RESPONDING TO TITLE INSURANCE CLAIMS

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CONTINUING LEGAL EDUCATION

Virtually every party to a residential or commercial transaction - whether as an owner, lender, seller, or lessee - assumes and believes obtaining a title insurance policy does at least two things.

First, it eliminates risk: Because the pre-requisite for a commitment to issue title insurance, much less the actual issuance of a policy of insurance upon the closing of the transaction, is a thorough examination of the indices to the land records, often accompanied by a competent survey of the land with a written report of survey, it is expected that these tasks will disclose any potential problems.

The title examination should reveal prior and current ownership, unreleased Deeds of Trust, outstanding liens, unpaid taxes, and unadministered estates against which creditors' may have the right to subject the real estate to sale to satisfy their claims. The examination should also show if the property has not been entered for taxation.

Additionally, in West Virginia an important factor disclosed during the title examination is any severance of the mineral estate. While those commonly involved in land transactions often assume ownership and use of the surface is all that will be conveyed, most sophisticated lenders and owners, particularly if the property is to be commercially developed, will expect, and require, that the title insurer include affirmative coverage for the undisturbed use of the surface. Accordingly, the prudent title examiner will need to obtain copies of the severance instruments so that the language affecting rights to the use and support of the surface can be made known to the interested parties.

The land survey should contain an accurate depiction of the parcel to be insured, whether

by itself or as a part of some larger tract from which it is to be carved, and show all roads and utility lines crossing or adjacent to the property as well as any improvements. Because the surveyor must actually visit the property in order to perform his work, he is in a unique position to report any apparent adverse uses: for example, the use of a portion of the property for access to adjoining tracts or encroachments.

The surveyor and the title lawyer must closely work together. The title exam by the lawyer might disclose utility rights of way, but seldom is there a plat of any kind showing their location. The survey, on the other hand, can show the location of the actual utility lines in or upon the ground on his drawing without reference to whether or not there are recorded documents granting rights for their installation and use, or rights of entry for maintenance.

Customarily the surveyor will communicate with each utility company holding utility easements disclosed by the title exam, and eliminate those which do not affect the property. His final survey and report will identify and show the location of those that remain as encumbrances.

The title insurance documents will be tied to the survey and will reflect the joint work product. Any problems should be readily apparent, and the vast number of potential problems eliminated. Most problems are readily solved by means of releases for unreleased but paid-out trusts and liens, completion of estate administrations, obtaining pay-off letters for liens and notes secured by deeds of trust where monies are still owed, and up-to date payment of taxes.

Through this process, the parties to the transaction have a high level of confidence that on the day of closing everything will go smoothly, and the buyer, lender and lessee will obtain a clear and marketable title. Our own experience tells us that, overwhelmingly, these confidences are achieved.

The second belief of the transaction participant comes into play when the expectations of the parties as to the first are unfulfilled.

Title insurance, like other insurance, is also viewed by those insured as a means of passing risk to someone else to protect their interest from harm. The title company has agreed to assume liability for certain actions which threaten the insured's right to the peaceful possession of the

property.

So, if you believe a client has, or might have, a claim under their title insurance policy what should they do? And how can you as a lawyer help them during the process?

First, let's make sure we're clear on what constitutes a claim. Any assertion of an interest in the property which might be adverse to the interest of an insured should be treated as a claim even though the potential of loss to the insured appears unlikely. One company has defined a "claim" or a "notice of claim" as any notice or demand by or on behalf of another towards an insured, or an action, as well as any statement which seems likely to ultimately result in a claim. There is an excellent, albeit now a little dated, annotation of what types of circumstances have been held to constitute a claim in 87 ALR3d 764. As well, there are two excellent annotations as to matters which are excluded from the coverage afforded under the policies by reason of the conduct of the insured. 87 ALR3d 515, 17 ALR4th 1077.

Clearly, a claim does not occur only where a lawsuit is filed seeking the ouster of your client from the property. Nor does it require a foreclosure notice. However, it probably does require more than the simple act of a surveyor checking the property lines of the adjoining landowner who puts survey stakes next to the wall of your client's master bedroom because there may be a perfectly simple explanation for his doing so. In the absence of a reasonable explanation for the survey stakes, all of these--clearly the first two and likely the third -- qualify as the basis for notice to the insurer.

Next, let's make sure that the client is the insured under a policy of title insurance. While this seems like it should be a fairly straight-forward question, it is not necessarily as clear to everyone as you might think. In the general body of insurance law, this is known as an "insurable interest."

First, let us consider banks and lending institutions. It is important to remember that it is the instrument that is insured, the deed or lease, and the person insured is identified not by who they are but, rather, because of their relationship to the insured instrument.

The easiest circumstance is if your client is a named insured on a policy because he or she

is named in the instruments described in the policy in the section commonly referred to as Schedule A. Your client is the named beneficiary of the insured Deed of Trust or is the grantee or lessee on an appropriate instrument transferring rights under the Deed of Trust or other writing.

But what if there is an assignment of the Deed of Trust but there is no endorsement amending the loan policy? Because it is the instrument which is insured, so long as your client has given value to the predecessor in title for the predecessor's interest, and is the holder of the indebtedness secured by the lien of the deed of trust, it is the beneficiary of the policy, and no endorsement is required naming that subsequent holder as the insured. ¶ 1, Policy, Conditions and Stipulations.

