

## OVERVIEW OF TITLE INSURANCE CLAIMS AND LITIGATION

By

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### Editors Note:

These materials are presented as a supplement to *The Law of Title Educational Series*. 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*. Mr. Foster is a partner in the Philadelphia law firm of Klehr, Harrison, Harvey, Branzburg & Ellers. Mr. Foster 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.

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NB The Author cites primarily Pennsylvania case law and the Pennsylvania RCP. The Editor further suggests the reader cross reference this article to the following supplementary resources:

- For further supplementation to those sections dealing with “the Insuring Clauses”, the “Exclusions from Coverage” and “Conditions and Stipulations” of the ALTA Policy, we suggest the reader refer to the numerous case law citations which appear in Gosdin, Title Insurance Underwriting, A Comprehensive Overview, Second Edition, published by the ABA Section of Real Property, Probate & Trust Law. In the Gosdin text the Insuring Provisions may be found at pp. 50-60; the Exclusions from Coverage may be found at pp. 63-90; and the Conditions and Stipulations may be found at pp. 103-152;

- The reader may further want to supplement his research by reviewing Thompson On Real Property, Thomas Edition, Chapter 93, prepared by Professor John McCormack, School of Law, Loyola University, Chicago

NB The Editor, with permission of the author, has taken the liberty of inserting some editorial reference notes particularly with regard to ALTA Policy Exclusion 3(b). It should be mentioned however that the "created, suffered, assumed or agreed to" 3(a) exclusion is invoked by title insurers more than any other exclusion from coverage under the ALTA Policy when excluding title coverage for "defects, liens or encumbrances" under Ex. Cl. 3. Readers may be interested in the following additional resources regarding exclusion 3(a): *What Constitutes a Charge, Encumbrance or Lien within Contemplation of a Title Insurance Policy*, 87 ALR3d 764; *Defects Affecting Marketability of Title Within the Meaning of a Title Insurance Policy*, 18 ALR4th 764; Taub/Rydeburg, *Defects Created, Assumed or Agreed to by the Insured*, 306 PLI/Real 489 (1988); Sher/Miller, *Interpreting the Term "Created" in Policy Exclusion 3(a)*, 434 PLI/Real 349 (1993).

## 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).

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 [Ed Note: see 1992 ALTA Policy Ex. Cl. 3(b); C&S 1(c); 1966 ALTA Commitment C&S 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 Owner's Policy Integration Clause C&S 15); *Kirwin*, supra. Distinguished; TLA Newsletter, Fall, 2002 Exhibit 38, Commentary].

The title insurance policy requires in the first instances that an insured notify the company within a prescribed period of any liens or defects in title. If the insured fails to notify the company in the time specified (90 days), the company may deny coverage if the delay has prejudiced its ability to defend against the claim, or otherwise cure the defect. *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 require notice, in writing, together with a proof of loss or damage sworn to by the insured within

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<sup>1</sup> Section 3 of the Conditions and Stipulations of the Policy. All references are to the 1992 ALTA Owner's and Loan Policies of Title Insurance.

90 days after the loss or damage has been computed. A typical notice provision requires:

**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 or interest that is adverse to the title or the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable under this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured, all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no way prejudice the rights of any insured, unless the Company shall be prejudiced by the failure, and then only, to the extent of the prejudice [Ed. note 1992 ALTA C&S 3]. 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. Section 4(a), Condition and Stipulations. 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 clauses<sup>2</sup>, the exclusions from coverage<sup>3</sup>, the Schedule B exceptions and the Conditions and Stipulation. 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 4 of the Conditions and Stipulations 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 adverse to the title or interest as insured, but only s to those stated causes of action alleging a defect, lien, or encumbrance or other matter 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.

<sup>2</sup> 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 ad from the land; (5) an insured mortgage is deemed invalid or unenforceable; (6) a competing mortgage is given a higher priority over the insured mortgage; (7) a mechanic’s lien is deemed to be superior to the insured mortgage; (8) a mortgage assigned is invalidated (provided the assignment is shown in Schedule A). Items 1-4 appear in both loan and owner policies; items 5-8 in loan policies only [NB Ed. Note: cites to ALR Annotations and case law may be found on the *Policy Format Link* and *Claims Litigation Index Link* and the major treatise named therein].

<sup>3</sup> Exclusions from coverage include: (1) governmental regulation of use; (2) eminent domain; (3) lien and encumbrances created 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.

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.

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 Paragraph 6 of the Conditions and Stipulations, the insurance company may pay the policy limits to the insured, thereby satisfying its obligations and effectively terminating the policy, or settle with the adverse claimant.

### 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: C&S Cl. 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 that the insured may have undertaken to settle the matter itself before tendering the claim. C&S Cl. 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 C&S 4 regarding the Duty to Defend and/or C&S 9 regarding Limitation of Liability. In that event the insurer should prevail under its rights of subrogation under C&S 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 proactively.

