), then there is no basis for a claim, regardless of how emotionally distraught might be the property owner/insured. Claims for lost profits due to delay in sale while title problems are cleared up is not a covered loss. *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S. 2d 399 (N.Y.A.D. 1997).

No payment of any loss will be made without production of the policy for endorsement of the policy unless the insured can prove the policy was lost or destroyed.

B. How to Deny a Claim:

1. Investigating the Claim:

Once notified, the title company must investigate the claim "without unreasonable delay" to determine coverage and its obligation under the policy. ALTA Condition 5. The company need not assume the defense of a claim while that investigation is underway. *Ticor Title Ins. Co. of Cal. V. American Resources, Ltd.*, 859 F2d 772 (9th Cir. 1988).

The claim investigation focuses on the four parts of the policy: the insuring clauses², the exclusions from coverage³, the Schedule B exceptions and the Conditions. After this investigation, the title company will decide either to extend coverage; deny coverage; or defend the insured's title under reservation of rights.

2. The Duty to Defend:

Paragraph 5 of the policy Conditions provides, in pertinent part, that:

...[T]he Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action insured against by this policy.

The duty to defend extends to any claim that could result in a claim the insurance company would have to pay but does not include claims that are clearly excluded from coverage. A corollary to the duty to defend is the right reserved by the insurance company to prosecute proactively a claim to establish, or quiet title. Although there is some debate as to whether this is a right or a duty, the contract language clearly establishes it as an option to be elected by the Company.

The company reserves the right to select its own counsel, subject to the insured's reasonable objection. If the insured retains personal counsel, the insurance company is not obligated to pay those fees.

As an alternative under Condition 7, the Company may pay the policy limits to the insured, thereby satisfying its obligations and effectively terminating the policy, or settle with the adverse claimant.

² There is insurance if: (1) title to the estate or interest is vested other than as stated in Schedule A; (2) there is a defect in or lien or encumbrance on the title; (3) title is unmarketable; (4) there is lack of a right to access to and from the land; enforcement of governmental zoning or other regulated use; (5) enforcement of government zoning or other governmental taking, if recorded; (6) exercise of eminent domain or other governmental taking, conditioned upon recording; (7) enforcement of preferential transfer rights in bankruptcy; (8) recording of a lien during the gap between issue date and recording; (9) an insured mortgage is deemed invalid or unenforceable; (10) a competing mortgage is given a higher priority over the insured mortgage; (11) a mechanic's lien is deemed to be superior to the insured mortgage; (12) a mortgage assigned is invalidated (provided the assignment is shown in Schedule A).

³ Exclusions from coverage include: (1) unrecorded governmental regulation of use; (2) unrecorded eminent domain; (3) lien and encumbrances created, suffered, assumed or agreed to by the insured, off record, but known to the insured and not disclosed in writing to the company; causing no loss; attaching or created after the policy date; or caused by the failure of the insured to pay full value for the property; (4) subordination of the insured interest by operation of bankruptcy or insolvency laws. Additional loan policy exclusions included: (1) unenforceability of the mortgage due to the insured lender's failure to comply with applicable "doing business laws;" (2) invalidity or unenforceability of the mortgage because loan documents violate usury, truth in lending, or consumer protection laws; (3) mechanics liens arising from work performed after the policy date and not financed by the insured mortgage.

3. Denial of the Claim:

The policy itself is silent as to how the title company should deny a claim. Clearly, it must investigate the claim thoroughly and document each reason it believes justifies a denial of a claim, whether it be one of the policy exclusions (which likely will be readily apparent), or the failure of the insured to meet one of the Conditions of coverage (which may require some further investigation). It may turn out, after investigation, that there has been no loss or impairment, in which case, there would be no coverage.

[NB here is a hypothetical example as a basis for denying a claim: Condition 3 requires that notice of an adverse claim must be given to the insurer promptly. Investigation of the claim may disclose that prompt notice was not given. It may also disclose that the insured may have undertaken to settle the matter itself before tendering the claim. Condition 9(c) relates to voluntary settlement by the insured. Since the title company retains the right to participate fully in the disposition of any claim; if the insured settles or compromises a claim without permission of the insurer the insured may have waived coverage under the policy because that settlement may have an adverse impact upon the insurer with regard to its ability to exercise its options and obligations under Condition 5 regarding the Duty to Defend and/or Condition 9 regarding Limitation of Liability. In that event the Insurer should prevail under its rights of subrogation under Condition 13.]