The same is not true, however, for assignees of other insureds. The policy runs only to the named insured, so any transfer of the property terminates the insurable interest, and therefore, terminates the coverage. Second Benton Harbor v. St. Paul Title Insurance Co., 337 N.W.2d 585 (Mich. 1983).

There are, of course, exceptions to the rule, but these are generally limited to "those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors of the policy." ¶ 1, Policy, Conditions and Stipulations. The issue is whether or not your client has succeeded to that interest "by operation of law" and not by virtue of any instrument of conveyance. Pioneer National Title Insurance Co. v. Child, Inc., 401 A.2d 68 (Del. 1979). Moreover, one reading of Child, supra, leads inevitably to the conclusion that if the insured obtained the interest in the property by virtue of **any** instrument other than that set forth in Schedule A of the policy there is no coverage for any claimed defects. Id., at 71.

Those of you who regularly represent partnerships which are purchasers or lenders in sophisticated transactions will recall that a Fairway endorsement is available under certain conditions to continue the insurance coverage if a partnership dissolves and its property which is subject to insurance becomes the property of the general and/or limited partners or their

permitted transferees, including a successor partnership, and the new owners carry on the partnership's business.

Ordinarily such a transfer is considered to be a voluntary conveyance and coverage would terminate, so this endorsement is very important if your client owner is a partnership and if any transfer to a successor partnership is a possibility.

Additionally, although this is not a claim issue directly, if such a transfer is within the contemplation of the parties, you should seek on behalf of your client a non-imputation endorsement to eliminate the exclusion from coverage appearing in the schedule of exclusions of the policy that denies coverage to your client because former partners, shareholders, officers, or other lenders if a loan policy, had knowledge of matters not appearing of record which could affect the title.

Obviously these endorsements significantly broaden the risk to the title insurer so an additional premium will usually be due (and sometimes a significantly additional premium, but it is nonetheless a great deal less costly than a new policy or the loss of the property), and it will take some additional time to obtain because some additional underwriting will have to be done. So plan ahead. If you ever have a circumstance where either or both of these endorsements would be applicable, your client will be pleased that you had the foresight to obtain the additional coverages for them.

Of course, there are always times when the policy has never been issued after the closing, even though there is compliance with all of the requirements of the commitment. No matter if your client is the party named in the commitment or otherwise qualifies under one of the successor rules already discussed, the coverage is available to him. The commitment for title insurance is akin to a "binder" for other types of insurance, so that the insurer is obligated to issue the policy, and to provide coverage, upon the payment of the premium and the fulfillment of the conditions of the commitment. However, always bear in mind that a title commitment is valid only for a finite period, unless it is extended by means of a bring-down and a new effective date is provided, as well as the payment of an additional commitment fee. This new commitment

will reflect any intervening matters.

The Virginias do not have a well-developed body of law interpreting the provisions of title insurance policies, so that in discussing the legal principles which might apply to such policies we have to look to analogous decisions from other types of insurance. However, we do happen to have a case which discusses the enforceability of a commitment for title insurance where a claim was made before the policy was issued.

In First American Title Insurance Co., v. Seaboard Savings & Loan Assoc., 315 S.E.2d 842 (Va. 1984), the Virginia Supreme Court was called upon to discuss the enforceability of a commitment and the ability of the insured to assert a claim under the unissued policy. The Court secured to say that the commitment required the insurer to issue the policy, and that the rights of the parties would be determined by whether or not the terms of the commitment were complied with. This was a case involving mechanics liens intervening between disbursements of a construction loan, and the commitment required lien waivers and other conditions as a pre-requisite to affirmative mechanics lien coverage being in force.

The Court held that, while the insured could assert a claim under the commitment, because the provisions of the commitment were not complied with, the insurer had no liability to the party named as the proposed insured.

Finally, although the borrower is required, in virtually every transaction in which title insurance is called for, to purchase, for the benefit of the lender, a title insurance policy insuring the deed of trust and the lender's security interest, and the purchaser in a commercial real estate transaction often requires that the seller obtain an owner's title insurance policy for his benefit, these transactions do not make the seller, or the buyer who procures the title insurance policy for the lender, a third-party beneficiary of the policy. Jimerson v. First American Title Insurance Company, 989 P.2d 258 (Colo. 1999); First American Title Insurance Co. v. Willard, 949 S.W.2d 342 (Tex. 1997) (paying title insurance premium does not make the payor a party to the insurance contract)

Now that we have determined that there is a claim and that your client is insured, what

should you do next, and what should be expected by the title company and the insured?

First and foremost, report the claim in the manner required by the policy. Every policy of title insurance contains directions about where to send the notice of the claim. Typically the addresses for these notices are to the home office of the company, although some policies do allow the insureds to give notice to any branch office. Every policy I have ever seen requires that the notice be given in writing and, although no particular type of writing is specified, inasmuch as most all policies merely give a street address or a post office box the implication is that a claim sent by facsimile, telecopy or electronic mail is not in compliance with the terms of the policy.

