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Overview of Title Insurance Claims and Litigation

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OVERVIEW OF TITLE INSURANCE CLAIMS AND LITIGATION

A good marketable title has been defined as "such a title as a reasonably prudent man would accept in purchasing the land or in securing a loan of money," or one "which can be sold to a reasonable purchaser, or mortgaged or transferred to a person of reasonable prudence as a security for a loan" and "one free from reasonable doubt; … not only a valid title in fact, but one that can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence." Ga. Real Estate Sales Contracts § 8:5 (6th ed.)(citations omitted). Though there are a myriad of potential issues, title litigation most commonly boils down to two fundamental questions: (1) is the deed of conveyance itself valid; and (2) does the deed convey that which it was intended to convey.

One of the first maxims I learned in dealing with title litigation is to never accept legal or factual premises established by others, since they are often based upon flawed assumptions and mistaken, omitted, or mischaracterized facts. The second maxim, which is a logical extension of the first, is to avoid litigating on the battlefield selected by your opponent, since that battlefield was chosen based upon select facts and characterizations that often tell only that part of the story favorable to their client.

As a defense attorney, my first exposure to a title claim is generally when I receive notice that my client – either an individual or a lender that has or had an interest in the subject property or adjoining property - has been served a copy of the summons and complaint.

Rewinding the hands of time, the title litigation process begins when an insured, either an owner or lender, submits a title claim to the title insurer. Though the specific requirements to make a title claim vary nominally among insurers, and are generally set forth in the policy itself, most policies contain a "timely notice" provision, and initially require only a general description of the title issue or dispute. Upon receipt, the initial notice of claim is referred to a claim representative who will open a file and conduct an initial evaluation of whether the claim is covered under the terms of the title policy.[1] If the claim is deemed to be a bona fide title issue not subject to an exclusion under the title insurance policy, the claim representative will initiate a more thorough substantive investigation, which may include requests for additional information, title examinations, and any other information necessary to assess the scope of the issue and options for a timely and cost efficient resolution. The claim representative and/or in-house counsel will thereafter generally attempt to resolve the title issue, either by effecting measures to cure the defect or payment of a claim to compensate the insured for damages actually incurred as a result thereof. If such in-house efforts are unsuccessful, the title insurer will engage outside counsel – claims counsel, who is generally selected from the insurer's approved panel, though an insurer may occasionally consent to non-panel counsel upon request of the insured.[2]

Claims counsel is engaged by the insurer for the benefit of the insured. Simple as this fact sounds, it is imperative for claims counsel to understand that though the insurer engaged him and the insurer is paying him, his duty of loyalty nonetheless lies with the insured. Furthermore, it is imperative for claims counsel to be aware of and to understand the terms of the policy under which he is engaged, specifically with respect to the terms of the policy, *i.e.* does the policy permit the insurer to settle a claim without the consent of the insured or alternatively, the implications of an insurer refusing to settle a claim on terms deemed acceptable to the insured. Balancing these sometimes competing – though generally not conflicting, interests require the continued diligence of claims counsel.

In any representation, particularly in matters involving title to real property, counsel's first task must be to identify the client. This may seem axiomatic, but doing so is not always as clear cut as it may initially appear, especially in an industry where multiple people perform multiple functions for multiple parties during the course of a real

[1] Coverage denial is beyond the scope of this presentation, and is best addressed by counsel specializing in insurance coverage disputes.

[2] Separate issues beyond the scope of this presentation may develop where the cure and/or compensation deemed appropriate to the insurer are disparate to that desired by the insured.

estate transaction and where loans are originated, funded, and assigned by multiple entities as a matter of course.

