

# Eliminating Claims from the Beginning

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# Overview: What is Title Insurance?



# Basics of Title Insurance

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- Risk Elimination
- Duty to Defend
- Duty to Indemnify
- Where there is a good chance of litigation, even with no chance for loss, a policy should not be written since the duty to defend and the ultimate cost of defense, in many cases, exceeds the actual loss.
- Off-record risks must be considered
- Role of MVT Underwriters



## You closed the transaction, now what?

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- Record all documents promptly
- Order a title update
- Review the requirements to see if all were met
  - They should all be met or you should not close or an appropriate exception should be made in the policy.
- Common items to address:
  - Old DOT release from proper entity (loan was likely assigned)
  - New DOT
  - New Deed
  - Taxes Paid?
  - Premium for title insurance
  - Payment of any other fees/closing costs
  - Affidavits signed
  - Waiver of Owner's Insurance



## You closed the transaction, now what? (Continued)

- Are all docs properly notarized?
- Legal description attached is the same as commitment?
- Documents signed, dated and notarized?
- Filed in correct order?
- Are the EXACT same names used on all new documents? If not, re-record or get name affidavits
- For those of you who issue your own policies, issue them timely. If you don't issue your own policies, submit them to us so that we can issue them timely. Lenders are becoming more strict about this.
- Fix problems quickly – sooner is better than later

## Post-Closing - Failing to Timely Record Documents

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A bankruptcy trustee can set aside certain transfers made within 90 days (and in some cases 1 year) prior to the filing of the bankruptcy petition. Section 547(b) of the Bankruptcy Code.

- A deed of trust falls within Section 547(b) and thus may be avoided.
- However, a bankruptcy trustee can not avoid a deed of trust that was recorded within 30 days after the closing.

One court found a settlement agent negligent as a matter of law for failing to record the vesting deed and deed of trust for 6 days. In the 6 day gap, a judgment was recorded against the seller. Huntington Mortgage Company v. Schmenk, 658 N.E. 2d 1109 (Ohio 1995).



# Access

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## Right of Access to a Public Road

Covered Risk 4 in 2006 ALTA Policy provides "[n]o right of access to and from the Land."

Confirm the plat shows the subject property touching a public road.

- If the plat does not show that the subject property touches a public road, confirm there is an easement that connects the subject property to a public road.

If the subject property does not have direct or indirect access, add an exception for lack of access.

Watch out for limited or controlled access where the insured property abuts on an interstate highway or other major artery.



# Easements

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A missed easement that burdens the subject property.

Failure of title to easement because the servient estate was not searched.

Failure of title to the easement because a lien on the servient estate foreclosed out the easement (can be prevented by getting partial release of easement description from the servient estate lender).

Easement was owned by the borrower but was not included in the insured deed of trust.

Easement falls short of reaching the subject property or a public road.





# Property Taxes and Tax Sales

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2016 City of Memphis Property Taxes are due and payable after the tax rate is set (generally the third week in June) and were delinquent September 1, 2016.

2016 Shelby County Property Taxes are due and payable October 1, 2016, and were delinquent March 1, 2017.

- Property Tax Liens have priority over all judgments, executions, encumbrances or liens whenever created. Tenn. Code Ann. § 67-5-2102.



# Property Taxes and Tax Sales

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**15+ Years:** Properties where the tax sale is more than 15 years old may be insured without exception, however unreleased liens of any kind where the applicable statute of limitations have not expired must be listed.

**6-15 Years:** Properties where tax sale is at least 6 years old (right of redemption has expired for at least 5 years) will be reviewed on a case by case basis. **Contact us** for approval subject to the following conditions:

1. Unreleased liens within their applicable SOL's must be listed as exceptions.
2. No challenge to the tax sale pending
3. Exception to the policy for matters pertaining to the tax sale, with affirmative coverage.
4. Any additional requirements as determined by Old Republic.

**0-6 Years:** Properties where the tax sale is less than six years old are not insurable.



# Adverse Possession

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Adverse possession requirements: Acts of possession (for a twenty years without color of title or 7 years with color of title) must be:

- open,
- notorious,
- continuous, and
- hostile.

-See Tenn. Code Ann. § 28-2-101 et seq. and *Ferguson v. Prince*, 190 S.W. 548 (Tenn. 1916).

**A title which is dependent on adverse possession is not insurable unless there is a final non-appealable order from a court of competent jurisdiction confirming title.**



# Bankruptcy Basics

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Secured liens ride through bankruptcy.

Common misconception that bankruptcies remove all prior debts, but mortgages and some other secured liens will remain as in rem liens against property acquired before the filing of the bankruptcy petition.



# Cemeteries, Burial Grounds and Archaeological Sites

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Title insurance should not be written on lands platted for or used as burial plots.

If the survey or deed discloses the existence of graveyards, or if you are aware of an express or implied dedication of the land to be insured as a cemetery, an exception should be made in Schedule B as to that fact.

- Many state laws allow for an implied easement from public roads to enter upon and tend to the graves. Tenn. Code Ann. § 46-4-102
- The exception should also include reference to an easement to enter upon, visit and tend to the graves.