Notice of the claim should be given promptly, and at least in sufficient time to allow the insurer an opportunity to investigate the facts and circumstances giving rise to the claim and to protect the rights of the insured. The policy typically provides that

> 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 be prejudiced by the failure and then only to the extent of the prejudice.

¶ 3, Policy, Conditions and Stipulations.

Therefore, if you have notice of a claim, give prompt notice. My worst horror story is one in which the insured lender knew of a sale scheduled to be conducted under an outstanding Deed of Trust but did nothing until two business days before the noticed foreclosure sale. They had received notice of the sale timely--weeks before it was scheduled. They knew of the outstanding Trust for many months prior to the sale even though it wasn't referenced as an exception to the Policy, because it was a seller take-back. Clearly there were a number of reasons why the title company might have declined to step in and act, but it did so anyway. Not every title company would do so.

Oh yes, I almost forget to tell you - the attorney for the lender gave the notice but did not give notice at the place and in the manner required under the policy (he gave notice only to the agent which had issued the policy by telecopy on Thursday before the Monday morning sale

date), and then gave none of the expected information we will talk about in a minute: no policy number, no date, nothing which would give the title company the information it needed to confirm coverage, must less sufficient information to step in and protect its insured.

The prevailing law is that the title company is excused from its obligations and any liability under the policy if there is "prejudice." This means, essentially, that if the insurer is denied an opportunity to take action which could have mitigated the loss in sum actual, demonstrable, and/or financially quantifiable way, it is prejudiced. Obviously, just like in the area of general liability insurance, litigation is certain to result between the insurer and the insured over the denial, and the many cases are confirmation of this, but if you represent the insured it is in your client's best interest not to have to bear the risk first of loss, and second of having to litigate to determine the timeliness and adequacy of its actions. So if your client has notice of a claim, give prompt notice in the manner called for by the policy it holds.

The policies also require the submission of a "proof of loss or damage," signed and sworn to by the insured. The proof must be provided to the insurer within 90 days after the insured determines the facts giving rise to the loss or damage. The policy requires the proof describe "the defect in, or lien or encumbrance on the title . . . [and] stat[ing], to the extent possible, the basis of calculating the amount of the loss or damage." ¶ 5, Policy, Conditions and Stipulations. The proof should set forth sufficient facts to give the insurer adequate notice of its potential liability under the policy. Hopkins v. Title Insurance Corp. Realty Title Co. of Mobile, 514 So.2d 786 (Ala. 1986). Failure to submit a proof of loss within the time, and in the manner, required by the policy has been held to be an absolute defense to the insurer's refusal to act on the claim. Goodale v. Pioneer Insurance Co., 614 N.Y.S.2d 657 (N.Y. 1994).

If, for whatever reason, your client has submitted a claim other than to the place designated in the policy, or has done so in a questionable manner such as by telephone, or has failed to give sufficient particulars as required by the notice of proof of loss provisions, by all means follow-up the initial transmittal with a proper notice of proof.

As I have already suggested, probably the most common error made by claimants is

submitting the claim to the agent who issued the policy - perhaps to you in your combined role of title attorney/agent - and by not giving sufficient information to the company to respond promptly. You can protect your client's interest by assisting your client in providing the following to the company promptly:

(1) The name of the insured and the policy number. If there is any other insured, perhaps a lender under a simultaneously issued loan policy, that information should also be provided.

(2) A description of the alleged title defect giving rise to the claim and, if it is known, the reason the defect was not either recognized or resolved before the policy was issued. This could be as simple as an overlooked lien or encumbrance, or as complicated as an error in recording or indexing, or a survey problem such as an overlap with, or a gore between, an adjoining parcel.

(3) Tell when and in what manner notice of the assertion of the adverse claim was received by the insured.

Virtually every title insurance company has adopted a procedure in the event that an issuing agent receives notice of a claim. I have attached one company's bulletin of what to do if someone gives you notice of a claim, together with the referral form which communicates the claim to the home office.

If the claim does not involve pending litigation, it is customary for the title insurer to utilize its own staff of claim or field service representatives to handle the claim. These are folks who have experience in the myriad of problems which arise after a transaction is closed: a defective acknowledgment, a claim of a forged signature, an unreleased lien, or a survey problem. Often, given sufficient information they have the resources and expertise to resolve the claim. Morever, they usually are able to do so quickly so that the inconvenience to your client is minimized. They can and have chased down notaries to confirm signatures or reform acknowledgments, obtained releases for liens, and even cured claims of outstanding interests through quitclaim deeds. Never let your client think that, because a claim is being handled

through a claim representative and not a local lawyer assigned by the title company, that the claim is not being given diligent attention.

However, if the claim involves pending litigation, the title insurer will most often assign some local counsel to defend the interest of the insured. All too often it is at this point in the process that things go awry. Bear in mind that many of the "cooperation" issues, like providing information as to those who have knowledge of the transaction, apply whether the claim is being handled by a claim representative or defense counsel.

The counsel designated by the insurer lacks the knowledge of the transaction that is in the possession of the insured, the knowledge you may have as the title attorney/agent, or even the knowledge you may have as counsel to the insured. Consequently, it is vitally important that you cooperate with designated counsel in providing as much information as possible: information about not just the claim itself, or any litigation, but about the underlying transaction.

