THE ABC’S OF TITLE CLAIMS
IN FLORIDA

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A. Title Defects

When a party to a real estate transaction discovers there is a problem with title to his property, it can take many different forms. For example, there may be a prior mortgage or lien against the property, there may be another party claiming ownership or seeking to undo the deed into the buyer, there may be a party claiming the boundary of the property is different from what the buyer understood, there may be parties claiming rights to easements over or under the property, there may be difficulties accessing the property due to rights of adjoining property owners, there may be matters of record that affect the property’s marketability, or there may be a multitude of other “title defects.”

When such problems are discovered, the titleholder or lienor often has recourse against various parties, including the title insurance company, the title agent, or the seller of the property. Each has potential liability under various circumstances, but each may also have limited liability depending on the exact nature of the claim and the manner in which it is pursued.

1. Claims Against Title Insurers

The first source of potential recovery is a claim against the title insurer. A title insurance policy is specifically intended to cover title defects. If a title insurance policy was issued, its terms and conditions must immediately be reviewed and considered. If no title policy was issued to the titleholder, there may nonetheless be potential claims which need to be evaluated.

(a) Claims Under Title Policies

Title insurance is an agreement of indemnity, not a guarantee of title. Lawyers Title Ins. Co. v. Synergism One Corp., 572 So.2d 517 (Fla. 4th DCA 1990). It identifies the precise matters for which it provides indemnity, the general categories which are excluded from coverage, the specific matters which are excepted from coverage, and both the conditions under, and forms by which, indemnity will be given. The policy also is an agreement to provide a defense to claims challenging title.

i) The Terms, Conditions and Exclusions from Coverage

A. What is Covered
Title policies in Florida are all in a standard form and only the individual information on a particular real estate transaction should vary. Such policies specify that subject to: (a) the standard exclusions from coverage, (b) the individualized exceptions from coverage in Schedule B, and (c) the standard conditions and stipulations, the title insurance company insures, as of the date the policy is issued, against loss, not to exceed the policy limits, incurred by the insured by reason of: (1) title being vested other than as stated in Schedule A of the policy, (2) any defect in or lien or encumbrance on the title, (3) unmarketability of the title, and (4) lack of a right of access to and from the land. In addition, the title company will also pay the costs, including attorneys’ fees, incurred in the defense of title.

B. Exceptions from Coverage

Schedule B includes several standard exceptions from coverage. Generally speaking, the standard exceptions include: (1) taxes for the year the policy is issued, (2) rights of parties in possession not shown by the public records, (3) encroachments which would be disclosed by an accurate survey, (4) easements not shown by the public records, (5) any liens for labor or materials not shown by the public records, and (6) any claim by the State under a right of sovereignty.

Under §627.7842, Fla. Stat., the survey exception must be removed if a survey is provided the insurer by the time of closing; the parties in possession exception must be removed if an affidavit of no parties in possession is provided by the seller; and the mechanics lien exception must be removed if the seller signs an affidavit saying there have been no improvements made to the property within the 90 days preceding the closing.

Schedule B then usually lists individual matters that the title insurer has discovered in its search and examination of title which may affect title and for which no coverage is provided. These frequently include prior liens of record, easements of record, restrictions imposed by plats, and the like. In addition, if a survey has been provided and it shows any encroachments, they are usually listed as exceptions here as well.

C. Exclusions from Coverage

The policy then lists standard exclusions (as distinguished from exceptions) from coverage. Generally speaking, these include: (1) (a) any governmental laws or regulations affecting use of the property, the dimensions or location of any improvements on the property, separation in ownership, or environmental protection, and (b) any exercise of governmental police power not already of public record, (2) rights of eminent domain unless already of public record, (3) defects (a) created, suffered, assumed or agreed to by the insured, (b) not known to the insurer and not recorded in the public records but known to the insured and not disclosed in writing to the insurer, (c) resulting in no loss to the insured, (d) arising after the date of the policy, and (e) resulting in loss
which would not have been sustained if the insured had paid value for its interest in the property, and (4) any claim arising out of the bankruptcy laws and which is based on a fraudulent conveyance or a preferential transfer unless the preferential transfer results from a failure to timely record the instrument or the instrument is ineffective to give proper notice.

