

# Avoiding Title Claims

Presented by:  
The Legal Education Department  
of  
Attorneys' Title Fund Services, LLC

Michael Rothman, Esq.  
Legal Education Manager



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## Program Outline

- Matters considered in handling of new claim
- Retention of outside counsel
- Common claims and their cause
- Liability of underwriter for agent's acts
- Avoiding negligence claims – tips to consider
- Don't get trapped by fraud



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## Overview

No one claim is identical to another

- Tend to repeat themselves



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## Overview

No claim is a good claim

- Even the easiest claim costs time and money



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## Overview

Florida's title insurance industry offers underwriting assistance and education



Education

Assistance



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## Overview

Cutting corners in closing leads to a sloppy atmosphere that fosters claims



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## Overview

Even the best intentioned practitioner is subject to human and technological error



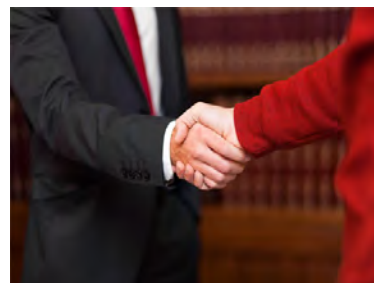
## Overview

Mistakes do happen

- Underwriters are usually resigned to treat errors as a cost of doing business



**"Why didn't  
you look more  
carefully?"**



## Overview

Some claims just cannot be avoided but:

Follow  
the law

Follow the  
Closing  
Instructions

Follow well  
established  
underwriting  
principles



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## Matters Considered In Claims Administration



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## Matters Considered

Is the claim covered or excluded?



Or



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## Matters Considered

Is there an exception from coverage?



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## Matters Considered

Should a defense be afforded under a reservation of rights?



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## Matters Considered

Has there been any prejudice as a result of the insured's actions or inactions?



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## Matters Considered

Does the claim involve the agent's misfeasance or malfeasance?  
Should the agent be put on notice to involve its errors and omissions carrier?

Misfeasance

Malfeasance



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## Matters Considered

Is there a pending litigation or will suit have to be brought?



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## Matters Considered

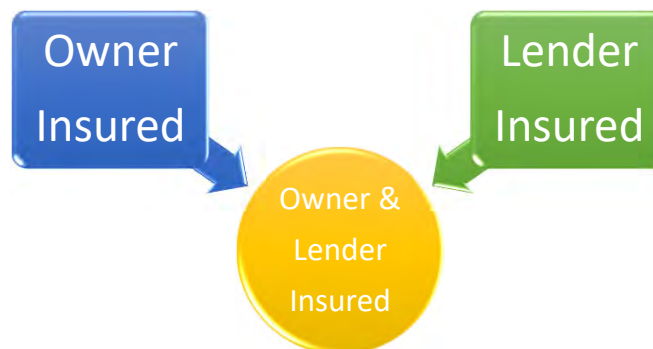
Can the defect be immediately dealt with by way of an indemnity and/or undertaking or is action now required?



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## Matters Considered

Owner or Lender insured? Or both?



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## Matters considered

Is the matter covered by the Fourth Revised Florida Mutual Indemnification Agreement?

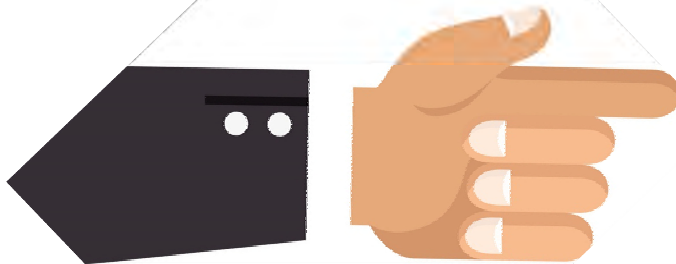


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## Matters Considered

Are there grantors under warranty deeds or other title insurance underwriters liable to cure the defeat or contribute to the loss?



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## Matters Considered

How Much to Budget?



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## Outside Counsel

- Rule 4-1.7 of the Rules of Professional Conduct: the “unique tripartite relationship of insured, insurer, and lawyer [which] can lead to ambiguity as to whom a lawyer represents.”