Accordingly, the comments of the insured as to the facts and recommendations for how it desires the claim to be handled should be communicated to defense counsel and the insurer. Not only should your client not hesitate to do so, your client should be and is encouraged to provide information about those who might either have additional information but who might also have liability for the claim: vendors, contractors, warrantors, guarantors, and the like.

Too often, once a claim has been submitted to the insurer the dialogue between the insured and those acting on its behalf seems virtually to cease.

Your clients can do a great deal to help the title company and those who are acting to protect its interest.

You or your client will receive some communication from the insurer identifying the claim representative or insurance adjuster handling the matter and identifying the responsible defense attorney. Do not provide information to anyone else without first getting the clearance and authorization of defense counsel.

Tell your client to expect to be contacted by both the designated defense counsel and by the insurer. And tell them not just not to ignore that call but to respond timely and completely.

Inevitably there will be a request for information. Often this is a two-stage process, with the documents necessary to respond rapidly to the claim being needed first. These documents should include at the least the following:

a. Title policy and Commitment
b. Purchase/sale contract or loan agreement
c. Warranty deed
d. Deed of Trust
e. "No Lien" or owners affidavit
f. Claim of Lien
g. Title Report
h. Tax tickets or receipts showing the payment of taxes
i. Summons and complaint if in litigation
j. Writing by which you received notice of this claim if other than a summons and complaint.
k. Survey and survey report
l. Closing instructions
m. Closing statement/HUD-1
n. Any correspondence relating to this claim

Typically, shortly after being retained, defense counsel will request the lender or owner to provide a complete copy of its loan or ownership file. Oftentimes this request is made by the insurer even before counsel is designated, because it has the first, early contact with the insured, and requests the file so that they can get it to defense counsel when they make the defense assignment. Compliance with this request is also required by the terms of the policy. ¶ 5, Policy, Conditions and Stipulations. Disappointingly, I have had insureds who not just declined but virtually refused to provide a copy and offered no explanation for their refusal. The typical response to such a request is to ask me to identify exactly what it is I'm looking for. It is the things I do not expect that are the most important. I guess some people don't have the word "complete" in their vocabulary.

My suspicion is that the insured, or the counsel to whom it has turned for advice on how to respond, somehow believes that defense counsel is secretly looking for a way to help the insurer deny coverage to the insured. The insured needs to understand and be advised that the

defense counsel's sole obligation is to the insured - he is precluded by law and by ethics from disclosing to the insurer matters which he might become aware which could serve as the basis for a denial of coverage. Indeed, he is obligated to find ways in which the interest of the insured can best be protected and advanced notwithstanding adverse knowledge which might come his way. Appleman, Insurance Law and Practice, §4682; see also, Rules of Professional Conduct, 1.7(b), 1.8(f), 5.4(c); L.E.I. 94-02. I have been assured in my conversations with eminent insurance defense counsel that these duties are well-recognized by all counsel defending the interests of insureds, and by the insurers, whether under title insurance policies or other varieties of insurance policies.

The insured needs to understand that sometimes their files will disclose the most important pieces of information. They might show that the loan officer gave specific instructions on how a previously disclosed lien would be handled by the closing agent, or that there was an agreement as to who would be responsible for assuming the risk for potential mechanics liens, or that the owner had procured a bond for known mechanic's liens.

These disclosures would not cause a denial of coverage to the insured, but actually instead led to a third party who was found to be primarily, if not solely, liable for the insured's claim. However, without a review of the files these obligations would never have been known.

I have seen, solely as a result of a review of the insured's file, matters which gave rise to both an urgency as to why a claim should be quickly resolved, as well as documents which showed that there were consequential damages to an insured if a claim was not resolved in a particular way. Unfortunately, neither the insured nor their counsel (both of these claims involved insureds who had their own counsel who advised them during the course of the claims) identified these matters during discussions with them. Fortunately, their files did disclose the potential problems so they were able to be resolved satisfactorily for the benefit of the insureds.

Any of you who do any litigation, or who have been involved in any litigation, know to expect that files will have to be maintained, produced and copied numerous times. You should meet the file custodian if it is someone other than your contact person and have confidence that

the assembled files will be complete.

Complete, that is, except for attorney-client material. I have seen files copied for production to opposing counsel which included attorney-client communications unredacted. If you are the person screening for such materials, and you find qualifying communications, make a cover sheet identifying the redacted material and insert it. I have attached a sample. Be sure to maintain a separate file of such redacted materials in the event the assertion of the claim of the attorney-client privilege is challenged and you have to produce them for inspection by the Court.

Most title insurance claims are filed by lawyers, either in-house counsel or an outside counsel to whom the insured turns for advise when it believes it has a claim (which says much about the poor claim filing methods). Accordingly, the individuals who have the most knowledge about the facts, the persons to be actually worked on the loan, are most often nothing more than a name in a file to defense counsel, if they are known at all. Defense counsel has no idea how or where to contact those individuals or even if they are still employed by the lender, for example, as a loan officer.