In a recent equitable subrogation[3] case, a lender had engaged counsel to foreclose upon their security interest. During preparations for foreclosure, foreclosure counsel identified a title issue affecting the lender's priority position, thus precluding its ability to foreclose from the senior lien position. A title claim was subsequently filed under the lender's title policy.[4] The title company engaged claims counsel, providing foreclosure counsel as claims counsel's point of contact. During the course of litigation, claims counsel, with the consent of the lender's foreclosure counsel, agreed to a monetary settlement with the defendant senior secured lienholder of record to secure senior lien status for the plaintiff insured lender, thus permitting the insured lender to foreclose from the senior priority position. When it came time to sign the settlement agreement, the title company refused to execute, directing the insured lender to do so. This relatively simple issue became much more complex when it was discovered that the insured lender had transferred servicing during the course of litigation -- to the defendant lender, who was now ostensibly both plaintiff and defendant in the litigation.[5] In consideration of the defendant lender's obligations to the insured lender – the actual holder of the security instrument - under its servicing agreement, substantial conflict of interest issues precluded the defendant lender from compromising the claim on behalf of both the insured and itself. Notwithstanding that claims counsel communicated with foreclosure counsel at the direction of the insurer, claims counsel never asked foreclosure counsel pertinent questions as to who was directing foreclosure counsel's representation, and never communicated directly with the insured lender. By failing to do so, claims counsel initiated, prosecuted, and agreed to settle a claim for and against a lender already represented by counsel, creating multiple conflicts of interest that precluded finalization

[3] Subrogation discussed in more detail *infra*.

[4] Though irrelevant to the purposes of this anecdote, it is unknown whether the claim was filed by the insured lender or foreclosure counsel.

[5] The actual holder of the security instrument was a trust, as is often the case these days, with an omnibus servicing agreement directing and authorizing the servicer to perform a multitude of functions, including the prosecution and settlement of claims.

of the relatively simple settlement agreement deemed acceptable to all. Though these issues were ultimately resolved after a great deal of angst and the case settled, substantial expenditures of time and money were wasted, simply because claims counsel did not identify and communicate with their true client upon engagement.

The second task of counsel is to identify the facts in order to develop a litigation strategy for the prosecution of causes of action and the assertion of defenses. Whether claims or defense counsel, this preliminary step is the touchstone for all that follows in the litigation. A claim is initially filed through the subjective prism of the insured's perspective and evaluated by an in-house title claims representative for prompt and efficient resolution. At the time of engagement, claims counsel will generally receive from the title company a fairly in-depth analysis of the issue(s), basic supporting documentation, and at least a basic outline of strategy to cure the defect or recover damages arising therefrom. Neither an insured's subjectivity, nor an insurer's pragmatism, is sufficient to sustain a cause of action, however. Where defense counsel's client is a lender, counsel will generally receive an overview of the allegations, a brief summary of the defendant's position, and basic loan documents at the time of engagement. Where defense counsel's client is an individual, initial materials often include only the complaint, a demand letter from the title company, and the obligatory question, "What the heck is this?!"

As lawyers, the essence of our professional being motivates us to characterize facts in the manner most favorable to our client. That said, facts do not lie, and an effective characterization of the facts requires a detailed knowledge of them. In litigation involving title to real property, the simple question is: "Who did what when for whom, and why did they do it how they did it when they did it?" Only by addressing this question as a preliminary matter can counsel effectively evaluate options and develop a strategy to resolve the title dispute.

Though issues may vary depending upon whether a claim is filed by an owner or lender under their respective title policies, the fundamental question for both is: does the insured own what they think they own? If not, the issue is whether the insured can obtain that which they thought they owned. Answers to these preliminary questions are often not as simple as they appear. If they were, the matter would not be in litigation. Though counterintuitive to many attorneys that are inclined to immediately evaluate causes of action or defenses related to the title issue identified by the title company, the prudent place to begin is by preparing a detailed chronology of events based upon independent research of relevant documents and public records. For claims counsel, this is essential to cross-check against the information upon which the title company's evaluation was based. Claims counsel has been engaged to resolve a title issue that the title company was unable to resolve, not to proceed blindly down a path that may have been initiated by the title company based upon partial or incorrect facts and/or flawed assumptions. Rest assured that defense counsel will identify these incorrect facts and flawed assumptions at the most inopportune time, often with fatal effect to the claim and counsel. Similarly, it would be tantamount to malpractice for defense counsel to accept the factual allegations of the insured without conducting a thorough and detailed independent investigation of the conveyances related to and concerning the insured's claim. (See maxims one and two above).