D. Conditions and Stipulations

Finally, the policy contains 2 pages of conditions and stipulations. These cover a great variety of subjects including: how to file a claim, the terms under which the insurer will defend claims against the insured, the obligation of the insured to provide a proof of loss and the insurer’s right to take a sworn statement from the insured concerning the alleged loss, the insurer’s option to pay policy limits, settle with a party making a claim against title, or pay the insured the diminution in value between the value of the property with and without the title defect, a duty of the insured to cooperate with the insurer and to allow its name to be used in any litigation to clear title, rights of subrogation by the insurer upon payment of any claim, etc.

E. Summary of Some of the Key Terms, Conditions and Exclusions

1. Who is Insured? Only the named insured may make a claim under a policy, not a purchaser of the insured’s interest. Successors by operation of law, including heirs and corporate successors, however, may also make a claim.

2. When Should a Claim be Made? A claim should be made promptly upon the insured’s first receipt of any knowledge of an adverse claim or of a title defect or if the insured is sued in an action challenging title. If the insured delays in giving notice, or gives notice to the wrong entity, (such as the title agent instead of the insurer), the insured risks losing coverage to the extent the insurer is prejudiced. See, for example, Rosen v Miller’s Mutual Fire Ins. Co. of Texas, 193 So. 2d 632 (Fla. 3d DCA 1967).

3. What Must Be Done to Make a Claim? Notice must be sent to the address given in the policy. A claim should ordinarily identify the policy by number, identify the insured, indicate the nature of the claim, identify the known loss and make a demand for coverage and/or defense. If the insured has been sued, a copy of the complaint and any other papers served in the action should be provided.

4. Will the Title Insurer Cover the Insured’s Attorneys’ Fees Incurred Prior to Making the Claim? Generally the title insurer will not pay for the insured’s attorneys’ fees for time spent prior to submitting the claim.
5. **What Matters Are Frequently Excepted From Coverage?** If the matter is a boundary dispute and no survey was provided the insurer, ordinarily the matter is not covered and is subject to the survey exception. Similarly, if there is a claim of adverse possession and the parties in possession exception was not deleted as no seller’s affidavit was provided, the claim will not be covered. Also, if the matter concerns something the insured was aware of as a potential title defect but which was not disclosed to the insurer before the closing, the insurer may deny coverage on the grounds the matter was assumed or agreed to by the insured. See generally, First American Title Ins. Co. v Kessler, 452 So. 2d 35 (Fla. 3d DCA 1984); Lawyers Title Ins. Co. v D.S.C. of Newark Enterprise, Inc., 544 So. 2d 1070 (Fla. 4th DCA 1989); Applefield v Commercial Standard Ins. Co., 176 So. 2d 366 (Fla. 2d DCA 1965).

6. **If a Suit Has Been Filed, What Are the Insurer’s Responsibilities?** A title insurer has the following options when a claim is made based on an insured being sued: (a) it can deny the claim as being outside the coverage of the policy and decline to provide a defense, (b) it can accept the defense of the lawsuit and retain an attorney to defend the insured but reserve its rights to later deny coverage in the event the facts reveal there is no coverage, (c) it can accept the defense of the lawsuit without reservation of rights, (d) it can pay or otherwise settle with the adverse claimant, (e) it can pay or otherwise settle with the insured for any loss incurred by the insured, or (f) it can pay the policy limits to the insured. If the insurer is uncertain as to whether the claim is within coverage or not, the insurer can also file a declaratory judgment action seeking a declaration of its obligations. Sometimes the defense of the insured also involves the commencement by the lawyer retained by the title insurer of a counterclaim, or other affirmative action, to cure the alleged title defect.

7. **Does a Mere Denial of an Allegation Give Rise to a Duty to Defend?** A simple denial of an allegation as to ownership does not give rise to a duty to defend. Something more in the nature of a defense or counterclaim is required. Pioneer Nat. Title Ins. Co. v. Fourth Commerce Properties Corp., 487 So.2d 1051 (Fla. 1986).