Whatever the reason for the denial of the claim, the insurance company is best served by explaining, in writing, precisely why it believes there is no coverage, citing the applicable provisions of the insurance policy. In the event of doubt, or if the company believes that the insured will sue for breach of contract, it might be advisable to proceed to declaratory judgment. This can be done even where the company is defending the insured's title under a reservation of rights.

C. Steps to Follow when Trying the Lawsuit:

1. Introduction:

Title insurance is intended to protect insureds, whether owners or lenders, from actual loss or damage caused by an adverse claim, or other cloud on title, that is not excluded from coverage, or that does not appear as an exception in the schedules.

A critical aspect of prosecuting or defending a claim under a policy of title insurance is a clear understanding of the indemnity nature of the insurance policy and just what risk the title insurance company is underwriting when it issues its commitments. The failure of most practitioners, and the Courts, to appreciate fully the nature of the insurance has given rise to much unnecessary litigation, which drags on needlessly because the Courts refuse to address summary judgment motions pro-actively.

Because title insurance policies are indemnity policies, a claim is perfected only when there is an actual loss arising out of a covered event. Negligence, or any other breach of duty outside the four corners of the contract, is not at issue in Pennsylvania; and the

insured need only establish that a loss has occurred which is covered by the policy. *Sattler v. Philadelphia Title Insurance Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960).

The indemnity feature has important ramifications on a litigated claim:

- a. First, no claim is perfected until an actual loss has occurred. The mere fact that an off-record mortgage, which has not been excepted from coverage and encumbers an owner's property, does not give rise to a claim until the mortgagee attempts to foreclose, or the property is conveyed (and the mortgage must be satisfied by the owner in order to convey clear title);
- b. The statute of limitations does not begin to run until the loss is suffered, which in many instances can be long after notice or actual knowledge of the offending lien, adverse furthermore, the loss or damage insured against is limited to the loss of claim, or other cloud on title.

Furthermore, the loss or damage insured against is limited to the loss of value of the real estate or the limits of the policy, whichever is less. It does not include loss of investment opportunity or potential appreciation in value brought about by any delay associated with clearing title, or any other consequential damage caused by the adverse claim. This is not to say that consequential damages may not be recoverable under a negligence theory from some other participant in the transaction, *i.e.* the abstract company, but, as against the title insurance company, they are not.

After the indemnity feature of the policy, the third exclusion from coverage dealing with events known, but not disclosed by the insured, is perhaps the most important contract provision from the perspective of defending against a claim. Too often insureds have the attitude that if they can escape from closing with a commitment in hand, knowing full well that the title company, or its agent, has missed something that would affect coverage (or even the decision to insure), then they are protected. Inevitably, this defense is very fact intensive and depends not only on the actual knowledge of the insured, but also on the insured's level of sophistication (insofar as it impacts upon the duty to disclose.)

Condition 5(c) of the Conditions and Stipulations provides that:

Whenever the company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse Judgment or Order.

This section deals with the actual prosecution or defense of a title claim by independent counsel, whether undertaken voluntarily by the company or pursuant

to its contractual duty to defend⁴. While the company is diligently seeking to cure the defect, whether through litigation or otherwise, any claim against the company by the insured is barred. Condition 9(b).

2. Claim Investigation:

Once retained by the title company to defend an insured's title, there are a few preliminary steps the litigation attorney must make:

- a. Secure a copy of both the claim and underwriting files from the carrier. If the company does not have the underwriting file, get it from the agent. Review the documents immediately to prepare for a substantive interview with claims counsel;
- b. Discuss with in-house counsel what investigation they conducted, and their basis for reaching the coverage decision that led to the matter being referred to you;
- c. Interview the important witnesses, who may include:
 - i. the title agent
 - ii. the insured;
- d. Obtain an updated title report, if it is not in the file already;
- e. If litigation has not yet started, evaluate the claim to determine if you should pro-actively commence litigation, or wait until the adverse claimant proceeds.

3. Explore Non-litigation Options:

It is often the case that disputes over title to real estate can be resolved without recourse to costly litigation. It may be, for instance, that a defect in title was insured against because of an agent's carelessness. In such situations, if the agent's errors-and- omissions carrier can be brought into the conversation early on, and cajoled into contributing to a settlement, the matter can sometimes be resolved.

