

THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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SCDTAA PAC Golf Tournament

April 14, 2011

Spring Valley Country Club



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Developments in Defending Claims Arising Out of Real Estate Transactions

by Andrew W. Countryman ¹

A by-product of the economic downfall over the past couple of years has been an increase of claims by title companies against closing attorneys over title issues discovered after closings. Most closing lawyers serve as agents for title insurance companies for real estate transactions. In these situations, the lawyer and title insurance company enter into an agreement that allows the lawyer to write title commitments to buyers and lenders at closings. At each closing, the agent then accepts a premium from the purchaser/lender (a portion of which is forwarded to the title company, and a portion of which the lawyer retains), and the commitment is issued.

Almost all agency agreements between title companies and lawyers issuing title insurance contain provisions providing that the lawyer must indemnify the title company for expenses (including payments on title claims), attorneys' fees, and costs associated with title claims resulting from an error or omission of the lawyer. However, over the years, real estate lawyers and title companies have generated significant business for one another. As a result, in the past, when a title issue arose after a closing, and a purchaser/borrower made a claim on the title policy, the title company was likely to handle the claim and move forward, often without turning to the lawyer for indemnification, even when the title issue could have been blamed on the closing lawyer.

When the real estate market crashed though, the number of title insurance premiums collected slowed while the number of claims increased. As a result, title insurance companies have started turning to closing attorneys for indemnification following title claims more often. In fact, some title insurance companies have even started making claims against the lawyer before the title company even pays the claim, as opposed to paying the title claim and then seeking indemnification from the lawyer. While the increasing number of claims may make it difficult for defendant lawyers on one level, under these circumstances, the potential to resolve claims globally on the front end is usually something worth investigating.

Governing Law

South Carolina courts have identified five steps in a residential real estate closing that are considered the practice of law and therefore must be conducted by, or under the direct supervision of, a licensed

lawyer. These include performing the title search/certifying title and recording the title and mortgage, preparing the closing documents, overseeing the transfer of closing funds and attending the closing.² Lawyers who fail to properly perform/supervise these steps have been sanctioned for assisting others in engaging in the unauthorized practice of law. Ethics opinions exist that discuss instruction, review, and correction of a non-lawyer's work as satisfying the supervision requirement, but the exact standard required could certainly use clarification.

Negligence

When bringing claims against closing lawyers pursuant to the agency agreements, title companies usually allege indemnification and negligence, as the title company is subrogated to the rights of the insured under the title commitment. Even if the title company only alleges indemnification, a negligence analysis still usually applies. Thus, the standard of care usually comes into play.

The preamble to the Rules of Professional Conduct states that “[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.”³ However, our Supreme Court has determined that a violation of an ethical rule may be relevant and admissible in determining whether a lawyer breached the standard of care in a legal malpractice action.⁴ So, the first step for any closing lawyer seeking to defend against and/or avoid future claims related to title issues is to make sure to have a system of oversight of the five elements of closings the Supreme Court has identified in place.

The fact that a lawyer is incorrect as to the ultimate marketability of title to real estate does not establish that he or she was negligent.⁵ Liability arises where the attorney *negligently* certifies title.⁶ Unfortunately, little case law exists describing what a lawyer must do to meet the standard of care in certifying title. In light of the lack of specifics, the general negligence standard applies, which provides that the standard of care is what a reasonable lawyer would do under the same or similar circumstances. Further and again, ethical violations can serve as evidence of negligence in these situations.

Almost every real estate attorney hires title abstractors to perform the title work for closings.

Continued on next page

The lawyer pays the abstractor a fee, and the abstractor goes to the courthouse for the title documents. This saves the lawyer a great deal of time and makes real estate closings profitable. Additionally, horn book law states that one who employs an abstractor is justified in relying upon the truth and accuracy of the abstract or report without making an independent investigation (unless the abstract itself makes it plainly apparent there has been an omission of mistake).⁷

Lawyers need to be careful though, as there is no certification required to be an abstractor or governing body overseeing the practice of abstracting title. Lawyers should only retain experienced abstractors with whom they are familiar and whose work they trust. It is also important to hire only abstractors with errors and omissions coverage. Lawyers should also review the title work the abstractor provides and be on the lookout for irregularities that might point to mistakes in the title work or title issues. Lawyers that take these steps (and oversee the other elements of closings) have a stronger argument that they met the standard of care in the certification of title if an issue arises down the road.