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## Outside Counsel

Outside counsel has an ethical duty of loyalty and competency to the insured

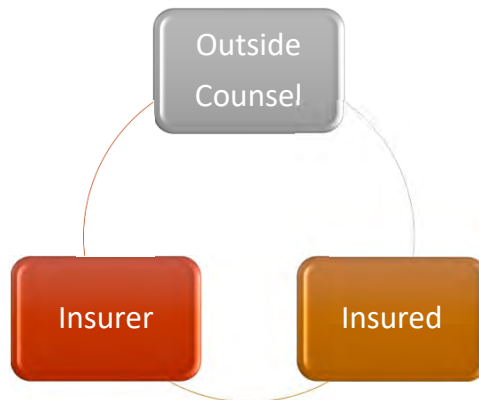


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## Outside Counsel

Outside counsel must make clear to the insured the nature of counsel's retention

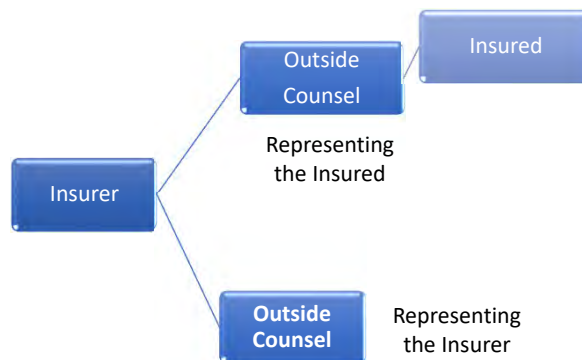


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## Outside Counsel

Outside counsel may be retained to represent the insurer and separate outside counsel retained for the insured



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## Outside Counsel

Insurer has a duty to defend but:

- May issue a reservation of rights letter
- Might engage separate outside counsel to represent the insurer
- Require an Examination under Oath

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## Outside Counsel

Selection of outside counsel is for the insurer to make:

- The insured can retain its own counsel, but costs will be solely borne by the insured



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## Common Claims

The following is a list of the types of claims most commonly reported



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# Common Claims

Bad legal description  
Superior mortgages  
Ad valorem taxes  
Non-joinder  
Ingress/egress and access  
Code liens and assessments  
Breaks in chain of title  
Survey-related  
Homeowner or condo liens  
Construction liens



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Defective Instruments  
Easements  
Corporate defects  
Judgments  
Foreclosure Defects  
Restrictions and Reservations  
Undisclosed Heirs  
Homestead  
Federal Tax Liens  
Probate Defects

# Common Claims



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## Common Claims

Miami-Dade and Broward counties generate more claims than the next 10 counties combined



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## Common Claims

### Causes for the Common Claim

- Four basic reasons

Simple Negligence	• Including human and computer error.
Gross Negligence	• Reckless closing instructions and underwriting principles.
Fraud & Illegality	• From misuse of notary seal, false conveyance documents, to participation in criminal acts.
Unavoidable Risk	• Such as the gap and back chain defects.

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## Negligence Claims

Is an underwriter liable for its agent's negligence?



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## Negligence Claims

Underwriter will **not** be held liable for mishandled closing **unless** the underwriter conducted the closing

*Sommers v. Smith and Berman, P.A.*, 637 So.2d 60 (Fla. 4th DCA 1994)



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## Escrow Agent Liability

Is the underwriter liable for escrow agent's errors and improprieties?

It depends!

Sec. 627.792, F.S., imposes liability on insurer for defalcation, conversion or misappropriation by a licensed agent or agency of funds held by agent pursuant to Sec. 627.8473, F.S.



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## Escrow Agent Liability

Does Sec. 627.792, F.S. cover attorneys?  
No!

*Hechtman v. Nations Title Ins. Of NY*, 840  
So.2d 993 (Fla. 2003)

Reminder: CPLs can cover owner insureds!



