

Title Insurers Face a Decade of New Challenges

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Title insurers have emerged from a tumultuous decade. In 2004, amid a record housing boom and unprecedented wave of refinancing, insurers could barely keep up with intense pressure to sign up more issuing agents to close more deals and issue more policies. By 2009, the bubble had burst, deals had dried up, and title agent defalcations rocked title insurers' ledgers. But by 2014, title insurers had shaken the bad apples from their issuing agent rosters, digested most of the title claim glut that emerged from the foreclosure crisis, and began to see deal volume resume. Similarly, in 2005, title insurers became a top target for plaintiffs' class action lawyers, who alleged overcharging for title insurance premiums in "reissue rate" cases filed in New York, Pennsylvania, and Florida. These cases swept the nation. Dozens of classes were certified by state and federal courts from Arizona to Maine. Initially, title insurers tried to buy peace, settling many claims of dubious merit. But the settlements served as mere chum in the water, attracting more and bigger lawsuits. Insurers changed tack, vigorously contested the cases, and by 2014 had turned the tide, scoring a string of critical victories that cut off new filings. With these challenges behind them, title insurers must be vigilant and proactive, particularly regarding the following trouble spots likely to flare up in the next decade:

- 1. Oil and gas claims.** The fracking boom drove a wave of acquisition and mineral rights trading, much of it with no production and on land that wouldn't normally raise severance questions. Unfortunately, many of these interests have been missed and insured over. Owners of these interests can often "hold up" the insured surface owner's development plans, just as the prospective profit in development begins to return. This means tricky and expensive title claims.
- 2. Title agent defalcations.** As new deals pump funds through title agents' escrow accounts, the temptation to divert them may recur. Detecting defalcations in progress, and before market interruptions bring them disastrously to light, should be a key goal for title insurers.

3. **"Regulator chaser" class actions.** As the CFPB rolls out massively complex new rules, effectively reconfiguring the entire settlement service industry, and as state and federal regulators continue to fund their own enforcement efforts with fines, settlements, and insurer-paid audits, plaintiffs will be right behind them. Copycat class actions can linger for years at staggering expense, even when their merits seem far-fetched.

From 2004 to 2014, title insurers proved strong through unprecedented crisis. From 2014 to 2024, they may find themselves fighting again on new fronts.

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