8. **Can the Insurer Deny Coverage Based on the Apparent Lack of Merit of the Lawsuit?** The insurer cannot deny coverage and refuse to defend on the ground that the lawsuit lacks merit. Klaeson Brothers, Inc. v Harbor Ins. Co., 410 So. 2d 611 (Fla. 4th DCA 1982).

9. **Can the Insurer Deny a Defense to a Lawsuit Based on an Exception From Coverage in the Policy?** The insurer may deny coverage, and a defense of a lawsuit, if the face of the Complaint alleges matters that are excepted or excluded from coverage. If, for example, the Complaint alleges an unrecorded easement over a portion of the insured’s property, which easement was in use and obvious from an inspection of the property at the time of the sale, and the insurer excepted from coverage all rights of parties in possession, the insurer may deny coverage and refuse to defend the action on
the ground that the claim is excluded from coverage under the policy.  *Louisville Title Ins. Co. v Guerard*, 409 So. 2d 514 (Fla. 5th DCA 1982).

10. **Can the Insurer Agree to Defend Only Portions of the Lawsuit and Not Other Portions?** The policy allows the insurer to deny a defense as to any portions of the lawsuit that do not allege a claim that comes within the coverage of the policy. Thus, insurers frequently will accept defense of some counts of a complaint or some defenses to a foreclosure action, but not others, on the ground that only some of the claims or defenses implicate title issues covered by the policy. The caselaw in Florida generally does not allow an insurer to deny a defense as to part of a lawsuit if other claims in the lawsuit are covered, but it is doubtful whether this rule applies to title insurance since title insurance policies clearly specify otherwise. See *Garden Sanctuary Inc. v Ins. Co. of North America*, 292 So. 2d 75, 78 (Fla. 2d DCA 1974).

11. **How Long Does the Insurer Have to Respond to a Claim?** The insurer has a “reasonable time” to respond. If the insurer does not respond within a reasonable time, it can waive its rights under the policy. *Ticor Title Ins. Co. v University Creek, Inc.*, 767 F. Supp. 1127 (M.D. Fla. 1991). Note that §627.4137, Fla. Stat, requiring that an insurer provide a statement of all coverage defenses within 30 days of demand is not applicable to title insurance pursuant to §627.401(4), Fla. Stat.

12. **If an Insurer Agrees to Accept Defense of a Claim or Agrees to Attempt to Cure Title, How Long Does the Insurer Have to Attempt to Effect the Cure?** Once again, the insurer has a “reasonable time” to defend and attempt to effect a cure of the title defect. *Cocoa Properties, Inc. v Commonwealth Land Title Ins. Co.*, 590 So. 2d 989 (Fla. 2d DCA 1991).

13. **At What Point Is the Insured Entitled to Payment of a Loss If the Insurer Is Still Attempting to Cure the Title Defect?** So long as the insurer is acting reasonably and with due diligence, the insured is not entitled to payment for the defect until the insurer has unsuccessfully exhausted all available remedies through final adjudication, including appeals. *Synergism, supra*.

14. **Who Gets to Choose the Attorney and “Control” the Defense?** The policy specifies that the insurer has the right to choose the attorney that will represent the insured, subject to the insured’s right to object for reasonable cause. Similarly, while the insured certainly retains some control over the scope and pace of the litigation, the insured is under a duty to cooperate in all respects with the attorney retained by the insurer to secure necessary evidence, provide needed testimony, etc. as deemed necessary to defend or cure title, and the failure of the insured to cooperate, if prejudicial to the insurer, can terminate the obligations of the insurer. Moreover, the insured must allow the insurer to use the insured’s name in all appropriate actions in its efforts to defend or cure title. And, the insurer retains the right, in its discretion, to settle the case with the
adverse party at any time, in the name of the insured, so long as such action prevents or reduces loss to the insured.

15. **Can the Insured Settle a Title Claim Without the Insurer’s Consent?** In order to preserve its rights against an insurer, an insured must have the consent of the insurer to settle a claim unless the insurer cannot show there was any prejudice by the settlement. *Holinda v Title & Trust Co. of Florida*, 438 So. 2d 56 (Fla. 5th DCA 1983). An exception exists if the insurer fails to timely respond to a request by the insured. *University Creek*, *supra*.