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## Escrow Agent Liability

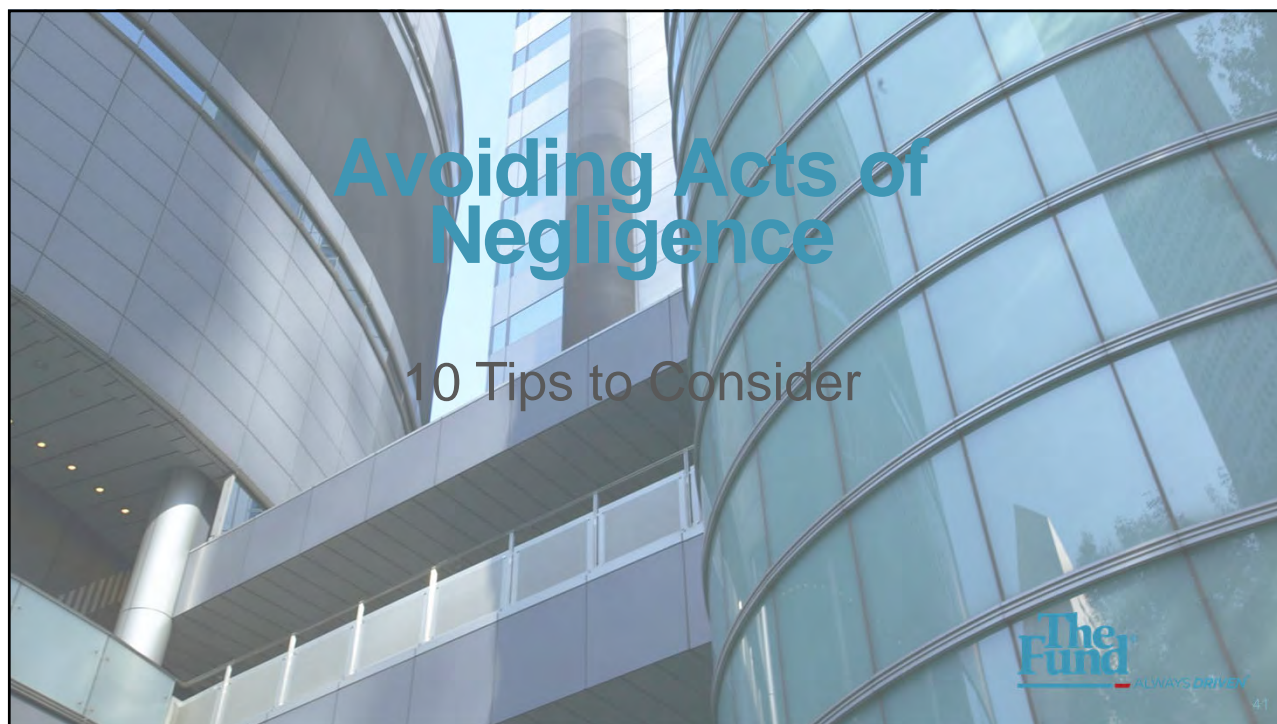
Underwriter not liable for escrow agent's defalcation where  
escrow agent not identified in PSA as title agent

*Winkler v. Lawyers Title Ins. Corp.*, 41 So.  
3d 414 (Fla. 3d DCA 2010)

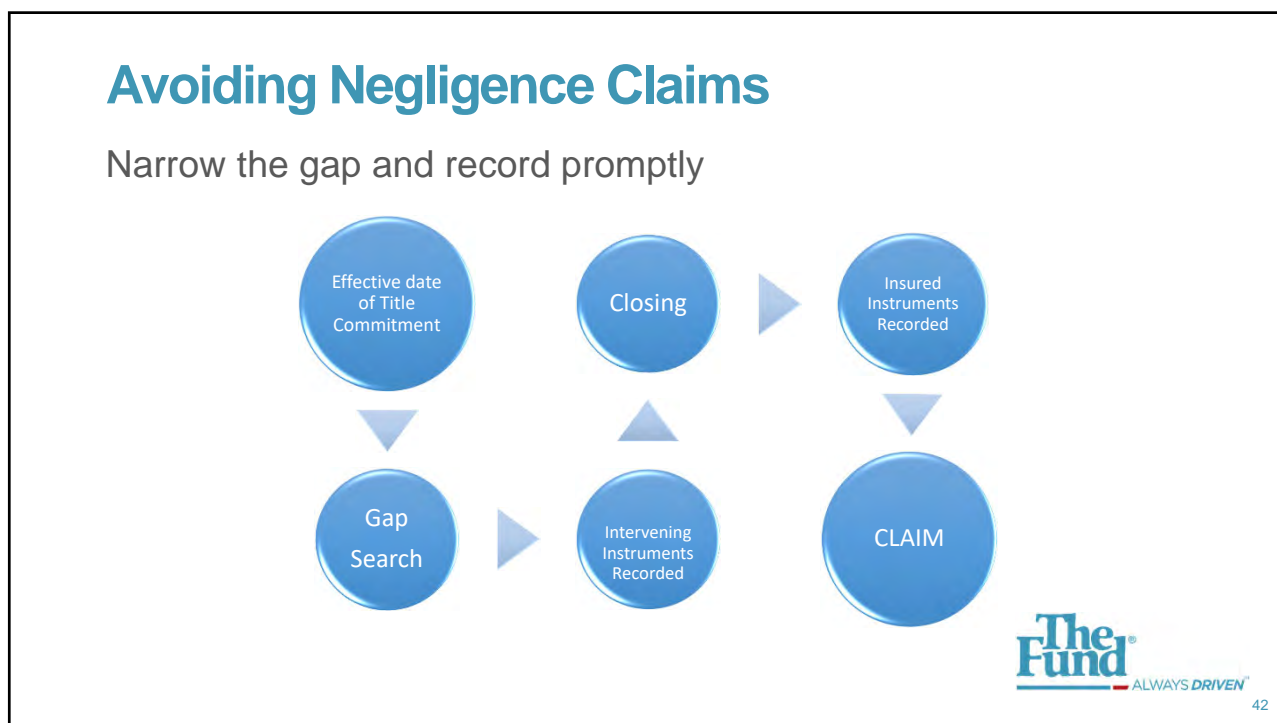


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## Avoiding Negligence Claims