Especially during the "slam 'em and jam 'em," halcyon days of the mid-90's through the mid-2000's, real estate transactions proceeded faster than even the best quality control procedures could keep up with. A standard Georgia real estate transaction involves a buyer, a seller, two real estate agents representing two separate real estate brokerages, a lender, a title company, and a closing attorney who is generally acting simultaneously as counsel for the lender and as an agent of the title company. Among these parties, there are a myriad of overlapping and interrelated contractual relationships that in practice, if not at law, present practical issues of loyalty and conflict. Within this context, the "what" may not always appear what it appears to be on the surface.

A detailed chronology of not only conveyances of title, but also of tangential events concerning parties related to the conveyances, such as deaths, marriages, dissolutions of entities, and mergers may all be relevant to the litigation. Moreover, parties involved in these events – including the lawyers and agents representing parties during the course of these events, may likewise be relevant to the litigation. The relevance of these conveyances, events, and parties may only be discernable after a detailed chronology is prepared.

As part of the chronology, dates of execution, dates of recording, exact party names, legal descriptions, and signing authority are essential. What is presented as a simple lot line dispute becomes much more complex when it is discovered that the predecessor in title to the seller to the insured lacked the corporate capacity to convey title via a deed that appeared to otherwise be valid on its face. Similarly, a subrogation claim becomes much more complex when it is discovered that the legal description of one security deed differs from the legal description of the other, with each describing a separate and distinct portion of the property intended to be secured. A diligently prepared chronology will not only identify these directly material facts, but will also identify gaps in counsel's cause of action or defenses and areas requiring further investigation. Additionally, most institutional clients require an initial case assessment and budget at the early stages of the engagement and periodic updates thereafter. A detailed chronology greatly facilitates the preparation and accuracy of these initial reports and becomes a working document to be updated and revised through the duration of the litigation.

Once an initial chronology has been prepared, counsel will be well on its way to answering the preliminary question of "who did what when for whom," which is essential to answering the second part of the question, "why did they do it how they did it when they did it." It is at this stage where distinctions between the client's assessment of the title claim and legal reality may and should be identified. It is also the stage that counsel has become well enough informed to make initial evaluations of the strengths and weaknesses of the cause of action and/or defenses, to address these strengths and weaknesses with the client, and to identify and request additional materials and information necessary to support such.

Just as with all civil litigation, it is plaintiff's burden in title litigation to establish each and every element of a cause of action by a preponderance of the evidence. Conversely, defense counsel need only show that plaintiff is precluded from establishing, by a preponderance of the evidence, a single element of its cause of action. Within this context, it is incumbent upon claims counsel to thoroughly vet its causes of action prior to commencing litigation.

Vetting claims and defenses requires a big-picture, objective evaluation of the facts and law. Many claims that appear obvious at first glance, especially when initially viewed through the subjective prism provided by the insured or the title representative, are in fact multi-faceted. A recent case, *Caraway v. Spillers*, 332 Ga. App. 588, 588 (2015) is a classic example of how even where there seems to be no genuine issue of material fact on what appears to be a clear question of law, competing questions of law may present issues of fact sufficient to preclude judgment as a matter of law. In *Caraway*, Spillers' mother deeded land to Caraway in 1998. Caraway lived on the land thereafter, but did not record the deed. In 2003, Spillers' mother deeded the same land to Spillers. Spillers recorded this deed three days later. The Caraway deed was filed approximately a month after the Spillers deed was filed. Spillers filed suit seeking to cancel the Spillers deed and for declaratory relief. The trial court granted Spillers motion for summary judgment, finding that since the Caraway deed was not filed until after Spillers' deed was executed and recorded, the Caraway deed was null and void as a matter of law.