16. **Upon a Settlement, Is the Insurer Entitled to Be Subrogated to the Rights of the Insured?** When an insurer settles a claim, all rights of subrogation automatically vest in the insurer and the insurer can pursue all actions to reimburse its loss from those otherwise liable to the insured.

17. **If the Insurer Fails to Defend a Claim or Cannot Cure Title, What Loss Can the Insured Recover?** The policy limits an insured’s loss payable under the policy to the lesser of: (a) the policy limits, or (b) the difference between the value of the insured’s estate as insured and the estate subject to the defect – i.e. the diminution in value as a result of the defect.

18. **Can the Insured Recover For Special or Consequential Damages?** The policy disclaims any liability of the insurer for any special or consequential damages suffered by the insured. In the event litigation is required to enforce an insured’s rights against an insurer, however, §627.428, *Fla. Stat.*, authorizes the insured to recover its attorneys’ fees.

19. **How Does an Insured’s Loss Get Calculated?** If the insurer is unable to defend or cure title and elects to pay the insured the diminution in value, ordinarily an appraisal is obtained to determine the difference between the value of the insured’s interest with and without the defect.

20. **When Does a Policy Expire?** Title policies never die. Even after the insured sells the property and no longer retains an interest in the property, if a claim is later made against the insured under any warranties of title, the insured still retains coverage under its title policy.

21. **What Coverage Exists If There is a Title Defect That No One Is Enforcing Against the Insured?** Title policies require a loss for there to be coverage; remember a policy is not a guaranty but rather an indemnity contract. The policy includes coverage for “unmarketability,” however, and therefore even if there is no present claim against an insured, if a matter affecting title exists which would enable a purchaser to be released of
the obligation to purchase by virtue of the condition, the insurer has a duty to either cure
the matter or pay the loss.

22. What Are Some Examples of Matters Generally Covered by Title Insurance
Policies? A failure of title by virtue of a forgery, a lack of subscribing witnesses, non-
joinder by a spouse, incompetency, a lack of authority of the grantor, a pre-existing lien,
easement, lease, or interest in mineral rights, a right of a party in possession, a competing
claim to title, a lack of legal access to the property.

23. What Are Some Examples of Matters Generally Excluded From Coverage?
Violations of building codes, wetlands, toxic waste, set-back restrictions, claims of usury
– See Rule 4-186.006, Fla. Admin Code, claims of joint venture – See Lawyers Title Ins.

  ii) Remedies

In the event there is a breach of the title policy by the insurer, the insured
obviously can sue for breach of the contract. The Complaint should attach a copy of the
policy, allege that notice of the claim was given in accordance with the terms of the
policy and specify the particulars as to the nature of the title defect and how the insurer
failed to satisfy its obligations under the policy. As noted above, while special or
consequential damages are not recoverable under the terms of the policy, attorneys’ fees
are recoverable if the insured prevails. See §627.428, Fla. Stat.

If the insurer and the insured simply disagree upon the amount of loss to be paid
under the policy, several out-of-court options are available. First, under the policy, the
parties are entitled to enter into arbitration to resolve the dispute. Alternatively, they can
mutually agree to have an appraiser of their joint selection appraise the property and
render a binding opinion on the difference in value with and without the defect. Or they
can enter into an arrangement whereby each party selects their own appraiser and if their
respective opinions of value differ by more than an agreed upon percentage, the two
appraisers select a third appraiser who will appraise the difference in value, which third
appraisal will be binding, but which amount will be limited by the two appraisals
previously obtained by the parties.