Assembling a listing of who has, or at one time had, knowledge of relevant facts, as well as a summary of the facts known by each, early in the process is extremely important. So, too, is providing to defense counsel information about their current whereabouts and how they could be contacted. An introductory letter would be most helpful.

During the course of the claim process there will be a need for someone in your client's office, or for the individual client itself, to be available to meet with counsel. Someone will need to answer questions, sign discovery responses, locate files and documents, and otherwise do those myriad things that occur during the course of litigation. To this end I would encourage you to locate some responsible person with the time and desire to fill this role. Ideally it will be someone with familiarity with the transaction giving rise to the claim and someone who can determine who else has relevant knowledge. Early on you should be certain that defense counsel and the contact person become acquainted.

I have had as the contact person an outside counsel who exercised total control and acted

as the sole contact, never identifying anyone at the business except in response to specific questions and needs. We managed, but I am not sure the client had any more confidence that things would go smoothly, or went smoothly, than I had.

I have had in-house counsel who ranged from very helpful and cooperative to those who I am convinced were just a name on a letterhead. On the other hand, I have worked with a legal assistant to in-house counsel who was very helpful and cooperative.

Most often I have dealt with a business person-usually a manager who supervised the process. This was by far the most effective contact person for a number of reasons.

First and primarily, he or she knows the details of the loan or other transaction giving rise to the claim, even though they might not have made the loan themselves or negotiated the transaction.

Second, they know and have access to the people and documents involved in the process. In one instance they knew that the notary involved in an alleged forgery had left the office for a job elsewhere. Even though they didn't know where, they remembered the name of the notary's best friend and, through her, was able to locate the notary in a bank in Atlanta. Locating her was the difference between a forgery claim we could have, and probably would have, lost to a forgery claim which we did not have to defend because it did not exist.

Most important, I think the business person has a better understanding of the business risk and the effect the claim will have on the bottom line for his department. He or she knows the trade-off in the time requirements and other resources for his department in asserting a claim versus what a reasonable settlement of the claim will return.

Many insureds never consider that they, or some representative of the insured, will be deposed, need to attend a mediation, or be present at trial. They somehow think that the claim process will be handled by defense counsel such that the business will never really have to be involved in the process. Clearly this isn't true.

While it is the obligation of defense counsel to coordinate the defense, the cooperation of the insured is essential. We have represented in-state lenders who hesitated to make their

personnel available as witnesses in proceedings in other parts of the State and national or regional lenders who hesitated to make their personnel available from other states. Some have gone so far as to make it clear that their people will not be available as witnesses at depositions or trial. Once opposing counsel gets wind of that inflexibility, your ability to resolve the matter favorably evaporates.

I have been able to obtain the consent of other parties, mediators and even judges to excuse the actual attendance of representatives of the insured at mediation. This is possible if the insured is several states removed, is available by phone during the course of the mediation or settlement conference and has given written settlement authority to counsel. It requires a lot of prior planning and consent, but your client first has to let you know there is a problem. So be sure your client maintains a good dialogue with defense counsel.

It also lets everyone know that the case is not that important and the client really does not care if it is won or lost. You can imagine the effect this has.

The insured must be responsive to the case. The insured must respond to settlement offers and generate settlement demands of its own. The insured must review and comment on proposed settlement and other documents and provide necessary documents which might further either settlement or trial.

I have, more than once, sent settlement demands and even proposed settlement documents to the insured and received no response. I have solicited the desires and settlement demands of my insureds and received nothing. I have drafted proposed settlement demands and sought the approval of the insured and heard nothing in response. I have had the designated contact person assigned by the insured leave the insured without my being given any other contact person, and without being told he had left while I continued to send faxes and letters, and even left messages on his voice mail, without response so make sure you keep counsel advised as to changes in personnel.

But why bother? Why should the insured spend his time and effort in defending the case when it is the insurer's money that will be lost, not his? The purpose of the insurance is to

protect the insured so let it protect the insured even from inconvenience, you might say. However, it is not that simple.

The insured has an absolute duty to cooperate in the defense of the claim. This duty is a part of the policy. Each of the problems we have discussed violates of that duty. If the insurer suffers prejudice, that is, if the insured is made more likely to lose the claim because it has failed to help defend against it, the insurer is entitled to withdraw its defense of the insured. Even worse, the insurer can deny coverage and refuse to pay the claim. The defense attorney will not report this lack of cooperation. As mentioned above, that attorney, although selected and paid by the insurer, is counsel for the insured and can do nothing to prejudice the rights of his or her insured client. Reporting non-cooperative and risking the withdrawal of the defense or of coverage would certainly be such prejudice. The defense attorney may continue to defend, doing the best possible job under the circumstances and covering up the insured's conduct if possible, or the attorney may withdraw from the case without advising the insurer why. But do not believe that insurers have not been in this situation before. They will recognize exactly what is happening and act accordingly.

But even worse, the rates for title insurance will be quietly adjusted to reflect the increased risk of a non cooperative client, such that everyone shares the costs for the bad behavior of the few.