4. Litigation Options:

Whether by way of counterclaim or affirmative complaint, there are a number of causes of action that recur in title insurance litigation. They include:

⁴ Query whether the Company has a contract obligation or merely a right to cure a defect, as it sees fit. New Jersey has held it to be an obligation. *Summante v. First American Title Ins. Co.*, 180 NJ Super. 605, 436 A.2d 110 (Ch. Div. 1998).

a. **Action to Quiet Title:**

This is probably the most common cause of action in title disputes. It is a quasi-statutory course of action controlled in Pennsylvania by Pa. R.C.P. No. 1061 *et seq.* and by Rule or statute in other jurisdictions. *See, e.g.,* N.J.S.A. 2A: 62-1, *et seq.* Its purpose is to consolidate into one cause of action the countless statutory and common-law causes of action which were designed to remove clouds on title. Whereas, previously, if a party did not invoke the proper statutory remedy, but was nevertheless entitled to the ultimate relief sought, the party ran the risk of dismissal of suit due to inadvertent pleading. It is now all lumped under the “quiet title” rubric. *See, Sutton v. Miller*, 405 Pa. Super. 213, 592 A.2d 83 (1991).

Accordingly, a quiet title action is the means by which one seeks to remove clouds on title to real estate in Pennsylvania. It is available to:

- i. compel an action in ejectment [Pa.R.C.P. No. 1061(h)(I)];
- ii. determine any right, lien, title, or interest in land, or determine the validity or discharge of any document, obligation, or deed affecting any right, lien, title or interest in land [1061(b)(2)];
- iii. compel an adverse party to file, record, cancel, surrender, or satisfy of record, or admit the validity, invalidity, or discharge of, any document, obligation, or deed affecting any right, lien, title or interest in land [1061(b)(3)];
- iv. obtain possession of land sold at judicial or tax sale [1061(b)(4)]. Under Pa.R.C.P. No. 1061(b)(1), an action to quite title may not be used when an action in ejectment is available.

There are certain jurisdictional and venue requirements for a quiet title action. First, it must be brought in the county in which the land, or part of the land, is located. Pa.R.C.P. No. 1062. Secondly, and this is critical, except when 1061(b)(4) applies, the plaintiff must be in possession of the land. *Bride v. Robwood Lodge*, 713 A.2d 109 (Pa. Super. 1998).

Quiet title actions are heard non-jury. The complaint must allege who is in possession of the property and state the legal basis for the plaintiff’s claim. The property metes and bounds, if available, should be plead with specificity.

Pa.R.C.P. No. 1066 defines the relief available in a quiet title action. The Court can: (1) Order that the defendant be barred from asserting any right, lien, title or interest in the land inconsistent with the claim of the plaintiff. [1066(b)(1)]; (2) enter a final judgment that a document, obligation or

deed affecting a right, lien, title or interest in land is cancelled, or is valid, or invalid, or discharged, or that a copy of a last plan, document, obligation or deed is authentic [1066(b)(2)]; (3) enter a final judgment ordering the defendant, the Prothonotary, or the recorder of Deeds to file, record, cancel, surrender or satisfy of record, as the case may be, any plan, document, obligation or deed determined to be valid, invalid, satisfied or discharged, and to execute and delivery any document, obligation or deed necessary to make the decree effective [1066(b)(3)]; (4) Enter any other action necessary for the granting of proper relief [1066(b)(4)].

Any defendant who believes that it has a legal basis for quieting title should assert the claim in a counterclaim, or the claim might be lost. *Carringer v. Taylor*, 402 Pa. Super.197, 586 A.2d 928 (1990).

b. **Declaratory Judgment:**

It is not uncommon to include a count seeking a declaration as to title. Although technically redundant, courts are more accustomed to such requests for equitable relief, and, they usually survive preliminary obligations.

c. **Action in Ejectment:**

Actions in ejectment are defined in Pa.R.C.P. No. 1051 *et seq.* They are the companions to actions to quiet title when actual possession of the property is unclear. They are the appropriate cause of action when the plaintiff is not in possession of the property but claims a right of possession. It is the appropriate procedure for a property owner to recover property owned by him. It is a possessory action that entitles a plaintiff to immediate possession of the land in question with a concomitant right to demand that the defendant vacate the land. *Krulac v. Pa. Game Comm'n*, 702 A.2d 621 (Pa. Commw. 1990).

An action in ejectment will only succeed if the plaintiff is in fact out of possession. If in possession, the appropriate cause of action is a quiet title action. Hence, the quiet title action of someone in possession to compel an out-of-possession adverse claimant to commence an ejectment action. The Complaint must include a title abstract, Pa.R.C.P. No. 1054(b), and may include a claim for rents, profits or any other damages stemming from the defendant's wrongful possession of the land. Pa.R.C.P. No. 1055.