(b) Tort Claims

The title insurance policy states that it is a fully integrated agreement between the
parties and specifies that “any claim of loss or damage, whether or not based on
negligence, and which arises out of the status of the title to the estate or interest covered
hereby or by any action asserting such claim, shall be restricted to this policy.”
The economic loss rule in Florida has been in a state of flux over the past 20 years. It is beyond the scope of this presentation to fully summarize that developing area of law. Suffice it to say that an insured, particularly under older Florida caselaw, may be entitled to assert a claim against an insurer for negligence or negligent misrepresentation, if the insurer failed to exercise reasonable care when scheduling recorded title defects in a title insurance commitment or policy. Shada v Title & Trust Co. of Florida, 457 So. 2d 553 (Fla. 4th DCA 1984); Safeco Title Ins. Co. v Reynolds, 452 So. 2d 45 (Fla. 2d DCA 1984); Crawford v Safeco Title Ins. Co., 585 So. 2d 952 (Fla. 1st DCA 1991); First American Title Ins. Co. Inc. v First Title Service Co. of the Florida Keys, Inc., 457 So. 2d 467 (Fla. 1984). More recent caselaw, however, strongly suggests this may no longer be the case. Erskine Florida Properties, Inc. v First American Title Ins. Co. of St. Lucie County, Inc., 557 So. 2d 859 (Fla. 1990); Moransis v Heathman, 744 So. 2d 973 (Fla. 1999); Medalie v FSC Sec. Corp., 87 F. Supp. 1295 (S.D. Fla. 2000); Detwiler v Bank of Central Florida, 736 So. 2d 757 (Fla. 5th DCA 1999); First Nat’l. Bank of Lake Park, N.A. v. Attorneys’ Title Ins. Fund, Inc., 620 So.2d 263 (Fla. 4th DCA 1993).

2. Claims Against Title Agents

In addition to the title insurer, a party who discovers a defect in title to its property may also have a claim against the title agent who performed the title search and examination. The title agent is ordinarily a separate and distinct entity from the title insurance company who issued the policy. Oftentimes it is an attorney or an independent title agency. Ordinarily the title agent charges the buyer separately for the title search and for the title examination, independent of the charge for the title insurance premium. Indeed, a title company is required to perform a title search and examination before issuing a policy as title companies are prohibited from issuing title insurance on a casualty basis. §627.784, Fla. Stat.

(a) Negligent Searches or Examinations

Thus, if the title agent performed the search or examination as opposed to the title insurer, the agent may be liable for errors or omissions in its search and examination. Indeed, oftentimes the agent has such liability not only to the insured under the title policy, but also to the title insurer who similarly relied on the search and examination of the agent in the issuance of the policy. In addition, title insurance agents ordinarily carry errors and omissions insurance of their own which specifically insure against such errors. See §§626.8419, 627.796, Fla. Stat. It should be noted that attorney agents are exempt from these insurance requirements under §626.8417(4)(a), Fla. Stat., but they frequently have malpractice insurance which covers the same risks.

Since it is rare that there is a written contract between the parties to a real estate transaction and the title agent concerning the rights and liabilities of the parties with respect to the services performed by the title agent, the economic loss rule, while still of
some force, may be of less use when it comes to whether a tort action may lie against a title agent as opposed to a title insurer. Accordingly, while an insured may be limited in what damages it may recover against a title insurer due to the limitations of liability contained in the title insurance policy, an insured may nonetheless have a viable negligence claim, which could include consequential damages, against a title agent who negligently performed the title search or examination.

(b) Other Tort Claims

In addition to possible negligence claims against a title agent for a negligent search and examination, there is some authority for the proposition that if the agent knew or should have known of the title defect from a reasonable search and examination, it could be liable for a failure to list the defect in a title commitment under a theory of negligent misrepresentation. Crawford, supra. The viability of such a theory, however, is in some doubt given the development of the economic loss rule as noted in section A 1 (b), supra.

3. Claims Against Sellers and Third Parties

In addition to claims a party may have against their title insurer or title agent for a title defect, such parties may have viable claims against other third parties related to the transaction. Such claims typically include a claim against the seller of the property for breaches of warranties of title in the deed, for breaches of a representation in an affidavit of no liens or an affidavit of no parties in possession, a claim against a surveyor for negligence or breach of contract as to the accuracy or completeness of a survey, or a claim for equitable subrogation, equitable lien or betterment for expenses paid that benefited the property or the true titleholder or lienor.

