

Real Estate Claims on the Rise

Information from professional liability insurers indicates that one of the fastest growing areas of claims against Georgia lawyers arise from real estate transactions. Much has been written about the increased demand for residential real estate and multitude of loan programs available to help virtually everyone qualify for loans. Many loan programs specifically target borrowers who do not have sufficient income or credit history to qualify for a traditional mortgage, including programs which do not require proof of employment, income, or the source of down payment funds. There is often little or no due diligence done to evaluate the borrower or the property's ability to support the loan amount before the loans are approved. As a result of these factors, lenders are reporting record numbers of defaults and foreclosures. In an effort to minimize losses from foreclosures, lenders are increasingly looking to other participants in the loan application and closing process to reimburse them for those losses.

CLOSING ATTORNEYS PRIME TARGETS.

Lawyers conducting residential and commercial closings often fill multiple roles in a single transaction: counsel for the lender, agent for the title insurer, employer of the individual conducting the title search. This multi-tasking and the lender's desire to shift responsibility for losses from defaults makes real estate closing lawyers at risk for claims. Although the potential for a claim exists regardless of diligence, there are several things you can do to minimize the risk of claims:



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- 1 Use written disclosures** defining the scope of representation.
- 2 Note all recipients of sale proceeds** on HUD1 form, even when not requested by the lender or customarily done. Obtain written approval from the lender to disburse funds to anyone other than the listed seller, both for disbursements done at the closing and those done thereafter.
- 3 If any party is unrepresented**, avoid statements which can be interpreted as giving legal advice. Examples of innocuous statements giving rise to claims include:
 - Comments on tax consequences, including status of tax liens
 - Comments on effect of termite bonds
 - Observations regarding perceived value of property relative to purchase price
 - Explanations of title policy scope or purpose
 - Potential zoning or use that can be made of the property
 - Purpose of or obligations flowing from deed to secure debt
- 4 Ensure that your professional liability policy** covers title searches and work performed as an agent of a title insurer
 - If using an independent contractor to conduct title searches in conjunction with issuing title insurance policies, ensure that the individual maintains sufficient professional liability insurance
 - Disclose use of independent contractors to title insurers and obtain written approval for use of them
 - Include a disclaimer regarding liens which may be filed between the date of title report and closing date



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