In title insurance policies provisions are usually found requiring the co-operation and assistance of the insured in resisting claims, or more particularly requiring that the insured shall aid in securing information, evidence, and the attendance of witnesses, in effecting settlements, and in prosecuting appeals. Such a provision is commonly called a "co-operation clause." To constitute a breach of a co-operation clause by the insured, however, there must be a lack of co-operation in some technical or inconsequential lack of co-operation or a misstatement to the insurer is immaterial in such respect. Such a failure to co-operate, in the absence of a waiver or estoppel, constitutes a defense to liability on the policy, if the insurer so elects. At least one court has held that, because the provisions of liability and title insurance policies are similar, the

standards of cooperation which have been applied to general liability insureds also apply to insureds under title insurance policies. Griffith v. Safeco Title Ins. Co., 812 P.2d 420 (Ore. 1991).

The standard policy provisions contain specific language which sets forth the duty of the insured claimant to cooperate with the defense and prosecution of actions. These provisions typically provide that:

> . . . the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting of defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest of the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

¶ 4(d), Policy, Conditions and Stipulations.

However, before an insurer is entitled to withdraw the coverage or defense available under its insurance policy because of the insured's failure to cooperate, it must satisfy certain conditions. Our Court discussed these elements in Bowyer v. Thomas, 188 W.Va. 297 (1992), and established that, to withdraw such coverage the insurer must show the insured's failure to cooperate was substantial and of such nature as to prejudice the insurer's rights. Such a showing may be made by demonstrating that the insured willfully and intentionally violated the cooperation clause of the insurance policy, and that the insurer exercised reasonable diligence in obtaining the insured's cooperation, including attendance at trial.

Bowyer was an appeal from a West Virginia circuit court decision which found that the insured had failed to cooperate with the defense of a civil action, resulting in the Court ruling that the insurance company was relieved of any liability because it had made a good faith effort to secure the cooperation of its insured, and that the insured had failed to cooperate as required by the insurance policy.

In Bowyer the attorney retained by the insurer had made several calls to the insured, but was unable to reach him and filed an answer on his behalf to prevent a default judgment. The insured also made several appointments to meet with his counsel but did not do so until several months later. Upon meeting with the lawyer and relaying the circumstances of the accident, the insured advised counsel that his job required him to travel constantly and that his mother knew how to contact him. In the months preceding, the insured would occasionally call the attorney, but did not provide a permanent address or other means of contact.

The insurer claimed that it had arranged the deposition of its insured and that he failed to attend, and wrote to the insured and cited language from the insurance policy which required cooperation with the insurer, warned that failure to cooperate in the future would require the insurer to defend under a full reservation of the insurer's rights. The letter did not inform the insured that his failure to cooperate might relieve the insurer of its duty to defend the lawsuit.

The insured did contact counsel and advised that he had moved to California, but still had no permanent address. He continued to call his attorney on several occasions, seemed willing to help and agreed to a deposition in California which was never scheduled. The insurer again wrote the insured citing his failure to attend the first deposition and reiterated that failure to cooperate would result in a full reservation of the insurer's rights but still did not warn that failure to cooperate would result in a loss of coverage under the policy.

A month later the insured's mother's deposition was taken and she testified that her son was working in California, that she had heard from him several times, and that he had given her an address where he could be reached which she provided to all attorneys present.

The insurer's affidavit outlining its attempts to locate the insured were vague and did not specifically identify any dates of its inquiries. After reviewing the facts, the Court held that the insurer failed to establish any right to declare the policy void because of failure to cooperate, pointing out that the insured made contact with his attorney even while in California, had furnished an address where he could be reached and that he had expressed a desire to assist in his case. There was no evidence in the record that he was ever notified of his deposition or that the

insurer was substantially prejudiced by the insured's perceived lack of cooperation. Moreover the insurer's efforts to contact its insured were minimal at best and there was insufficient evidence that the insurer had exercised due diligence in securing the cooperation of the insured.

The Bowyer Court cited Marcum v. State Automobile Mutual Insurance Co., 134 W.Va. 144, 59 S.E.2d 433 (1950), which follows the general rule that before the insurance policy will be voided because of the insured's failure to cooperate, such failure must be substantial and of such nature as to prejudice the insurer's rights. Moreover, the insurer must show that its insured willfully and intentionally violated the cooperation clause of the insurance policy before it denies coverage, and that the insurer has exercised reasonable diligence in obtaining the insured's cooperation, including attendance at trial.

Two Virginia cases are instructive in discussing that level of cooperation which could reasonably be expected by the insurer. In State Farm Mutual Automobile Ins. Co. v. Arghyris, 55 S.E.2d 16 (Va. 1949), the insured was under a duty to cooperate by virtue of a policy provision very similar to that set forth above. However, he had failed to do so and as a result the Plaintiffs had recovered a judgment against him.

They then asserted a claim against the insurer. The insurance company contended that the insured's failure to comply with the "co-operation clause" justified its denial of liability and that the evidence showed its interests were prejudiced as a matter of law and fact. The insured failed to give timely notice of the claim, repeatedly mislead the insurance company over a period of many months, and denied the liability of the company to him or to anyone claiming through him. The insurer was deprived of an opportunity to determine for itself, through an immediate investigation, aided by a true statement from its insured of whether or not it was liable. In this case there was a withholding of information, the making of untruthful statements, and the concealment of necessary, relevant, and material facts, actions not calculated to help the insurer. The insured did not only neglect the performance of the co-operation condition, he wilfully and deliberately failed to comply with it. The Court found that the insured wilfully breached the cooperation clause of the insurance contract in a material and essential way, all to the prejudice of

the insurer.