5. Procedure:

a. **Starting the Lawsuit:**

Quiet title actions are stated in common pleas court by a complaint (or agreement for an amicable action), and are subject to all of the rules of civil procedure for actions at law. Venue is proper only in the county where all or part of the land in

question is situated. Pa.R.C.P. No. 1062. If the land is located in more than one county, any of the involved counties is an appropriate venue.

If an out-of-possession plaintiff seeks to maintain a quiet title action, it has been held that the court has no jurisdiction to hear such claims, thereby voiding any action the court might take. *Moore v. Duran*, 687 A.2d 822 (Pa. Super. 1996).

Service of the Complaint is subject to the rules of civil procedure governing service. Pa.R.C.P. Nos. 400-403.

b. Parties:

All persons, whose rights and interests would be affected by a judgment, must be joined. *Hurtzfeld v. Green Glen Corp.*, 330 Pa. Super. 513, 552 A.2d 306 (1989). Permissive joinder of other persons involved in the chain of title is also permitted.

c. Allegations:

The plaintiff must allege that (s)he has a right, lien, or other interest in the land, and the Complaint must allege with specificity the basis upon which that claim of right, lien, or interest is based.

The plaintiff must also:

- i. describe the land by metes and bounds. The better practice is to include this description in the body of the Complaint, rather than incorporation by reference; and
- ii. in an action to compel an action in ejectment, allege actual physical possession. *Girard Trust Co. v. Dixon*, 335 Pa 243, 6 A.2d 813 (1939). If possession is contested, a quiet title action is proper.

d. Defenses:

All of the preliminary objections and defenses available in a civil proceeding are available in a quiet title action. *Versailles Twp. Authority v. McKeesport*, 171 Pa. Super. 377, 90 A.2d 581 (1952).

Typical defenses, such as adverse possession, estoppel, superior title, laches, or res judicata must be pled as new matter in an Answer pursuant to Pa.R.C.P. No. 1030.

Under Pa.R.C.P. No. 1031, a defendant may counterclaim for any contractual or quasi-contractual claim, or for claims that arise out of the same set of circumstances set forth in the Complaint. Such counterclaims could include claims for: the fair value of improvements; reimbursement of taxes; specific performance of any contract that gives the defendant the right to use or occupy the land; fair rental value of the property, of even ejectment, if the quiet title action

does not seek an Order compelling the defendant to commence an action in ejectment. If so, the ejectment action must be brought in a subsequent action and may not be pled as a counterclaim.

i. Adverse Possession:

One who occupies property openly and continuously for twenty-one (21) years, without the consent of the owner gains absolute, marketable title to that property. *Philadelphia Electric Co. v. City of Philadelphia*, 303 Pa. 422, 154 A. 492 (1931).

If the defendant claims title by adverse possession, that claim should be made in a counterclaim, although it acts as well as a defense to the plaintiff's cause of action.

ii. Prescription:

Rights acquired by prescription are an analog to those acquired by adverse possession. "The chief distinction between the doctrines is that in adverse possession, the claimant occupies or possesses the land . . . whereas, in prescription, the claimant makes some easement-like use of it . . . A prescriptive easement is created by (1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of 21 years." *Newell Rod and Gun Club, Inc. v. Bauer*, 409 Pa. Super 75, 597 A.2d 667, 669-70 (1991).

To acquire a prescriptive easement, the use does not have to be exclusive, nor must it be constant. There must simply be evidence that over a period of 21 years, the unexercised right of land that they considered to be a property right. *Id.*

iii. Consentable Lines:

The doctrine of consentable lines exists separate and apart from that of adverse possession. A litigant may prove that two properties are divided by a consentable line, irrespective of what the deed reflects, in one of two ways:

- (1) by establishing that there once existed a boundary dispute; that a line was agreed to as a compromise; and that both parties consented to the line, or;
- (2) by proving that each party has claimed land on each side of an openly-recognized line for 21 years. *See, Plott v. Cole*, 377 Pa. Super. 585, 547 A.2d 12167 (1988). When a consentable line is established, each neighbor gains marketable title to the land behind

the line, regardless of what their deeds say. *Soderberg v. Weisel*, 455 Pa Super. 158, 687A.2d 839 (1996).

e. **Resolution of the Quiet-title Action:**

The factual disputes in a quiet-title action are usually quite limited, and the matter is often resolved by Summary Judgment, or on a case-stated basis. To the extent that there are factual disputes, they are resolved by the court, without a jury. The burden is on the plaintiff to prove the strength of his title, not the weakness of the defendant's, that the plaintiff must do by a fair preponderance of the evidence. *Kaiser Energy, Inc. v. Commonwealth*, 129 Pa. Commw. 628, 566 A.2d 905 (1989).