The Court of Appeals, however, compared O.C.G.A. §44-2-1, which provides that a prior unrecorded deed loses its priority to a subsequent recorded deed from the same vendor when such purchaser takes such deed *without notice of the prior deed*, with O.C.G.A. §44-5-169, which provides that *possession of land constitutes notice* of the rights or title of the occupant. Without finding what rights, if any, Caraway had in the land, or whether Caraway's possession was sufficient to preclude Spillers from obtaining priority under O.C.G.A. §44-2-1 regardless of any inquiry Spillers would have made, the Appeals Court reversed, finding that there was at least a question of fact as to whether Caraway's possession put Spillers on inquiry notice of Caraway's title to the land.

Once a chronology has been prepared, and an initial analysis of potential claims and defenses has been conducted, counsel should independently examine each document to identify all facial and substantive defects. In order for a deed to attain priority and to provide notice to third parties, it must be filed of record. O.C.G.A §44-14-61. In order for a deed to be recordable, it must be properly attested. O.C.G.A. §44-14-33 provides:

> In order to admit a mortgage to record, it must be attested by or acknowledged before an officer as prescribed for the attestation or acknowledgment of deeds of bargain and sale; and, in the case of real property, a mortgage must also be attested or acknowledged by one additional witness. In the absence of fraud, if a mortgage is duly filed, recorded, and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers.

It is important to understand the distinction between an "attestation" and an "acknowledgment," since such is a frequent source of title issues, particularly with deeds executed outside of Georgia, and more specifically with "mail away" closings. An authorized officer "attests" to the execution of a deed when the deed is executed in the attesting officer's presence. When a deed is not executed in the presence of an authorized officer, an authorized officer may "acknowledge" that the deed was in fact signed by the grantor and that the signing grantor is who he/she represents to be. Since a deed must be "attested" by two witnesses, a deed executed in the presence of one witness and acknowledged by another is ***not*** recordable. The Georgia Supreme Court provided substantial clarification on this issue in *U.S. Bank Nat. Ass'n v. Gordon*, summarizing therein that a security deed which appears on its face to be properly attested should be admitted to record, but that a deed that shows on its face that it was not properly attested or acknowledged, as required by statute, is ineligible for recording. 289 Ga. 12, 15 (2011). *Gordon*, however, must be distinguished from the other seminal case on the topic, *Leeds Bldg. Products, Inc. v. Sears Mortgage Corp.*, where the court concluded "that in the absence of fraud, a deed which, on its face, complies with all statutory requirements is entitled to be recorded, and once accepted and filed with the clerk of court for record, provides constructive notice to the world of its existence." 267 Ga. 300, 301 (1996). The operative distinction between the two is thus whether the defect is latent or obvious on the face of the document, with a facially defective instrument potentially being fatal.

Distinct, but related and equally important issues for the title litigator, in examining the face of conveyance instruments, are that of authority and capacity of a grantor and the form of execution by a corporate grantor. It is axiomatic that one cannot convey that which it does not own, so an initial review of conveyancing instruments requires inquiry into both the authority of the grantor to convey that which is sought to be conveyed, as well as the form of execution. Where the grantor is a corporation and a corporate seal is used, a deed of conveyance may be executed by *any* officer of the corporation and either the secretary or assistant secretary. O.C.G.A. §14-2-151(a). Where a corporate seal is not used, however, the deed of conveyance must be executed by the president or vice-president of the corporation, as well as the secretary or assistant secretary. O.C.G.A. §§14-2-151(b), 14-5-7. Whether the grantor is a corporation, limited liability, or other type of business entity, inquiry should also be made as to whether the signer(s) possessed authority to execute the instrument, *i.e.* a resolution or power of attorney, on behalf of the entity.

