



# STEWART TITLE GUARANTY COMPANY

CLAIMS WEBINAR

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# CLAIMS AND OTHER NASTY THINGS TO AVOID

By:

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# The claim process (in general)

- Claim is submitted to underwriter (either from agent, insured or third party)
- Acknowledgment is sent to insured with Proof of Loss (promulgated form)
- Investigation by claim attorney (usually includes request for file or information from agent)
- Coverage determination and, if covered, plan of action determined.
- Matter concluded and file closed.

# Examples of recent claims

# FIXING THE FIX

Owner owns Lots 1 & 2 and sells Lot 1, but Deed and Deed of Trust incorrectly describe both lots. Owner contracts to sell Lot 2 and title company discovers error. The prior title company is contacted, a corrected Deed is filed and sale of Lot 2 closes. Six months later the insured is notified that his Lot 2 is posted for foreclosure in two weeks. Unfortunately, the deed of trust was never corrected.

# ACCESS

1. Easement of record, but never used. No survey is in the file. Easement is expressly insured and now owner of servient estate contests easement and claims it has been abandoned. Litigation ensues.

- 2. Involves undeveloped acreage. Prior plats and agreements establish an “access easement” running east-west through large tract. When tract is actually subdivided and the southern tract is sold for development, the property line is moved north of the access easement by 8 feet, to meet an apparent City requirement for placement of the fire hydrants.

Buyer and seller enter a new easement agreement and later file a revised plat to reflect the new access abutting the northern tract, which is its only access. Later, when property northern tract is sold for development, access is insured by way of prior plats and new easement agreement.

- Deed of trust on servient estate (southern tract) is recorded before new easement agreement and revised plat. As construction on insured tract commences the note secured by the servient tract is sold, new lender forecloses and claims new easement and plat are inferior and were "cut off" by foreclosure and old plats do not provide easement to new tract as subdivided, so that our insured is landlocked.

# FORGERY AND IDENTITY THEFT

Forgery-Signing someone else's name, usually outside of closing.

Actual examples:

- current girlfriend forges ex-wife's signature on deed.
- adopted brother forges sister's signature on deed to sell inherited property.
- forged release, often not in connection with a transaction.

Be careful of documents executed outside of closing and "stray" releases.

# Identity theft

- Usually in connection with mortgage fraud.
- Actual case:
  - Property was foreclosed and purchased from lender.
  - Property was “flipped” from seller to A then to B.
  - B was not the real B.

- Mortgage broker had stolen B's identity, used it to get financing and had established a phone number and fake letterhead to verify false employment information on loan application. Real B, from California, contacts lender when she received a default notice and threatened to sue for wrongfully damaging her credit if the lender foreclosed. We eventually convinced B to convey to a subsidiary entity subject to the lien so the lender could foreclose.

# DEAL IS NOT DONE UNTIL... PAPERWORK IS DONE (CORRECTLY)

## True Real Life Examples I

Have Seen:

1. Missing page in DT
2. DT without legal description (2x)
3. DTs recorded in wrong order
4. DT on wrong property
5. Deed and DT filed 18 months after closing.
6. DT with incorrect legal description
7. Deed without legal description
8. Deed and DT recorded in wrong county

# OH, YOU MEANT THAT LOT!

Owner is refinancing. Order is phoned in by lender. Title does title search and examination and prepares title binder. Loan closes at lender's office. Claim is filed for missing mortgage payoff. Claim is paid. Loan is foreclosed. Loan is assigned back to original lender. Original lender sells property. Purchaser moves in. Lender says we insured wrong lot. Gotcha!! Owner owned two adjacent lots. What were the odds of that?

# The best (or worst) yet on property mix ups

- Owner seeks financing for improvements to mobile home. He owns 1 ½ acres, mother owns neighboring tract. Home encroaches on mother's tract, so she deeds ¼ acre to him. Loan closes and policy is issued. Lender forecloses then makes a claim, as it seems the DT legal only covers the 1 ½ acre tract, while the policy insures the validity of the lien only on the ¼ acre tract. Needless to say, neither the borrower who was foreclosed nor his mother are very cooperative in curing.

# PAYOFF ODDITIES: RELEASE FROM WRONG LENDER

Sellers had seven mortgages on their property. The first five were with the same lender. The title agent sent seven releases of mortgage to the lender. They signed all seven. The other lender filed foreclosure based upon their two mortgages. Isn't word processing great? You just click, copy and click, paste. No extra typing.

# WRONG LOAN

- Borrower has two loans from same lender, one secured by property, other was car loan. Closer, unaware of car loan, requests payoff, which lender gives, but on wrong loan. We are notified when lender is foreclosing, threatening to “wipe out” our insured lender.