A similar result was reached in Cooper v. Employers Mutual Liability Ins. Co. of Wis., 103 S.E.2d 210 (Va. 1958). While the insured gave timely notice to the company of the particulars of the claim, he did not comply with the other conditions. He failed to forward the suit papers, did not notify the company of his change or address or forwarding addresses, and failed to contact the company after the initial notice. In addition he failed to assist in the preparation for trial and to attend the trial which unquestionably prejudiced his case. The Court concluded that the insurer did all that a reasonably prudent person could be expected to do under similar circumstances in locating the insured and that the insured's wilful failure to comply with the terms of the policy was substantial, material and prejudicial to the insurer. Specifically, it rejected the insured's argument that the mere disappearance of the insured does not constitute a wilful and intentional breach of the cooperation clause.

These cases illustrate the risk of the failure to cooperate, because cooperation is so important to the achieving of a good result, and the failure of cooperation is so prejudicial. We speak of prejudice as the standard by which the failure to cooperate effects the results. If the insured fails to cooperate, but the conduct does not effect the outcome or prejudice the results, the insured will continue to receive the benefit of the coverages available under the policy, including being afforded a defense and coverage for any loss which might result. However, if the effect of the lack of cooperation is that the insurer is unable to prepare and conduct a meaningful defense of the claim, or the result is less than what would be expected, then the insurer will be found to be prejudiced and the insured will be without the coverage for which he paid.

It is inconceivable to me that an insured would take the risk of such lack of cooperation. First, he will have suffered the adverse result, a blow which by itself is significant. But then, he will be forced to litigate a second time, this time against the insurer, and his ability to recover will be dependent upon carrying the burden of showing that he cooperated and that the insurer was not prejudiced by the conduct of the insured. This seems to me to be a lot like trying to prove the proverbial negative, and demonstrates a lack of practical business judgment at the outset.

Numerous cases interpreting the many different types of insurance have discussed the broad obligation of the insurer to defend an action brought against the insured. This is a fairly well-acknowledged concept under the case law of West Virginia as well as every other state.

However, I would submit to you that the defense obligation is not so broad under title insurance claims as under other types of insurance. Again, West Virginia doesn't have a well-developed body of law interpreting title insurance policies so we have to look elsewhere.

My suggestion is to look at other types of policies involving real property, in particular environmental liability policies. In cases construing such policies the courts have given them a far more restrictive application than other types of liability policies, such that the insurer is only obligated to defend claims falling within the ambit of coverage. Contrast, e.g., Supertane Gas Corp. v. Aetna Casualty & Surety Co., 92-0014-M (N.D. W.Va., Keeley, J.); Supertane Gas Corp. v. Perry, 3:90CV 33 (N.D. W.Va., Stamp, J.) (holding pollution exclusion effective in precluding coverage for pollution damage claims) with Joy Technologies, Inc. v. Liberty Mutual Insurance Co., 421 S.E.2d 493 (W.Va. 1992) (holding that pollution exclusion did not preclude coverage for pollution damage, so long as not "sudden and accidental" and not "expected or intended" by insured). Such cases seem to more strictly construe the coverages afforded to insureds or those harmed by the activities of the landowners who assert claims under the policies than do the cases which more broadly construe the coverages afforded by general liability policies.

My other suggestion is to look at cases from our neighbor Virginia. I found two Virginia cases of interest. The first addressed that subject we discussed early on, the survey and survey issues. In Brenner v. Lawyers Title Insurance Corp., 397 S.E.2d 100 (Va. 1990), the policy contained the standard survey exception as well as the standard exception for defects attached or created subsequent to the date of the policy.

A quitclaim deed to an adjoiner purported to convey a prescriptive easement over the insured premises, and the owner-insured both filed a claim and an action for breach of the duty to defend. The Virginia Supreme Court found that the insurer would not be liable under the policy

because of the survey exception, and thus there was no duty to defend. Id., at 103-04.

A similar result was reached in Carstensen v. Chrisland Corp., 442 S.E.2d 660 (Va. 1994), which interpreted the post-policy exception not reached by the Brenner panel, as well as the unrecorded easement exception. Chrisland involved a developer-modified access-easement. The insureds had refused to grant access over a joint driveway for an adjoiner, so the developer exercised the rights reserved in the PUD plan to modify the plan and declare such rights. When the developer did so the owner-insureds asserted claims under their policies.

The Court relied on Brenner in finding that, while the obligation to defend might be broader that the duty to pay, in the absence of a claim under which there was policy coverage, the insurer was under no obligation to provide a defense to its insured. Id., at 665-66.

What if the complaint or claim has elements covered by the policy, as well as those excluded by the policy? I have not found any cases on the issue in the Virginias. However, the answer seems to be this:

First, the insurer must defend at its cost those claims covered, or arguably covered, by the policy. There is a body of law which endorses the concept that the insurer should defend the entire action on grounds that bifurcating the defense is impractical.