If the plaintiff makes out a *prima facie* case, the burden shifts to the defendant to establish a superior title.

If the quiet-title action is one to compel an action in ejectment, the only issue is the Plaintiff's actual possession. The underlying merits, i.e., who really owns the land, are reserved for the ensuing ejectment case. *Seven Springs Farm, Inc. v. King*, 235 Pa. Super. 450, 344 A.2d 641 (1975) (proof of barbed wire fence, construction of roads to remove lumber, and use for recreation, were found to be insufficient proof of "actual possession" of the land).

If the claim of title is by adverse possession, the possession must not be only "actual," it must be exclusive. If not, the interest awarded will not be in fee, but will be some lesser interest, such as a prescriptive easement. *Newell Rod & Gun Club, Inc. v. Bauer*, 409 Pa. Super 75, 590 A. 2d 667 (1991).

f. **Judgment:**

The judgment will be determined by the form of relief sought. In addition to entering a judgment for and against the litigants, the court may direct appropriate non-parties to take certain action, such as recording or amending a deed, striking a lien, or modifying a subdivision plan. Damages may be awarded where appropriate.

6. Litigation Strategies:

Litigating the title insurance claim is no different than litigating any commercial litigation matter – pleadings, interrogatories, document requests, depositions and trial. There are, however, a couple of strategic issues that tend to recur in this type of litigation.

a. **Pretrial Motions:**

Litigating disputes over title to real estate is by and large technical, statutory-driven litigation that many litigators, and courts for that matter, are not accustomed to seeing on a daily basis. The cases are rendered all the more

complicated by the involvement of the title insurance policy and its indemnity qualities, which remove it from the universe of casualty/liability policies with which most courts and practitioners are accustomed to dealing. It is not unusual, therefore, to be faced with a Complaint that does not state a technical cause of action, either under the theory advanced (*i.e.*, action to quiet title based upon doctrine of consentable lines) or under the title policy (*i.e.*, there is no loss). It is tempting under such circumstances to file preliminary objections and/or motions for summary judgment.

Consider fully whether the cost of filing such motions outweighs the potential benefit, because the chances are that the court will deny the motion. When a court does not understand the cause of action, or the policy of title insurance, it is easier to deny such motions, which are interlocutory, than to issue a final order and risk being reversed on appeal. Courts are also aware that the majority of such cases settle (ignoring the fact that they often do so because at least one of the litigants may be concerned about the level of sophistication of the participants in the process).

If you intend to file a motion for summary judgment, then it is probably a good idea to file preliminary objections to get the education process started. This only works, however, in counties where the same judge is going to be ruling on the two motions.

The point is to be circumspect about filing such motions. Most title companies require that counsel confer with them and obtain consent before doing so. Even if there is no such requirement, it is probably a good idea anyway, because they can be expensive.

b. The Indemnity Claim:

When defending a title company against a claim under a title policy, it is not unusual that the claim arose because of an error committed by an independent agent. If so, the title company is entitled to indemnity that, hopefully, is covered by an errors and omissions (“E&O”) liability policy owned by the agent. In order to perfect the indemnity claim, counsel for the title company should:

- i. Demand that the agent put it carrier on notice. If the agent balk, counsel should do so himself;
- ii. request that the E&O carrier assume the defense of the claims;
- iii. when the request is denied, keep the E&O carries apprised of the status of the case, particularly settlement discussions;
- iv. invite the E&O carrier to participate in settlement;

- v. notify the E&O carrier of any settlement before it is consummated. Invite it to object, and, if it does, to take over the litigation.

Each of these steps would then be pled as a factual predicate to any Complaint against the agent and its carrier (under a third-party beneficiary theory) to be indemnified for any loss, including attorneys' fees, incurred as the result of the agent's negligence.

c. **Practice Pointers:**

i. Evaluation of Coverage:

- (a) outside counsel should clearly define its role, whether defending an incurred against a claim or rendering coverage advice. Retained counsel may not do both, and, if during the representation of an insured, outside counsel learns of an event or occurrence that could affect coverage, he/she may have to withdraw;
- (b) Ordinarily, in house counsel has evaluated coverage, or consulted outside counsel to do so, and defines the scope of retention in a form engagement letter.

ii. Initial Strategy:

- (a) Evaluate whether a loss has been incurred. If not, nothing need be done;
- (b) Consider whether it would be appropriate to limit an insured's potential loss by pro-actively filing an action to quiet title or a declaratory- judgment action.