It is also easy to overlook the type of instrument used to convey an interest in land, and whether the instrument actually contains the conveyance language conforming to the document title or reflecting the intent of the parties. Whereas a general warranty deed warrants title back through the chain of title, a limited warranty deed only warrants title during the term of the grantor's ownership, and a quit claim provides no warrant of title at all, conveying only that which the grantor owns – which may be nothing. In a world of "cut & paste" and templates that have been modified multiple times over the years by persons incompetent to do so, it is not unheard of to encounter a "warranty deed" that contains no warrants. O.C.G.A. § 44-5-34 (If two clauses in a deed are utterly inconsistent, the former shall prevail; but the intention of the parties should, if possible, be ascertained from the whole instrument and carried into effect.)

It is one thing for a document to be recordable, but quite another for it to be recorded in a timely manner. The failure to timely record security instruments has been the catalyst for an entire field of title litigation among lenders – equitable subrogation.

At a traditional primary loan closing, the closing agent will receive closing instructions from their lender client. These closing instructions will generally require the closing agent to certify as a condition of funding, or in the closing package to be returned to the lender within a few days of closing, that the loan to be closed will be – and has been, closed as a first priority lien. Such a certification is fraught with risk since priority can only be established upon recording of the security instrument. As a practical matter, it is impossible for a closing agent to certify lien position before a loan is funded, since they have no way of knowing what might have been filed since the certification date of the title examination. Even if certification is not a condition of funding, and is only required to be provided with the closing package returned to the lender, it is nonetheless impossible for the closing agent to know what may have been filed between the date they certified first lien priority and the actual recording of the security instrument. A closing agent's certification of first lien priority is thus substantially dependent upon the representations made by the borrower at closing.

Under Georgia's recording acts, O.C.G.A. §§44-2-1 *et seq*., it is the date of recording, not the date an instrument is executed, that is controlling for purposes of establishing priority position. Furthermore, even a timely filed deed will not attain senior lien status under Georgia's recording acts if earlier recorded liens are not properly satisfied and cancelled of record. This is particularly an issue with revolving lines of credit, where termination of the account and cancellation of the security interest require not only the payment of all amounts owed, but an affirmative request by the borrower to terminate the account as well. O.C.G.A. § 44-14-3(B)(2). As a result, where an intended payoff is tendered based upon an account statement or even an estimated payoff provided by the revolving account lender itself, such will only be applied as a "pay down" unless the borrower has also provided an express written request to terminate the account.

In order to avoid windfalls to lenders with earlier filed security interests, Georgia courts have created the remedy of equitable subrogation, where a lender that was intended to be in the first security position, upon payoff of a loan secured by an earlier recorded first security instrument, steps into the shoes of the paid off lender ahead of an intervening lien that was originally subordinate to the lien paid off. As explained in *Davis v. Johnson*, the seminal Georgia case on equitable subrogation:

> Where one advances money to pay off an encumbrance on realty either at the instance of the owner of the property or the holder of the encumbrance, either upon the express understanding or under circumstances under which an understanding will be implied that the advance made is to be secured by the senior lien on the property, in the event the new security is for any reason not a first lien on the property, the holder of the security, if not chargeable with culpable or inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equity of others would be prejudiced thereby; knowledge of the existence of an intervening encumbrance will not alone prevent the person advancing the money to pay off the senior encumbrance from claiming the right of subrogation where the exercise of such right will not in any substantial way prejudice the rights of the intervening encumbrancer; under the foregoing circumstances, equity will set aside a cancellation of such security and revive the same for the benefit of the party who paid it off. 241 Ga. 436, 438(1) (1978).

Thus under *Davis*, equitable subrogation would be appropriate where: (1) the lender paying off a loan secured by a first priority lien is not chargeable with culpable conduct or inexcusable neglect; (2) the grant of equitable subrogation would not prejudice the superior or equal equity of the intervening lender; and (3) that, even if the lender paying off a loan secured by a first priority lien has prior actual knowledge of the earlier filed intervening security instrument, the grant of equitable subrogation would not substantially prejudice intervening lender's rights.