# OTHER DEBT

- Seller has loan secured by property, which is paid at closing. Same lender had recently obtained a judgment against seller on other debt. AJ was filed after sale, but lender claims that “dragnet” clause in DT included the judgment. Case was tried and clear instructions from closer when sending payoff, including letter specifying loan number and that release of lien was required, saved the day.

# WHEN IS A PAYOFF, NOT A PAYOFF

Closing of refinance. Title binder shows three unreleased mortgages. Owner says one mortgage was paid off by Brand X Title Company five months ago. You check with Brand X. Yes, they refinanced and paid off two mortgages. You close and payoff two mortgages. What do you mean they are foreclosing?

# ONE RELEASE IS AS GOOD AS ANOTHER

Closing a refinance. Title binder shows one mortgage to be paid and released. You obtain a payoff. It seems awfully low. You pay. The lender releases. Owner comes to you with foreclosure demand. Why didn't someone tell me the mortgage had been assigned?

# Sometimes its not worth the paper its written on

False bills paid affidavits from contractor. Subs then file lien affidavits.

False affidavits of debts and liens. Other Deeds of Trust filed before closing.

False heirship affidavits.

False homestead designation.

# THROWING GOOD MONEY AFTER BAD

You close on a transaction. A contractor is to install some aluminum siding after closing. You holdback from the seller's proceeds for the installation of the siding. You send one check to the contractor. It gets lost. You stop payment. You send a second check. The buyer comes in and says they paid the contractor. You cut a third check and give it to the buyer. How many times do you have to pay for one improvement?

# WHAT YOU CANNOT READ, CAN HURT YOU

An undeveloped tract of land is being bought by some land investors. You search the chain of title and locate a 1947 warranty deed. The second page of the warranty deed from the county clerk's records is illegible. You insure the property. Fifteen years later, the land is being sold to a shopping center developer with visions of a grocery store on the property. The new title insurance agent uses a different title plant to locate a better copy of the 1947 warranty deed. They can read the second page. SURPRISE!!! What is an overworked title examiner to do?

# AT LEAST, I KEPT MY EYES ON THE ROAD

You are closing on a construction mortgage. You drive out to do a lot inspection before recording the mortgage. All you can see is native vegetation, at least, that is all you can see from the driver's seat of your car. You record. You forget the lot inspection. Years later, the general contractor for the two story motel on the lot claims he put out wooden survey stakes to mark the footings for the foundation the night before your inspection. The mechanic's liens total \$1.5 million. You can't remember what you saw or didn't see. Besides, you can't see wooden survey stakes at 30 miles per hour. That's right.

# IF YOU CAN'T TRUST A LAWYER, WHO CAN YOU TRUST?

A lawyer representing the seller sends you a purchase agreement with a metes and bounds legal description on an out-of-county closing. You send the purchase agreement with legal description to the title insurance agent in that county. The other title insurance agent performs a title search and issues a title binder showing title in your seller's name, but the legal description is on an adjacent piece of property. The lawyer prepares the warranty deed for the seller to sign. The lawyer uses the legal description on the title binder. You close on the second legal description. What is an overworked escrow officer to do?

# Restrictions

Large tract is restricted to residential use only in 1948. Over the next 50 years the property is subdivided and transferred many times, but never developed, other than a few houses on some of the smaller parcels. Insured purchases prime tract, which is now frontage, for commercial development. When construction starts, neighbors object and lawsuit is filed. Even the old stuff matters.

# You want to do what with the property?

- Prior deed restricts property to residential and some commercial uses, but prohibits use for storage in multiple buildings. Examiner misses the restriction. Guess what the insured wants to do with the property?

- Construct a self storage facility for which plans have been drawn and construction just commenced when insured is notified of restriction. Appraiser we retain determines that there is no diminution in value, therefore no loss on the policy, as the property has other commercial uses allowed by restrictions. Very unhappy insured sues for bad faith.

# Minerals, timber and gravel

- Several claims involving missed mineral reservations, either in whole, or partial interests.
- Prior timber deed missed in examination results in claim for diminution for lost timber rights.
- Reservation of "clay, sand, gravel, sod and grasses" in deed several links back in the chain leads to litigation against the insured by son of the owner that made reservation for right to remove gravel.

# Mortgage Fraud

- Red Flags:

1. Does the transaction involve a flip?  
(A recent or simultaneous sale, particularly with a sharp increase in price.)
- ✓ Is the seller in the contract in title?
  - ✓ Does the commitment reflect the true record owner as of the plant date?
  - ✓ Is the owner shown on the tax rolls consistent with the record owner shown in the commitment?

## 2. Is a “straw buyer” involved?

- ✓ Is there any indication that the ultimate purchaser will not take immediate possession of the property?
- Is there a trust involved and who is acting on behalf of the trust?