Agency Agreement

The foundation for any claim against a closing lawyer by a title company is the agency agreement. The first step in analyzing a lawyer's potential liability is dissecting the language of the agency agreement. These agreements almost always provide that the title company has the right to seek indemnification from the title agent (closing lawyer) for title claims the company pays resulting from an act or omission of the lawyer. However, the particular language of the agreement may be important, as it defines the relationship between the lawyer and title company and may limit or define the lawyer's duties to the title company in the event of a claim.

Expert Affidavit Statute

In recent years, the expert affidavit statute (S.C. Code Ann. § 15-36-100, *et seq.*), has been employed to defend against claims against lawyers for professional negligence. This provision requires plaintiffs filing malpractice claims against licensed South Carolina professionals to file an affidavit of an expert witness along with the complaint. It is not completely clear how this applies across the board to claims against closing lawyers by title companies, as judges handle it differently. However, it is something to consider when dealing with these types of claims.

Third-Party Claims

In South Carolina, the title company's claims are really only against the lawyer (title agent), as the title company is not usually in privity with the abstractor. As a result, even if the title issue is the result of a mistake by the abstractor or other third party, the title company has little reason, motivation, or even ability to seek recovery against that third party. The

lawyer, however, usually is in privity with the abstractor and should consider bringing third-party claims as a result. *This is why it is very important for real estate lawyers to only use abstractors with errors and omissions coverage.*

Resolution Road Map

When dealing with claims against lawyers arising out of title issues, it is important to gain an early understanding of the parties and potential parties involved. Even if the title company is not making a claim directly, it may be financing a named party's case. In that situation, the title company may have a claim for (at least) attorneys' fees against the lawyer who issued the title policy pursuant to the agency agreement. This needs to be considered from the beginning in order to accurately evaluate the claim from the defendant lawyer's perspective.

Sometimes a more efficient result can be achieved by orchestrating a global resolution early in the claims process that includes a combined payment to the title policy holder on behalf of the lawyer, title company, and/or abstractor or other third parties. Of course, it is very important to demand from the onset, when dealing with title claims on behalf of closing lawyers, that participation in settlement negotiations will only happen if the title company agrees to release the lawyer for all present and future claims related to the closing (including indemnification pursuant to the agency agreement). This is true regardless of whether the title company is a party to the claim.

The coming years should be interesting from the perspective of monitoring claims against lawyers related to real estate closings. While some issues related to dealing with such claims are still being developed, some fundamental principals should hold true, including the importance of adhering to the applicable ethical rules and evaluating claims from a global perspective as early as possible. Staying in front of these issues should result in fewer claims against closing lawyers and more efficient resolutions of claims once they are made.

Footnotes

1 Andy Countryman is an Associate in the Charleston, South Carolina office of Carlock Copeland. He has a litigation practice focusing in legal and medical malpractice, general liability, and construction litigation.

2 *State v. Buyers Service*, 357 S.E.2d 15 (S.C. 1987); *Doe v. McMaster*, 585 S.E.2d 773 (S.C. 2003); and *Doe Law Firm v. Richardson*, 636 S.E.2d 866 (S.C. 2006).

3 Rule 407, SCACR.

4 *Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 322 S.C. 433 (1996).

5 *Bass v. Farr*, 434 S.E.2d 274, 315 S.C. 400 (1993).

6 *Id.* citing *Cianbro Corp. v. Jeffcoat & Martin*, 804 F.Supp. 784 (D.S.C.1992).

7 Larsen, Sonja, "Liabilities of Abstractors," *Corpus Juris Secundum*, 1 C.J.S. Abstracts of Title § 16.