There may also be occasions where a tract of land will include pre-historic burial sites of native people often in the form of mounds. These are given extensive protection under the law.



# Deeds of Trust

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**HELOCs** - Paying off the HELOC down to \$0 does nothing. It still remains as a line of credit. Look at the request for closing of the HELOC very carefully, and confirm everything is done correctly. Keep copies of everything (Letter signed by borrower, check, FedEx tracking info, communication to lender, etc.).

**Cancellations** - Obtain releases of prior mortgages from the current assignees, and confirm the releases are correct. Be sure to keep copies of them.

**Subordination Agreements** - Make sure that the agreement is correct and executed by the correct parties.

**Assignments** - Whenever the title to the land to be insured is dependent on a foreclosure, confirm that there is a proper chain of assignments of the foreclosed Deed of Trust into the entity that foreclosed.



# Divorce

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The Decree should **divest** one spouse of the property, AND **vest** title into the other spouse.

- An order directing one spouse to give a deed to the other is a good start, but does not complete the process. This is because people don't end up doing it and don't discover it until they go to sell it or refinance it. Then sometimes the ex-spouse is deceased or not willing to assist.
- Note that the words "full use & possession of the property" does NOT transfer anything. This statement does nothing in reference to the title.

It is best to also have the spouse being divested of the property to also sign a deed conveying the property to the other spouse.



# Homestead

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Homestead Exception Statute. Tenn. Code Ann. § 26-2-301.

- If a marital relationship exists, a homestead exemption shall not be alienated or waived without the joint consent of the spouses.
- Exception: A deed of trust executed to secure the purchase of the homestead property is valid without the non-owning spouse's signature. Tenn. Code Ann. § 26-2-301(c). This exception only applies to the homestead right. If both spouses are grantees in the Deed, both must sign the purchase money deed of trust.
  - If refinancing or a Second Deed of Trust is being issued, both spouses must execute regardless of whether they own it or not.
- Lender may not take possession of foreclosed property until it has applied the homestead exemption amount toward acquiring a new homestead. *Brown v. United Companies Financial Corporation, 1992 WL 4780 (Tenn. Ct. App.)*.





# Foreclosure Basics

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In a non-judicial foreclosure, the law (Tenn. Code Ann. § 35-5-101 et seq.) should be strictly construed. The procedure can be varied by agreement of the parties. *Self Help Ventures Fund v. Robilio*, 2010 WL 2176093 (Tenn. Ct. App. 2010).

- Make sure to follow the procedures allowing the foreclosure were met:
  - Foreclosure sale not conducted in accordance with the procedures agreed to in the Deed of Trust is **void**. *In re Kitts*, 274 B.R. 491 (E.D. Tenn. 2002).
  - Foreclosure sale not conducted in accordance with the statutory procedures is valid, but the Trustee is liable for damages. Tenn. Code Ann. § 35-5-107.

A valid foreclosure of a deed of trust cuts off and extinguishes junior liens and encumbrances.

- Exceptions: Special procedures must be followed to extinguish the following subordinate liens: Federal Tax Liens, State Tax Liens, Liens in favor of the United States or Certain liens as a result of criminal activity.



# Foreclosure – Continued

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Statute of Limitations for Foreclosure: 10 years from maturity date.

Statutory Right of Redemption: 2 years, but can be waived in the Deed of Trust.  
Tenn. Code Ann. § 66-8-101 et seq.

Judicial Foreclosure is available, but is rarely used.

Underwriting Things to Look For:

- Confirm the Deed of Trust that was foreclosed was sufficient (grantor was owner at the time of execution; if homestead property, make sure spouse of grantor signed the Deed of Trust; valid legal description; proper acknowledgment).
- Confirm chain of assignments into current beneficiary.
- Determine foreclosure was conducted in accordance with TN statutes and the terms in the Deed of Trust.
- Confirm notice was provided to all proper parties (i.e. Subordinate Lienholders).



# Minors

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In general, a person must be 18 years of age or older to convey or encumber real property in Tennessee. Tenn. Code Ann. § 1-3-105.

- A minor (anyone under the age of 18) is under legal disability and does not have capacity to convey property without court approval.

The Uniform Transfers to Minor's Act allows real property to be conveyed to a custodian for the benefit of the minor, and allows the custodian to convey or encumber the real property on behalf of the minor. Tenn. Code Ann. § 35-7-201 et seq.

In order to approve the sale of property of a minor, an action must be commenced under Tenn. Code Ann. § 34-11-116 to authorize a guardian to sell the property on behalf of the minor.

The disability of minority can be removed pursuant to Tenn. Code Ann. § 29-31-101 et seq.



# Mental Capacity

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Mentally incapacitated persons experience a disability that prevents them from executing a legal conveyance or encumbrance of title to real property.

Closers of real estate transactions must be aware of the fact that any instrument can be set aside upon proof that the grantor was mentally incapacitated at the time of its execution.