(a) Breaches of Warranties

If the seller of the property gave the buyer a warranty deed, it ordinarily will serve as a form of indemnity of the buyer, much like a title insurance policy, by which the seller is obligated to defend any claim against the buyer’s title and pay the buyer for any losses the buyer may suffer should title be other than as warranted, including attorneys’ fees. Williams v Azar, 47 So. 2d 624 (Fla. 1950); Nelson v Growers Ford Tractor, Co., 282 So. 2d 664 (Fla. 4th DCA 1973); Needle v Lowenberg, 421 So. 2d 678 (Fla. 4th DCA 1982). If a party makes a claim under its title insurance policy and the title insurer defends a lawsuit or pays the claim, the title insurer, of course, is subrogated to the rights of the insured against its seller and the insurer may direct the attorney representing the insured in the litigation to file third party claims against the seller for the insurer’s benefit.
If a seller is liable for the attorneys’ fees of the insured in such an action, the fact that the title company paid the fees should not preclude their recovery. Robertson v. Cobb, 695 So.2d 507 (Fla. 5th DCA 1997). See also Aspen v. Bayless, 564 So.2d 1081 (Fla. 1990). In this manner, the insurer will be made whole for the attorneys’ fees it incurs on the insured’s behalf.

(b) Breaches of Representations, Equitable Remedies and Betterment

If a title defect arises that is contrary to any representations in an affidavit given by the seller at the closing, (such as a mechanics lien being filed contrary to an affidavit of no labor being performed on the property or a lessee claiming an interest in the property contrary to an affidavit of no parties in possession) claims for negligent misrepresentation or breaches of warranties may exist against the seller. Ordinarily the affidavits that sellers sign at closing recite they are being relied upon by the buyer, the buyer’s lender, and the title insurance company. Thus, all three parties ordinarily have a direct action against the seller for their breach. Another place to look for possible warranties is the sales contract. Sometimes warranties are made in the sales contract which recite that they survive the closing.

If a junior lien against the property was missed at the time the property was refinanced or sold, oftentimes the new lienor can avoid the missed lien from priming the new lien under the doctrines of equitable subrogation or conventional subrogation. Under appropriate circumstances, the missed lienor will be held not to be entitled to a windfall by being elevated from a junior position to a senior position simply by the fortuity of a title examiner missing his lien. Rather, so long as the new lienor paid off the prior senior lien and intended to be in a like-senior position, the new lienor will be substituted for the position of the former lienor that was paid off to the extent of, and under the same terms as, the lien that was paid off. Federal Land Bank of Columbia v Godwin, 145 So. 883 (Fla. 1933); Palm Beach Savings & Loan Ass’n, F.S.A. v Fishbein, 619 So. 2d 267 (Fla. 1993); Suntrust Bank v Riverside Nat’l. Bank of Florida, 792 So. 2d 1222 (Fla. 4th DCA 2001); In re Forfeiture of United States Currency in the Amount of Ninety-One Thousand Three Hundred Fifty-Seven and 12/100 Dollars($91,357.12), 595 So. 2d 998 (Fla. 4th DCA 1992).

Under related principles, a party who believes he owns property or has a valid lien on the property, and who therefore pays taxes on the property or improves the property, but who later is informed that another party claims ownership of the property, may be entitled to assert a claim for an equitable lien against the property to the extent his expenditure of funds benefited the property or the true titleholder. Radisson Properties, Inc. v Flamingo Groves, Inc., 767 So. 2d 587 (Fla. 4th DCA 2000). In addition, he can make a claim of betterment in response to an ejectment action and recover the value of his improvements in that fashion. See §66.041, Fla. Stat.
B. Closing Errors

Aside from title defects, there are a host of closing errors that can occur which may or may not implicate a title defect, but for which a party may be entitled to seek recourse independent of the title policy. These can include the improper disbursement of closing funds, the failure to follow closing instructions, the failure to disclose material facts relevant to the real estate transaction, the failure to close the sale in strict conformance with the terms of the sales contract, the failure to disclose known title defects even if excepted from coverage under the policy, etc.