Then, as to claims which are not even potentially covered by the policy, the insurer is entitled to seek reimbursement from the insured for such "uncovered" defense costs. See, Buss v. Superior Court, 939 P.2d 766, 775-78 (Calif. 1997). This seems to be a practical result, economical and beneficial both to the insurer as well as the insured, and, from the California Supreme Court's extensive discussion, appears to be a fairly well-recognized and adopted one in almost all of those states which have been called upon to address the issue.

So, in summary, if the underwriting fails to resolve all of the title issues and a claim results for your client, be prompt when making a claim, comply with the policy by giving all information available, and then make certain that there continues to be a high level of communication and cooperation between the client and defense counsel. Do what counsel and the company requests, and have every confidence that the interest of your client is being

protected to the best of the title company's ability.

If you suffer the misfortune to have a claim in your capacity as a title agent, do not forget to notify your own errors and omissions carrier. Obviously every lawyer should maintain at all times a policy of professional errors and omissions insurance. Certainly if a part of your practice includes the issuance of title insurance policies as a title agent, be certain that your malpractice coverage provides coverage for such services.

Virtually every company which issues attorneys malpractice coverage, and the last time I checked this was true for those companies writing attorneys malpractice insurance in West Virginia, will provide coverage for your actions as a title agent.

There are a couple of things to bear in mind, however. First, be sure to ask your agent if your policy covers your activities as a title agent. Most policies have an information questionnaire which queries if you act as a title agent, and this questionnaire become a part of the policy both for underwriting and coverage purposes. If you do, be sure to say so; if you weren't a title agent when you applied for and/or obtained your malpractice policy, but have since become an agent, be certain to call your agent and advise him or her of your change in status. Remember that disclosure is the key to coverage in the insurance industry.

Secondly, ask the agent who provides you your malpractice policy for an endorsement which provides you coverage for your acting as a title agent. In most circumstances you will find the coverage, in the form of an endorsement, to be readily available and usually for no additional premium. I have attached an endorsement for a typical title agent's coverage. Like the exclusions under the title insurance policy itself, the typical endorsement excludes from coverage errors arising from those matters which do not appear of record, as well as those matters which were known to you as an agent.

The attached endorsement is one issued by the Attorneys Liability Protection Society. It is obtainable from ALPS at no additional charge if you advise them that you are an agent and are doing significant real estate/title insurance work. I am not aware that the other companies which write attorney malpractice insurance in West Virginia will issue such an endorsement without an

additional premium or surcharge.

Remember if you have a claim as an issuing agent, as an attorney who provided an opinion of title upon which a policy was issued, or simply as an attorney involved in the process of searching a title or closing a transaction, these materials will give you an outline of the materials you should provide your own carrier. In our own practice we have defended some professional liability claims against attorneys also, and what is true of claimants under title policies is typical of claims by title attorneys also, with one exception I will talk about in a second.

In any claim under your malpractice policy there is a much greater cost to you than simply the cost of the deductible, assuming your conduct is something covered under your errors and omissions policy. While the issue of paying a (usually) hefty deductible is alone a significant cost, the attorney will have other costs involved, including but not limited to the costs of retrieving, indexing, and copying files. I know I have closed a number of transactions in which the files number several of those large expandable folders.

The attorney assigned to your claim is inevitably going to be involved in significant time in discussing the claim with counsel retained by his own insurer, and in reviewing many of the documents in the file and screening for privilege. He will have to prepare for interviews and depositions with his own counsel, as well as those conducted by counsel for the title company and other parties. Every minute consumed by these endeavors is a minute in which he is unable to devote to his business. The client you are unable to service because you have to be deposed or interviewed is a client who may not return to you, particularly if, as seems inevitably to be the case, the client's need is something urgent.

Anyone who has been involved in litigation in which they are interested will tell you that they become consumed both in it and by it. Do not discount the effect of this, psychologically, financially and emotionally. As a professional you believe it essential to defend your conduct, because your reputation is all you have to sell. Your own desire to be vindicated will have an effect on your ability to service your clientele, because you will lose enthusiasm due to the belief

that you are perceived to have erred, and you will devote untold hours to proving to everyone that you did not err at all. Thus, even if you are successful you will have lost something in the process. This is the one significant difference between title claims and professional negligence claims, in my experience. Professionals are usually and typically very involved in their defense because it is their reputation and their practice which is under scrutiny.

Additionally, even after the claim is over and even if you are found to have not been at fault in any way, you will find yourself taking extra steps to assure that nothing of this sort happens again, with the result that you are not nearly as efficient at your practice as you were before, at least for a time.

Lastly, there is the issue of future malpractice insurance premiums. Someone once said that malpractice insurance isn't really insurance at all, because if there is a loss your future premiums are adjusted in such a way that you will inevitably pay the loss because it will be built into the next year's (or years') premium structure. There is some level of truth in this, I think. Premiums usually do increase following a loss, and often they increase even following a claim where there was no loss and the claim was defended successfully. This is not unlike other kinds of insurance, including title, automobile, homeowners, and general liability insurance, where the costs of defense, as well as the loss, are built into the premium structure.