# Mobile Homes

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Don't insure mobile homes unless you know all of the requirements and have confirmed everything is good to go.

Mobile Homes Installed 2003 through Current:

- Confirm Inspection Certificate declares home is permanently attached.
- Confirm Affidavit of Affixation has been recorded.

Mobile Homes Installed prior to 2003:

- Confirm Affidavit of Affixation has been recorded.

If the Mobile Home is not permanently attached to a foundation, you cannot issue title insurance (list as exception on policy). You can insure the property, but not the Mobile Home.

Contact us if you have ANY questions, because there is no easy way to cure these claims without hiring an attorney.



# Estates

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Be sure to look through the estate file for these issues:

- Errors in the file.
  - Notice to creditors.
  - Pay creditors.
  - Pay proceeds to estate.
  - All beneficiaries or devisees must sign.
  - Are trusts created by will?
- Upon death of a person, his property vests immediately in his heirs or in devisees or distributees under his will (unless special provisions are set forth in the will). Tenn. Code Ann. §31-2-103.
  - The court may authorize a sale of real estate when the value of the personal estate is not sufficient to pay the decedent's debts. Tenn. Code Ann. §30-2-401 et seq.

Unadministered Estates



## Admitting Will as Muniment of Title

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If a full probate is not necessary due to how long it has been or some other legitimate reason, a copy of the will may be admitted through the process of Muniment of Title.

This is a lower cost alternative to full probate and allows the granting of letters testamentary.

Tenn. Code Ann. Sec. 32-2-111

## Heirship Affidavits – Tenn. Code Ann. §30-2-712

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### Guidelines for Reliance on Heirship Affidavits:

- Obtain two (2) heirship affidavits to determine the identity of the heirs at law of the decedent.
- The affidavits must be obtained from disinterested people with personal knowledge.
- The affiants knew the deceased during his entire adult life.
- **The agent personally believes the affiants to be reliable.**
- The heirship affidavits should be recorded as exhibits to the deed.





## Extra-Hazardous or Unusual Risks

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The following are some examples of unusual title matters which should be submitted to your supervisory office for review and determination of insurability before issuing a commitment:

- Title through:
  - tax deed;
  - sheriff's deed under an execution sale;
  - federal marshal's deed under an execution sale;
  - sale by Commissioner of Internal Revenue for unpaid federal taxes; or
  - sale following a drug forfeiture.

Title to land now under or formerly under navigable waters (filled-in land).

Title to air space or transferable development rights.

Title by adverse possession.

Title acquired through eminent domain/condemnation.

Title to severed mineral or oil and gas interest.



## Extra-Hazardous or Unusual Risks (continued)

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Insurance of options to purchase.

Titles in or through or in trust for individual Indians or tribes, or reservation lands, or tribal property.

Present or threatened title litigation.

Transactions refused by other insurers.

Title through railroads.

Title or easements from the U.S. other than through a patent.

Requests to insure against "creditors' rights" claims.

Requests to insure against "mechanics' lien" claims, particularly when:

- a. new construction or repair work has already started (priority is lost);
- b. work has recently been completed and the time for filing liens has not expired; and/or
- c. you are asked to rely on indemnities to insure over existing or unfiled liens ("credit underwriting").



# Red Flags to Look For

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## Underwriting Red Flags

- Proposed insured is seeking a policy not in connection with a real estate transaction.
- Another underwriter has declined to insure the subject property.
- Borrower or other interested party, brings a release or subordination agreement to the closing attorney.
- Property is not encumbered by a mortgage (did owner inherit the property?).
- Deed of Trust canceled with no evidence of source of funds to pay off Deed of Trust (i.e., no sale or new loan).

## Forgery Red Flags

- Parties are not able to appear at closing to sign documents.
- If you let the document out of your sight, you don't know what is happening with it.
- Most forgeries are mailed out or taken out of the office.
- Mortgage cancellations that appear by themselves in the chain of title.



# Red Flags to Look For

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## Mortgage Fraud Red Flags

- Closing Disclosure must be truthful.
- Be aware of inflated appraisals and other misrepresentations.

## Escrow Red Flags

- Hackers can get into your email account as well as the seller, realtor, mortgage holder, lien holder, etc.
- Be on the look out for emails that:
  - Change wiring instructions that were previously received
  - Arrive outside usual business hours
  - Arrive at the last minute
  - Change often
  - Contain poor grammar and/or typos
  - Come from someone other than the parties with whom you have been working
- Emails can closely resemble original emailer. Watch out for johndoe@sendmoneyhere.com vs. johndoe@sendnoneyhere.com



# Reporting Claims

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For Tennessee claims, you can email me ([mbryant@oldrepublictitle.com](mailto:mbryant@oldrepublictitle.com)) or our claims department ([TNClaims@oldrepublictitle.com](mailto:TNClaims@oldrepublictitle.com)) who will send it to us.

We are here to assist you with underwriting questions and with claims on Mississippi Valley Title and Old Republic Title Policies when you have a problem with something that we insured.

Feel free to call us anytime.





**THANK YOU**

**Marc Bryant**

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