Beware parties in possession  
Confirm Tenant's status and rights

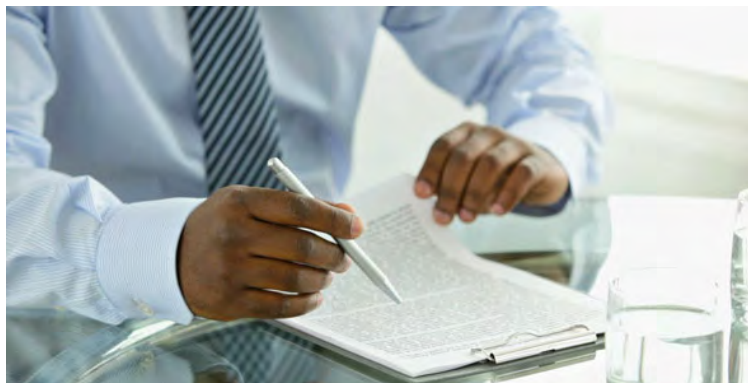


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## Avoiding Negligence Claims

Know how to read the title search and review the exceptions

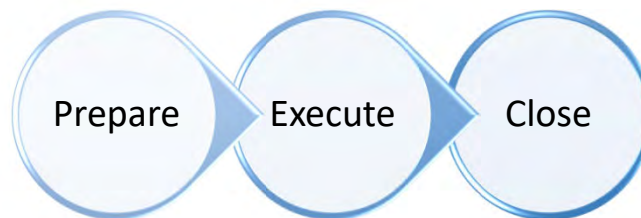


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## Avoiding Negligence Claims

Ensure proper preparation and execution of the closing documents



## Avoiding Negligence Claims

Terminate lines of credit and home equity loans properly





## Avoiding Negligence Claims

Be sure you're...

- Satisfying the RIGHT loan
- Confirm the estoppel letter
- Obtain the Satisfaction of the Mortgage



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## Avoiding Negligence Claims

Take extra precautions when insuring title out of small lien foreclosures



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## Avoiding Negligence Claims

Review the survey and make specific exceptions:

- Failure to review the survey
- Failure to understanding its import



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## Avoiding Negligence Claims

Watch out when paying off PACE liens



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## Avoiding Negligence Claims

Parking spaces and other LCE's are not typically insurable



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## Avoiding Negligence Claims

Follow the lender's closing instructions



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## Avoiding Fraud

Unfortunately, mortgage fraud is a major problem in Florida



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## Avoiding Fraud

Closing Protection Letter (CPL) protects against:

- fraud and dishonesty in handling of funds and documents
- failure to follow written loan closing instructions



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## Avoiding Fraud

Beware the intra-familial quitclaim deed



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## Avoiding Fraud

Be suspicious of cash-out loans on vacant lots



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## Avoiding Fraud

Be suspicious of the naked Satisfaction of Mortgage



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## Avoiding Fraud

Carefully research the background of new hires and supervise them



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## Avoiding Fraud

Be suspicious of buyer-borrowers who put no money down and title has just come out of foreclosure



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## Avoiding Fraud

Be cautious with mail-away closings



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## Avoiding Fraud

Beware the caregiver

- make inquiry into the capacity of a party to sign a deed or mortgage



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## Avoiding Fraud

Avoid doing closings in hospitals, nursing homes and senior centers



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## Avoiding Fraud

Be alert when title is coming out of divorce



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## Avoiding Fraud

Be sensitive to recent changes to SunBiz filing and corporate documents



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## Conclusion



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## Conclusion

Avoiding claims is no easy task

- Attention to detail
- Healthy dose of skepticism
- Educate yourself and staff
- Don't ignore lender's written instructions
- Take advantage of legal education and underwriting assistance
- Don't take the easy way out and hope for the best



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A black and white photograph showing a low-angle view of several tall skyscrapers reaching towards a cloudy sky. The perspective creates a sense of height and scale.

# Thank you!



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