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:

1. First, no claim is perfected until an actual loss has occurred [Ed. note: *see* Ex. Cl. 3(c), C&S 7 (a)(ii) and 60 ALR2d 972 regarding *Measure of Damages*]. 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);
2. 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.)

Section 4(c) of the Conditions and Stipulations provides that:

Whenever the company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from 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 defend.<sup>4</sup>

<sup>4</sup> 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. Summote v. First American Title Ins. Co., 180 NJ Super. 605, 436 A.2d 110 (Ch. Div. 1998).



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. Paragraph 9(b), Conditions and Stipulations.

## 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:

##### **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 by pa. R.C.P. No. 1061 *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)(1)];
- 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)].

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).

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 Protonotary, 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)].

**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, or 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:

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). Any interruption in the chain of title will start the 21 years running anew (*i.e.*, if a spouse deeds jointly-held property to the other spouse individually, but they remain married and continue to occupy the land together, the 21 years will begin to run from the date of the inter-spousal transfer).

### 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 (1795) (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 A2d 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 not 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 carrier 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 insured 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 proactively filing an action to quiet title or a declaratory- judgment action.

**PRACTICE POINTER:** 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-complicated 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:

- a) Obviously, whether the material facts are undisputed;
- b) The time and expense of preparing the motion in relation to the likelihood of success;
- c) 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.

iv. 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.

#### **D. Current Developments in Title Insurance Litigation:**

Most current title insurance litigation involves the typical issues that have arisen over the years; an insured making a claim for consequential damages; an insured discovering that a neighbor's fence, or corner of a garage has been placed on his property; a title agent accepting non-collected funds closing; a title agent accepting the promise of a seller that a tax lien will be removed; or an intervening lien being placed on a parcel of real estate before an insured lien or deed is recorded.

One area of litigation that is becoming more prevalent is that of identity theft. A mortgagee borrows money, repayment of which is secured by a second mortgage on a home. The loan goes immediately into default. When notified, the true owner of the property professes ignorance of the transaction. In the meantime, the recipient of the money has absconded. The title company has insured the capacity of the borrower and so will be liable for the second mortgage up to the policy limits.

The following is a list of cases that reflect some of the title insurance industry' pre-litigation underwriting concerns:

1. Buffalo Township v. Jones, 778 A.2d 1269, 2001 Pa. Commw. LEXIS 427 (2001) (no abandonment of railroad right-of-way and no revision to property owner; conversion to a recreational trail under National Trails Act);
2. In Re: Sterling Packing Corp., 265 B.R. 701, 2001 Bankr. LEXIS 1038 (2001) (chapter 11 plan of reorganization made no mention of creditor's secured claim or statutory mechanics lien; held that secured claim is not divested or extinguished and that statutory lien remains in existence and attaches to the property);
3. In Re: Palcini, 261 B.R. 836, 2001 Bankr. LEXIS 452 (2001) (purchaser of property at sheriff's sale completed prior to filing of bankruptcy petition, but before delivery of deed, permitted to perfect title and proceed to eviction);
4. Exton Plaza Associates v. Commonwealth, 763 A.2d 521, 2000 Pa. Commw. LEXIS 614 (2000) (transfer of property by general partnership to a limited partnership as part of a partnership reorganization not subject to realty transfer tax);

5. Echevarria v. Chicago Title & Trust Co., 256 F.3d 623, 2001 U.S. App. LEXIS 15050 (2001) (title company did not violate Real Estate Settlement Procedures Act by charging home buyers more than the amount charged by the Recorder of Deeds to record a mortgage);
6. SASCO 1997 NL LLC v. Zudkewich, 166 N.J. 579, 767 A.2d 469 (2000) (four-year statute of limitations under New Jersey's Uniform Fraudulent Transfer Act begins when the subject property is transferred, not the date of judgment. A reasonable commercial creditor can obtain the benefit of a one-year tolling provision by conducting an asset search within one year after default);
7. Dressel Associates, Inc. v. Beaver Valley Builders Supply, Inc., 778 A.2d 800, 2001 Pa. Commw. LEXIS 428 (2001) (Borough's judgment for reimbursement of costs to enforce a zoning ordinance does not have priority over a prior mortgage as a municipal claim to remove a nuisance);
8. SEPTA v. Board of Revision of Taxes, 777 A.2d 1234, 2001 Pa. Commw. LEXIS 346 (2001) (SEPTA property used to effectuate its public purpose of operating a transportation system is immune from real estate taxation. Commercially leased space to raise revenue is taxable.);
9. Sanft v. Borough of West Grove, 437 A.2d 133 (Pa. Commw. 1981) (municipality must file claim for water rents or rates within three years of year in which the taxes or rates are payable in order to retain priority over intervening purchasers and lienors. Municipality may file after three years, but loses priority).