Title issues: Buyer beware

Know the difference between a lay settlement agent versus a real estate attorney

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All of you should be aware of the phrase "Caveat Emptor," which translates to "Let the buyer beware." As a practicing real estate attorney, I am amazed at the number of real estate agents who simply don't understand the true differences in using a lay settlement agent versus a real estate attorney when it comes to protecting their clients with respect to marketable issues of title and the issuance of the owner's title insurance policies.

Most agents assume that if the owner purchases an owner's title insurance policy, they are protected. Nothing could be further from the truth!

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Many title policies take exceptions to many aspects of the title to the property.

For instance, when a buyer does not purchase a survey, the typical owner's policy will take exception to matters of survey and simply will not insure the buyer over any issues arising out of possible encroachments that could impact the marketability of the property.

When a buyer uses a non-attorney for settlement, they are completely without legal representation as to all matters affecting the title to the property. They have no one in their corner who can discuss with them the findings of a title examination or the requirements and exceptions of the title commitment.

There can be serious issues and title defects that the title underwriter is choosing to "insure over" or taking exception to in the policy itself. There are many times the closing can still occur because the title issues and exceptions may be insured for the lender in the transaction, yet not for the unsuspecting buyer.

With the buyer not aware of any problems or issues, there would be no objections to keep the closing from occurring. No one at a non-attorney settlement agent's office may discuss these matters with the buyer because this would constitute an unauthorized practice of law. Even if a settlement agent is owned by an attorney or has an attorney on staff, the buyer is not the client and the attorney is not in a position to represent that buyer.

The Unauthorized Practice Consideration 6-1 of the Virginia State Bar Professional Guidelines provides: "A non-lawyer may not express to any person, an opinion as to the validity or legal status of title to real estate or as to the legal effect of anything found in the chain of title such as, for example, a suit, will, judgment, release deed or extension agreement or as to the effect on title of matters not necessarily appearing of record such as, for example, adverse possession, the statute of limitations, or the disabilities of parties. A lawyer employed by a lay agency to render services for others is restricted to the doing of acts in the course of his employment that a non-lawyer can lawfully do."

As an attorney with experience in handling real estate transactions for more than three decades, I can't tell you the number of times I have represented homeowners who face marketability issues with their property when either refinancing their mortgage or selling their property. This is due to the fact that they had no legal representation when purchasing the property and were uninformed about defects in their title because they simply had no one who was able to discuss with them the legal and marketability ramifications of title matters.

It is always recommended that you, as a licensed real estate agent, explain to your client, a prospective buyer, that when they choose to use the services of a non-lawyer settlement agent, the non-lawyer settlement agent, including its in-house counsel, cannot discuss with the buyer matters of title and marketability issues relating to the property being purchased. This is particularly true if you are the one directing them to the non-lawyer settlement agent.

Any discussion with the buyer as to the validity or legal status of the title to the property is a practice of law in Virginia and any advice and discussion can only be done through a licensed Virginia attorney.