3. Is there any indication of falsified credit applications?
4. Is the appraisal inflated? Is there a large disparity between the sales price and appraised value on tax rolls?

Are you being asked to do anything  
which violates the lender's  
closing instructions?

- ✓ Are there any payments to third parties from the sales proceeds, receipt of funds from third parties, use of gift funds, or use of cash in the transaction?

# Is there anything misleading or false on settlement statement?

- Are all sources of funds listed, are there any disbursements to parties not identified on the settlement statement?

# The Players:

- ✓ "Straw buyer"
- ✓ Appraiser
- ✓ Closer
- ✓ Seller
- ✓ Lender
- ✓ Perpetrator (mortgage broker)

# Lender's responsibility

- Lenders always look at the transaction in 20-20 hindsight.
- Many will play the victim, regardless of the information or knowledge they possessed at the time the loan was made.
- Costly and time consuming litigation, even if no basis for liability.

# Loan Brokers

- Often at the root of the problem.
- Some courts have held that they are the agent for the borrower, not the lender.
- Do not assume that all information provided to a loan broker gets to the lender, or that it gets there exactly as it left your office.
- We have seen altered commitments, run sheets and settlement statements, as well as forged documents.

# The Consequences

- Suits against Title agents (and sometimes underwriters) alleging a “conspiracy to defraud” lenders.
- Action by Feds (HUD and other agencies) and state regulators (TDI) for violations of RESPA and state regulations. In one case involving multiple transactions a company was fined a total of \$6.2 Million.
- Criminal action against closers involved in transactions. In one case, closer was sentenced to 97 months in federal prison.

# General Closing Instructions

- Mortgage Bankers Association Draft 02/06
- "Fraud Prevention"

Lender is committed to taking the strongest action, including criminal referrals, against settlement agents and signing agents who, by their acts, create an increased risk of loss to Lender and a bad reputation for the mortgage lending industry. Such acts include altering title documents, back-dating Loan Documents, falsifying settlement statements, facilitating identity theft, committing notary fraud, turning a blind eye to false down payments or fraudulent checks, creating false payoff figures, etc. See Section B.9 for Settlement Agent responsibilities in the event such actions are committed or encouraged by an employee of the Lender or Mortgage Broker.

**If any one or more of the following circumstances is known (or should have been known in the normal exercise of its duties) by the individual Settlement Agent or Signing Agent actually conducting the Closing to exist during any stage of this transaction, Settlement Agent must immediately contact Lender and postpone Closing or Disbursement of the Loan until Settlement Agent receives permission to proceed from Lender's designated Contact Person in the Lender Contact Information section of the SPECIFIC CLOSING INSTRUCTIONS:**

**I.1 Property Transfers.**

a. This transaction will occur in conjunction with, or simultaneously with, any other sale, transfer or financing of the Property (e.g., double escrow, double closing, flip sale, pass through, equity skimming, etc.) except for the following:

- i. a junior loan provided or approved by Lender;
- ii. the Property was acquired through inheritance;
- iii. the Property is a single-family residence and Seller is a federal government agency, other than Fannie Mae or Freddie Mac;
- iv. the Lender has approved the existence of multiple concurrent transactions in the Specific Instructions.

b. The Property has been conveyed within 6 months preceding the Closing Date and/or the new Loan represents an increase of over 25% of a previous Security Instrument recorded in that same time period, unless the conveyance or Security Instrument was noted in the Title Document and accepted by the Lender in the Title Insurance section of the SPECIFIC CLOSING INSTRUCTIONS.

c. A full or partial transfer of the Property has occurred or will occur on or after the issuance date of the Conveyance Document, except for the transfer to Borrower by the vested owner shown in the Conveyance Document.

d. The Loan is for purchase money and Borrower has acquired record title to the Property prior to the Closing Date.

e. The Loan is for a refinance and Borrower has not acquired record title to the Property prior to the Closing Date.

i. The Earnest Money Deposit covers substantially all of the Seller's "profit" or the Down Payment, and may not be "real".

**J.2 Material Facts.**

Any material fact that may have an impact on Lender's decision to make the Loan. A material fact includes but is not limited to, any significant information on changes in the value or title of the Property, changes to the sales contract (if a purchase), changes to the financing, bankruptcy, enforcement of creditor's rights, or any knowledge or indication of suspicious activity.