1. Scope of Agency Between Insurer and Agent

One of the first matters a claimant must evaluate if there appears to have been a closing error is whether the closing agent was acting on its own behalf in closing the transaction or whether it was acting as an agent of the insurer. If the closing agent was acting on its own behalf as a title insurance agent independent of the underwriter when conducting the closing, then the underwriter is not liable for the acts of the closing agent under general agency principles. Sommers v Smith and Berman, P.A., 637 So. 2d 60 (Fla. 4th DCA 1994); Sussman v First Financial Title Co. of Florida, 793 So. 2d 1066 (Fla. 4th DCA 2001).

This is frequently the case as title agents are often independent entities, separate and apart from the underwriter, and they only act as an agent of the underwriter when actually issuing a policy or commitment, not when conducting a closing. Indeed, there often is a separate fee charged by the title agent, and not remitted to the underwriter, paid directly to the title agent on its own behalf for its services in closing the transaction. See Security Union Title Ins. Co. v Citibank (Florida) N.A., 715 So. 2d 973 (Fla. 1st DCA 1998) (title insurer that allowed lawyer to act as agent in making title commitments and policies conferred no apparent authority on agent for closing functions).

On the other hand, in some instances the underwriter handles the closing directly, or the title agent has received actual or apparent authority from the underwriter to act as its agent for purposes of conducting the closing. In those instances the underswriter has liability for any errors made by the closing agent.

2. Insured Closing Protection Letters

Most insurers who issue title policies through an outside agent will also issue what is referred to as an “insured closing protection letter.” Such letters are in a form approved by the Florida Department of Insurance and provide special protection to the insured for the closing functions of the agent. See §627.786, Fla. Stat., and Rule 4-186.010, Fla. Admin. Code. They are issued specifically because in those instances the
agent is not acting as an agent for the title company when performing closing functions, and therefore parties seek to have an insurer indemnify them for any misfeasance by the title agent in their performance of such duties. Such letters ordinarily provide contractual coverage to an insured for an agent’s failure to follow written closing instructions or for an agent’s fraud or dishonesty in the handling of funds or documents in connection with a closing.

While most sophisticated lenders request and receive insured closing protection letters as a matter of routine, often owners can also get similar protection if they request it. In the event of a defalcation by the title agent, as discussed in more detail infra, there is also statutory protection that benefits owners without the need for a closing protection letter.

3. Duties of Closing Agents

This area of law is often controlled by the unique facts involved in any particular transaction. Nonetheless, it appears that there are some general principles that can be articulated, it’s just a matter of when they apply and when they give rise to a viable claim which can differ depending on the specific facts involved.

(a) Fiduciary Duties

It appears clear under Florida law that a closing agent owes both parties to the transaction a fiduciary duty. See Gerson v Broward County Title Co., 116 So. 2d 455, 457 (Fla. 2d DCA 1959); Askew v Allstate Title & Abstract Co., 603 So. 2d 29 (Fla. 2d DCA 1992). The extent and satisfaction of that duty is subject to debate. Certainly it is clear that a closing agent has a fiduciary duty to properly account for all funds it receives in trust in connection with a real estate transaction. §626.8473(2), Fla. Stat. Moreover, it has been held that if a closing agent knows of a survey that identifies encroachments on the property, the closing agent owes the buyer a fiduciary duty to disclose such encroachments to the buyer regardless of whether the agent is issuing a policy that makes exception for any encroachments a survey would reveal. See Daniel v Coastal Bonded Title Co., 539 So. 2d 567 (Fla. 5th DCA 1989). Indeed, the court held that if the failure to disclose the encroachments was done with a fraudulent intent to induce the purchaser to proceed with the transaction so the title agent could sell a title policy, a claim for fraud against the closing agent could be alleged. Id. at 569.