In practice, Georgia courts liberally apply equitable subrogation in favor of lenders who have paid off loans secured by first priority liens, even if such would appear to compel intervening lenders that originally obtained security interests junior to the loan paid off to remain in the second priority position indefinitely. The expansion of this remedy may be due in part to the fact that many first mortgage lenders are also the primary issuers of home equity lines of credit, with portfolio sizes of the former substantially exceeding those of the latter. As a result, there is simply not much of an impetus for lenders that issue both first mortgages and secured revolving lines of credit to appeal cases in which equitable subrogation has been granted, since the lenders that are best situated to do so generally benefit more from the liberal grant of equitable subrogation on their first priority liens than they lose by having their revolving lines of credit subrogated. For these same reasons, however, first mortgage lenders are also generally disinclined to appeal where the trial court declines to grant equitable subrogation, at risk of slowing the expansion of the remedy or establishing defined limits on its application. These circumstances require due consideration by both claims and defense counsel when preparing an initial litigation strategy.

In a recent case, Lender C made a $400,000 refinance loan to Borrower, remitting $250,000 to payoff Lender A, the first lien holder, and remitting $100,000 to Lender B, the junior secured credit line holder, with the remaining proceeds distributed to the Borrower. Several years later, the Borrower defaulted and Lender C initiated foreclosure proceedings. During the course of preparing for foreclosure, foreclosure counsel discovered that Lender B’s earlier filed security instrument was still open of record. Lender C filed a title claim and initiated litigation, seeking cancellation of Lender B’s security instrument or, in the alternative, that Lender B’s interest be subrogated to its interest by virtue of having paid off Lender A. During the course of discovery, it was discovered that Lender C had relied upon an estimated payoff provided by Lender B. The estimated payoff expressly provided that a final payoff would only be issued upon the Borrower’s execution and return of the written request to terminate the account that had been issued with the estimated payoff. The estimated payoff also expressly provided a specific postal address to which payoffs and requests to terminate were to be sent. In its order granting Lender B’s motion for summary judgment, the trial court found that even though there may have been a question of fact as to whether Lender C had tendered the estimated payoff and request to terminate to a branch of Lender B, there was no question of fact that Lender C had actual knowledge of Lender B’s loan and had not complied with Lender B’s express requirements for obtaining a final payoff, or for remitting the payoff or request to terminate the account to the specified postal address. Lender C promptly filed a notice of appeal, essentially contending that the trial court had failed to make a finding that Lender C's conduct constituted culpable conduct or inexcusable neglect. Lender C, a major first mortgage lender, withdrew its appeal shortly thereafter. Though the actual reasons for withdrawal remain unknown, it is reasonable to conclude that the decision was strategic, *i.e.* upon consideration of the unfavorable facts specific to this case, the standard for appellate review regarding findings of fact, and the risk of an appellate decision that would potentially establish defined limits upon the grant of equitable subrogation in the future, the losses sustained on this single transaction paled in comparison to the continued liberal grant of equitable subrogation.

As noted, equitable subrogation is an equitable remedy. In theory, "[s]ubrogation is of equitable origin and benevolence. It is founded upon the dictates of refined justice. Its basis is the doing of complete, essential, and perfect justice between all the parties, without regard to form, and its object is the prevention of injustice." *Secured Equity Fin., LLC v. Washington Mut. Bank, F. A.,* 293 Ga. App. 50, 55-56 (2008. The equitable maxim of "he who would have equity must do equity" applies to claims of equitable subrogation. *Bank of Danielsville v. Seagraves,* 167 Ga. App. 135, 141 (1983). As such, it is only appropriate where a legal remedy is not available.