**J.3 Fraud, Misrepresentations, Falsehoods.**

- a. a fraud or scheme related to the transaction has been or may be committed.
- b. any party to the transaction, including but not limited to Borrower, Seller, Real Estate Broker, Builder, Mortgage Broker, Title Insurer, Appraiser, Signing Agent or Settlement Agent has made a material misstatement or committed a falsehood.
- c. a loan document or invoice has been tampered with, falsely generated, bears any incorrect or falsified data, bears different names or addresses for the same party, or bears a fictitious name.
- d. a party's handwriting or signature is inconsistent on the Loan Documents.
- e. Borrower is being paid to lend credit or identity to the transaction.

**J.4 Property Condition.**

Recent changes in the condition of the Property, including fire, flood, regional disaster, or other damage.

**J.5 Parties to the Transaction.**

The employee of Signing Agent who handles the transaction has a conflict of interest, is a party to the transaction, or is a family member, a relative or a close personal friend of any party to the transaction. "Relative" includes spouse, parent, child, brother, sister, aunt, uncle, niece, nephew, cousin, grandparent, fiancé or life partner, as well as corresponding in-law and step relations.

**J.6 Incomplete Loan Documents.**

Any attachment referenced in the **Required Documentation** section of the **SPECIFIC CLOSING INSTRUCTIONS** is not attached.

**J.7 FTA Allowable Costs.**

Borrower's actual costs are less than the allowable closing costs set forth in the **Conditions to be Satisfied Prior to Disbursement of Loan Proceeds** section of the **SPECIFIC CLOSING INSTRUCTIONS** (excluding prepaid interest and tax and insurance escrows).

- J.8 Title Document.
- a. If the Title Document does not conform with the Title Policy requested by Lender, or the Title Document conflicts with the Title Policy requested by Lender.
- b. If the title owner shown on the Title Document does not match the Seller on the purchase contract. (Note: Except in a Contract for Deed refinance, the transaction cannot be subject to the Seller acquiring title to the Property.)
- J.9 Loan Documents.
- The Loan Documents are incomplete or inconsistent with other information in the closing file.
- J.10 Identity.
- Signing Agent cannot determine the true identity of any signatory, or any signatory is unable to produce an unexpired form of government issued identification.
- J.11 Silent Second.
- A "silent second mortgage" has been or will be placed on the Property.
- J.12 Source of Borrower Funds.
- Borrower's funds are paid from a source other than a source specified in the **Source of Funds** section of the SPECIFIC CLOSING INSTRUCTIONS.
- J.13 Mortgage Broker.
- The mortgage broker is the same person or is owned or controlled by the same person as the Seller, Borrower, appraiser, Settlement Agent, or any other interested party to the transaction.
- J.14 Prior Interest.
- Borrower, real estate agent, mortgage broker, appraiser, Settlement Agent or any other person with an interest in the transaction, except Seller, has had a prior interest in the Property.
- J.15 Coercion, Undue Influence, Incapacity.
- Borrower or Seller appears to be coerced, under undue influence, or incapable of reading and understanding the nature of the transaction.
- J.16 Sales Price.
- There are any changes to the sales price or the escrow opening instructions or it appears that the Earnest Money Deposit is fictitious.
- J.17 Closing Fees.
- The amounts provided by the Settlement Agent and disclosed in the **Loan Fees, Charges, Reserves and Payoffs** section of the SPECIFIC CLOSING INSTRUCTIONS for services provided by Settlement Agent are incorrect.

**J.18 Non-Occupied.**

Borrower owns and occupies another residence not subject to this transaction and does not intend to occupy the Property (unless this is noted as an investment property on the **Property Description** section of the SPECIFIC CLOSING INSTRUCTIONS).

**J.19 Payments.**

Any request for a payment from Loan Proceeds is ambiguous, has missing or incomplete information, lacks a clear description, or appears unusual in any manner.

**J.20 Seller.**

If Seller is a business entity, Borrower directly or indirectly controls Seller or is related to Seller's owner.

**J.21 Commissions.**

If any real estate sales commissions are excessive for the market.

**J.22 Manufactured Housing (i.e., Mobile Homes).**

Settlement Agent discovers that the home has not been affixed to the land or converted to real property.

**J.23 Taxes.**

The Property tax assessment is 10% or more of the appraised value shown in the **Property Information** section of the SPECIFIC CLOSING INSTRUCTIONS.

END

# Class Actions

- RESPA violations:
  - overcharging for services rendered; generally held to not be a violation of RESPA.
  - markups; “fees charged by settlement service providers to consumers for settlement services provided by third party-vendors in excess of the fees that the third-party vendors charged to the providers for those services, without the providers performing any additional services.” Split in Federal Courts over whether markups violate RESPA.

# Other Class Action Litigation

- violations of antitrust laws, such as allegations that title companies discussed and set the price for title insurance in California during refi boom.
- Allegations that title companies do not provide applicable discount rates.
  - Texas R-8 and R-18



# STEWART TITLE GUARANTY COMPANY

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