PRACTICE PONTER: Both of these causes of action are statutory, and the statute must be researched to insure that the cause of action complies with the statutes, both in form and in substance.

- (c) Investigate the conduct of all independent contractors, including the abstract company, approved attorney, or other agent issuing the commitment, for purposes of pursuant a possible indemnity claim.

PRACTICE POINTER: Find out whether the agent owns any E&O insurance coverage, and, if so, place that carrier on notice of a potential claim as soon as possible.

iii. Case Preparation:

- (a) Retrieve the underwriting file. In the more-case, prepare a timeline of events.

(b) Witness interviews:

PRACTICE POINTER: When conducting these interviews, be conscious of the relationship between the witness and possible adverse parties so as to avoid ethical constraints against *ex parte* interviews of represented persons or parties.

(c) Draft pleadings:

- (1) Complaint or Answer;
- (2) New matter;
- (3) counterclaim;
- (4) cross-claim against named defendants;
- (5) third-party complaint against other not named as defendants;
- (6) preliminary objections.

(d) Draft discovery:

- (1) Interrogatories;
- (2) document production requests (to parties only);
- (3) third-party subpoenas.

PRACTICE POINTER: New Rules of Civil Procedure require that notice of intent to serve a subpoena on a third party be provided to the opposing party 20 days in advance. If there is an objection, leave of court is required.

- (4) Depositions;
 - i. the insured;
 - ii. the adverse claimant;
 - iii. title agent;
 - iv. other relevant witnesses.
- (5) Requests for admission;
 - i. to authenticate documents;
 - ii. to establish clear and indisputable facts.

- iii. identify areas of contention.

PRACTICE POINTER: Requests for Admission have some uses in cases such as this that are usually controlled by documents and that have few undisputed facts. If the practitioner wishes to avail him/herself of this somewhat vestigial tool, it is critical that each request contain one, simple declaratory statement; include a reference in the record to support the request; be non-confrontational and non-argumentative. Also, be sure to include an interrogatory, asking for the basis for each denial.

(e) The Motion for Summary Judgment:

Few areas of litigation are more conducive to summary judgment than a title insurance claim. Courts, however, are loath to grant such motions, and careful consideration should be given to filing such a motion. That consideration should include:

- (1) Obviously, whether the material facts are disputed;
- (2) The time and expense of preparing the motion in relation to the likelihood of success;
- (3) Whether in-house claims counsel is in agreement.

PRACTICE POINTER: Such motions are a bone of contention with claims counsel, and many engagement letters proscribe them without prior approval. Even without such a proscription, prudent litigation counsel is best served by consulting with in-house counsel before filing.

(f). Third-party Claims:

Given the potential exposure represented by policy limits, title insurance premiums are remarkably low. That is because, if everyone is doing their job, the title company's exposure should be limited to situations of undetectable fraud, or situations where a lien intervenes between insurance of the commitment and recording. Needless to say, those are not the only situations giving rise to a claim, which means, in most situations, someone has not done their job properly – most commonly in situations where on behalf of a good customer, an agent compromises prudent underwriting. In such situations, a third-party claim or cross-claim for indemnity is appropriate.

PRACTICE POINTER: Before filing such a claim, get the approval of the title company, who may have practical business reasons for electing not to pursue such a claim. If the title company chooses not to proceed,

counsel's advice, and the declination, should be clearly set forth in writing. In the event the decision is made to proceed, the following is a checklist of things that should be done:

- (a) A copy of the agency agreement;
- (b) obtain a copy of all underwriting guidelines that may have been violated;
- (c) interview the agent;
- (d) notify the agent of a potential claim and ask the agent to notify its E&O carrier;
- (e) obtain a copy of the E&O policy (if possible);
- (f) notify the E&O carrier of your claim and invite it to assume the defense/prosecution;
- (g) keep the E&O carrier advised of all developments and the ongoing cost of the litigation;
- (h) before settlement, advise the E&O carrier of the proposed settlement and invite it to oppose the settlement, if it wishes.

PRACTICE POINTER: When seeking indemnification for a settled claim, you will inevitably be faced with the “Santa Claus” defense; *i.e.* a claim that where settlement was unnecessary, too costly, or untimely. By keeping the putative indemnitor advised as the case proceeds, this defense is significantly weakened.