In cases where culpable conduct or inexcusable neglect appear to be viable defenses, a legal remedy may be available where such conduct resulted from the acts or omissions of the lender's closing agent. Notwithstanding that a principal is deemed to have actual knowledge of matters of which the agent has actual knowledge (*Gustafson v. Cotton States Mut. Ins. Co.,* 230 Ga. App. 310, 312 (1998)) and that the negligence of an agent is imputed to the principal (*Wilbanks v. Carter*, 110 Ga. App. 644, 646 (1964)), a lender may have a legal remedy through the title company if an insured closing protection letter ("ICPL") was issued. Most ICPLs contain an indemnification provision for losses incurred by the lender as a result of the closing agent's failure to close a transaction in accordance with the lender's closing instructions. As previously discussed, it is physically impossible for a closing agent to certify that the lender client's security instrument is in the first lien position before it is recorded. Likewise, where closing instructions contemplate the satisfaction of senior liens of record, it is physically impossible for a closing agent to certify to its lender client that such senior encumbrances have been satisfied of record before money to satisfy them has even been disbursed. In cases where a closing agent has prematurely made such certifications, or otherwise failed to take reasonable efforts to comply with the closing instructions to the extent of the intervening lien, it should be argued that the lender in fact possesses a legal remedy through the ICPL. Obviously, the title company would prefer to provide its insured with a senior lien position through equitable subrogation rather than pay a claim under the ICPL, but equitable subrogation is an equitable remedy and it is incumbent upon defense counsel to establish that a legal remedy is in fact available.

As noted in *Davis*, equitable subrogation is only appropriate in cases where a first priority lien has been paid off, and then, only to the extent of the balance owed on the first lien. Therefore, where Lender C has made a $200,000 loan to Borrower, tendering $150,000 to pay off Lender A, the first lien holder, and $50,000 in an attempted (but failed) payoff of Lender B, the intervening secured credit line lender, Lender C would only be able to seek subrogation of $150,000 of its loan – the balance owed to Lender A. Likewise, where Lender C has made a $200,000 loan to Borrower, tendering $150,000 to pay off the first lien holder, Lender A, and the remaining $50,000 proceeds to the Borrower, without any payments made to Lender B, an undisclosed and/or unidentified intervening secured credit line lender, Lender C would nonetheless only be able to seek subrogation as to $150,000 of its loan. In such case, Lender C could through subrogation find itself in the position of having a $150,000 first lien and a $50,000 third position lien junior to Lender B's $50,000 second priority lien. Depending upon the value of the property secured, such a conundrum could provide useful leverage in settlement discussions.

More generally, even though the title company may have attempted to resolve the title claim in-house prior to engaging claims counsel, there may nonetheless be opportunities for claims counsel to resolve title disputes prior to commencing litigation.

Especially in lender versus lender disputes arising under lender's title policies, where counsel is generally known to one another, it is surprising what a simple phone call can accomplish. Prompt and efficient settlements are substantial marketing tools. In a recent dispute, I was contacted by claims counsel on a matter for which I had not yet been engaged, but that involved a lender I regularly represent. Claims counsel identified the title issue – which was similar to several others we had litigated in the past, advised as to the insured's position – which was likewise similar to those expressed in the past, and inquired if the matter could be resolved prior to commencing litigation along the lines of settlements we had achieved in the past. I contacted the lender, advised them of my conversation with claims counsel, and was engaged. Within a matter of days, I was provided settlement authority, which I promptly conveyed to claims counsel. Within hours, I received an acceptance, and the title claim was thus resolved within a matter of days without litigation. Though neither of us will retire on the fees we earned on this single dispute, I am confident that the efficiency with which the matter was resolved will be noted when subsequent disputes arise.

Pre-litigation settlement is also an option that should be explored by claims counsel for title claims submitted under owner's policies. Individual adverse parties, especially in the cases of lot line, easement, or attestation disputes, often are simply incapable of understanding the nature of the title claim and/or have been engaged in a prolonged, emotional dispute with the insured. In litigation, rarely does anyone do what you ask them to do because you ask them nicely. People only do what we ask them to do because the consequences of not doing so are worse than the consequences of cooperating. When emotional factors are removed from the equation and an individual is faced with the real and imminent prospect of having to bear the expense of defending against claims funded by a title company with substantial resources, logic and reasonableness will occasionally prevail.