Likewise, in Askew, supra, the court suggested that since the closing agent has a fiduciary duty to both parties to the transaction, if the agent is aware that one of the parties to the transaction is committing a fraud on the other party, the closing agent’s duty is to withdraw from the transaction without disclosing what the agent has learned so as not to reveal confidential information to the other party. This can put a closing agent in a very difficult position at a closing as it may suspect something is not proper but not know
it for a fact. If it raises the issue and inquires about the matter, it may be charged with
having interfered with the contract of the parties by raising a point it shouldn’t have or
with having breached a fiduciary duty not to disclose information, while if it remains
silent, it could be charged with breach of a fiduciary duty by proceeding with a closing
when it should have known there was something untoward going on or even aiding a
fraud. On the other hand, if the closing agent simply withdraws from the transaction, and
it turns out there was nothing improper that was taking place, the parties may claim the
agent breached a duty to have closed the transaction and caused them damage by not
closing. Such are the perils of those who act as closing agents. It is to be noted that more
often than not, there is no written agreement between the parties and the closing agent as
to what the duties and responsibilities of the closing agent are, let alone any agreed
limitations of liability.

Also in the general category of a breach of a fiduciary duty by failing to disclose
to one’s principal all material information, a closing agent was found to have had an
obligation to inform a buyer that while the sales contract called for the buyer to assume a
mortgage with a 9½% interest rate, but the actual mortgage had an 11% interest rate, the
closing agent breached a duty of disclosure to the buyer. Sudberry v Lowke, 403 So. 2d
1117 (Fla. 5th DCA 1981).

(b) Statutory Duties

In addition to the somewhat gray area of what fiduciary duties closing agents owe
parties to real estate transactions, there are some more clearly defined statutory duties.

As noted above, a closing agent has fiduciary duties by statute to properly account
for all trust funds. §626.8473(2), Fla. Stat. Moreover, a closing agent cannot place
closing funds in anything but an escrow account with a financial institution insured by the
FDIC. §626.8473(3), Fla. Stat. The closing agent must maintain separate records of all
receipts and disbursements of escrow, settlement or closing funds. §626.8473(5), Fla.
Stat. A closing agent must not disburse trust funds unless the funds the agent has
received have already cleared its account or are certified funds, a bank check, another
trust account check, an insurance company check or a government check. Rule 4-
186.008, Fla. Admin. Code. And, a closing agent must charge the promulgated rate for
the risk premium, but the agent may rebate a portion of the agent’s share of the premium
(which can be no more than 70% of the total risk premium). Chicago Title Ins. Co. v S.
Clark Butler, 770 So. 2d 1210 (Fla. 2000); §627.782, Fla. Stat.

In addition, there are federal and state statutes regarding disclosure of information
regarding costs related to the real estate settlement process and prohibiting kickbacks and
unearned fees connected with business referrals and fee splitting. See 12 U.S.C. §2601
In the event a closing agent misappropriates escrow funds, the title insurer is liable for such defalcation. §627.792, Fla. Stat. As with several other provisions of the Florida Statutes, however, this statute only applies to licensed title agents, not attorney agents, so title insurers are not liable for defalcations committed by attorney agents under this statute. Independent of any liability of the insurer, personal liability can attach not only to the agent but also to officers and directors of the agency under §§626.734, 626.8411(1)(a), Fla. Stat.

(c) Duties of Reasonable Care

Closely aligned with the commonlaw fiduciary duties described in section B 3 (a) above, the courts have also recognized a general duty of closing agents to supervise the closing in a “reasonably prudent manner.” Thus, if a sales contract calls for the buyer to be entitled to a negative termite inspection, and the seller merely provides a letter from a pest control agency that indicates there were no termites visibly observed on the day of the inspection, the buyer has a claim against the closing agent for allowing the transaction to close without “point(ing) out the possibility that (this report) did not constitute the ‘negative termite report’ which was a condition to closing.” Florida Southern Abstract & Title Co. v Bjellos, 346 So. 2d 635 (Fla. 2d DCA 1977).

While the full scope of this duty to supervise the closing in a reasonably prudent manner has not been fully developed, suffice it to say closing agents appear to be under a duty to read and follow the sales contract, or specifically point out any conditions to closing that are apparently not being satisfied. This is likely a fact-specific duty depending on the sophistication of the parties, whether they are otherwise represented at the closing, and the nature of any conditions not being satisfied. Since many closing agents are not attorneys, they must also be careful not to given any legal opinions on the satisfaction of all conditions to sales contract or to improperly interfere with a contract between the parties, much like the problems discussed above as to a closing agent’s fiduciary duties.