Likewise, defense counsel has a duty to provide their client with an unvarnished evaluation of the claims alleged and potential defenses, based upon the known facts and an informed opinion of the law, so that the client can make informed decisions as to the scope and extent of the defense to be asserted. Counsel's evaluation must be based upon facts and the law, not the willingness or ability of the client to pay. Within this context, and to avoid chasing my tail when settlement opportunities arise or we are deep into litigation, I have found it useful to point-blank ask my clients at the outset of engagement what they would consider a "win." The answer to this question is generally an evolving one, especially with individual clients unaccustomed to the rigors of litigation, based upon a candid assessment of the prospects for success, duration of litigation, and monetary expenditures necessary to achieve each desired "win." Once a baseline "win" is established, a viable initial litigation strategy can be developed with respect to settlement, initial filings, and discovery. A tangible litigation strategy also facilitates the preparation of an estimated litigation budget through discovery. Since no budget can fully anticipate opposing counsel's litigation strategy or their response to your litigation strategy, prudence dictates that any estimated budget – with emphasis on "estimated," be presented with sufficient caveats for circumstances and/or events as of yet unknown and matters initiated by the opposing party. During the course of litigation, the client should be promptly made aware of new facts or events that could materially affect the budget. That said, provision of an estimated litigation budget, even when not required by an institutional client, provides at least a limited level of predictability for a client and a basepoint to which counsel can refer as the client's frustration with litigation increases over time.

As noted in the first paragraph of this presentation, title litigation generally boils down to two fundamental questions: (1) is the deed of conveyance itself valid; and (2) does the deed convey that which it was intended to convey. Like most contract disputes, many -- if not most, title disputes involve few genuine issues of material fact, and are thus well situated for disposition on issues of law alone. As such, defense counsel should at least consider a motion to dismiss as an initial filing, especially where Plaintiff has attached material documents as exhibits to the Complaint. In light of the exceptionally liberal pleading requirements in Georgia state courts, the attachment of exhibits to a complaint is generally a matter of strategy, not necessity.[6] Within the context of the foregoing, claims counsel should evaluate the benefit and prudence of attaching exhibits to the complaint. Though the imprudent attachment of exhibits to a Complaint may unduly expose claims counsel to a motion to dismiss, it may also facilitate settlement and/or help to explain a complex fact pattern and/or legal argument.

When a motion to dismiss is filed before or with an answer in Georgia state courts, discovery is stayed for 90 days or until the motion is ruled upon. O.C.G.A. § 9-11-12(j). A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes and, if incorporated into the pleadings, may be considered when deciding a motion to dismiss for failure to state a claim without converting the motion into one for summary judgment. O.C.G.A. § 9-11-10(c), *Stendahl v. Cobb Cnty.*, 284 Ga. 525, 526 (2008). A thorough investigation of documents attached to or referenced in the complaint will often provide a cognizable basis, such as a defectively attested deed or a claim for equitable subrogation where an ICPL has been issued, for a motion to dismiss. Recognizing the liberal pleading standard applied in Georgia state courts, the stay of discovery effected upon a timely filed motion to dismiss nonetheless provides a valuable opportunity for counsel to exchange informed positions and engage in efficient and timely settlement discussions.

Once pleadings and preliminary motions have been filed, a comprehensive chronology has been prepared, and counsel has had an opportunity to conduct an informed analysis of claims and defenses, discovery can be conducted efficiently. Though most title claims are resolved through negotiation or dispositive motion, counsel should utilize the chronology as a working document, inserting notes, questions, and legal arguments among the material facts and events as discovered. By doing so, counsel does not need to reinvent the wheel once the discovery period lapses. A working chronology with evolving legal arguments, scrutinized through on-going settlement

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6 "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient." *Bourn v. Herring*, 225 Ga. 67, 70 (1969)

negotiations with opposing counsel, provides a strong foundation by which to evaluate potential scenarios for summary judgment or trial. In either case, counsel will have identified the flawed assumptions and mistaken, omitted, or mischaracterized facts upon which your adversary's initial claims or defenses were based, and you will be in position to present your claims or defenses upon the battlefield of your choosing.