

# NORTH CAROLINA LAWYERS WEEKLY

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## Malpractice claims on the rise against real estate lawyers

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North Carolina's troubled real estate market is driving up malpractice claims against real estate lawyers, according to the largest legal professional liability insurer in the state.

"The high rate of foreclosures is partially responsible for the increase in claims," said Will Graebe, vice president of claims for Lawyers Mutual Liability Insurance Company of North Carolina.

Graebe oversees nearly all of the claims handled by the company.

"Foreclosures can bring errors to the surface," he said.

In many cases, when title or other closing-related errors rise, title insurers pay claims on behalf of lenders or insured owners.

"The title insurer then steps into the shoes of the owner or lender and files a claim against the attorney based on the error," Graebe said. "That's where we come in."

### Targeting attorneys

Graebe said there is a correlation between the increased numbers of claims paid by title insurers and the increased number of malpractice claims brought against real estate attorneys.



Williams



Riggsbee

"Title insurers are having a difficult experience in terms of the numbers of claims they are seeing," he explained.

Far more claims are being brought against attorneys by title insurance companies than by lenders or owners, Graebe said.

He added that the increase in claims by title insurers against their own approved attorneys is changing their relationship.

"I think real estate lawyers need to think about who they are doing business with and what a carrier is going to do if they make a mistake," Graebe said. "Title insurers are becoming more aggressive in pursuing claims. Lawyers need to understand that."

Graebe added that real estate attorneys should ask title insurers if they will work with them to resolve problems before filing suit or filing a claim against their malpractice policy.

"Some carriers are more cooperative in working to resolve claims than others," Graebe said. "Some are not very cooperative."

### Insurers walking tightrope

Title insurers rely on real estate attorneys to produce business. They write policies for owners or prospective owners of property who are clients of real estate attorneys, or for lenders involved in financing the purchase of property.

Attorneys collect premiums at closing and remit them to the title insurers.

"On the one hand, title insurers want to market themselves to attorneys because they want their business," Graebe said. On the other hand, he said, "They have some legitimate concerns about who is placed on their approved-attorney list."

Newly licensed attorney Amy K. Williams of Greensboro said she understands the concerns of title insurers.

"I wouldn't feel comfortable doing a closing without help," she said. "It's like the first time you get a criminal case: What do you do? You go down to the courthouse and watch. I ask questions. That's how I learn."

Graebe said it is appropriate to expect that a lawyer should have sufficient knowledge and experience to practice in a particular area of the law, or else associate with someone who does.

"That is consistent, I think, with the Rules of Professional Conduct," he said.

"A lot of claims are the result of pure inexperience or the inability of the attorney to address issues in the chain of title or at closing," he said.

Inexperienced attorneys have also been taken advantage of by fraudsters.

"Everybody thinks they can close a loan," said Greensboro attorney Jerry S. Weston, who began practicing real estate law in the 1960s. "They have no idea how complex it is. They can't do it, period."

Williams said two experienced real estate attorneys are mentoring her. She considers herself lucky. She recently became an approved attorney with two title insurers. A third will only accept title opinions that are reviewed by one of her mentors.

"It's a tough time now for people who want to practice real estate," she said. "The real estate firms aren't hiring, yet it's hard for people who are going solo to get approved."

Graebe said he understands the concerns that title insurance companies have.

"We have the same concerns," he said.

### The underwriting perspective

Renee Riggsbee, vice president of underwriting at Lawyers Mutual, said the process of insuring new attorneys is "not the same as it has always been."

"Our claims experience has changed," she said. "We're taking a closer look at each applicant on an individual basis."

Riggsbee added that the company is still providing coverage. However, for brand-new attorneys, coverage may be limited to \$1 million.

According to Riggsbee, Lawyers Mutual wants to make sure that attorneys

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new to real estate practice are the kind of detail-oriented professionals who can conduct title searches and closings correctly.

“We have a supplemental application geared towards real estate lawyers to gather information about their practice,” she said.

In the end, she said, “It’s not going to get them turned down.”

Riggsbee said Lawyers Mutual also tries to assist new attorneys or experienced attorneys who are new to the real estate practice.

“We encourage new lawyers fresh out of law school to work with a mentor. We try to provide them with information about best practices. We do the same thing for experienced attorneys,” she said.

“Even if you are an experienced lawyer in other practice areas, real estate is a whole new ball game.”

Riggsbee stressed that members of the Lawyers Mutual staff are available to attorneys who may have misgivings about a transaction.

“If something is happening at closing that is raising red flags, we want attorneys to know that they can get up from the closing table and come and call us,” she said.

## Attorney defalcations

Not all real estate-related malpractice claims brought against attorneys result from inexperience.

Graebe said Lawyers Mutual has no real data on the number of claims that have resulted from attorney defalcations.

Still, in his 12 years with the company, he said that he had “seen more defalcations and embezzlement over the past five years by far than what I saw in my first seven years.”

The glut of real estate activity and the large amounts of money flowing through trust accounts created an opportunity for some attorneys to “play the float,”

“For a time they were able to do that and go unnoticed,” Graebe said. “When the real estate closings dried up, and the money wasn’t coming in like it was, they weren’t able to play the float and eventually a check bounced, then the Bar came in and audited their trust account. In many cases, they discovered that the embezzlement had been going on for some time.”

Still, Graebe said has seen a leveling off of defalcation claims in the past two years.

“Attorneys don’t have that float money today. The business dried up. The opportunity isn’t there like it was,” he said.

## Dirt lawyers a dying breed

Graebe doesn’t see many more lawyers switching paths and getting into real estate.

“The real transition is for experienced real estate lawyers who are getting into other practice areas because there is no real estate business,” he said.

“Ten years ago, I thought I’d practice forever,” Weston said. “Nine-and-a-half years ago, I thought I’d had enough of it.”

“Real estate attorneys are already in a difficult position,” Graebe added. “They are expected to do everything in a short period of time at a low cost.”

According to Graebe, attorney fees in real estate closings have been stagnant for decades. At the same time, the burdens and responsibilities on real estate lawyers have increased.

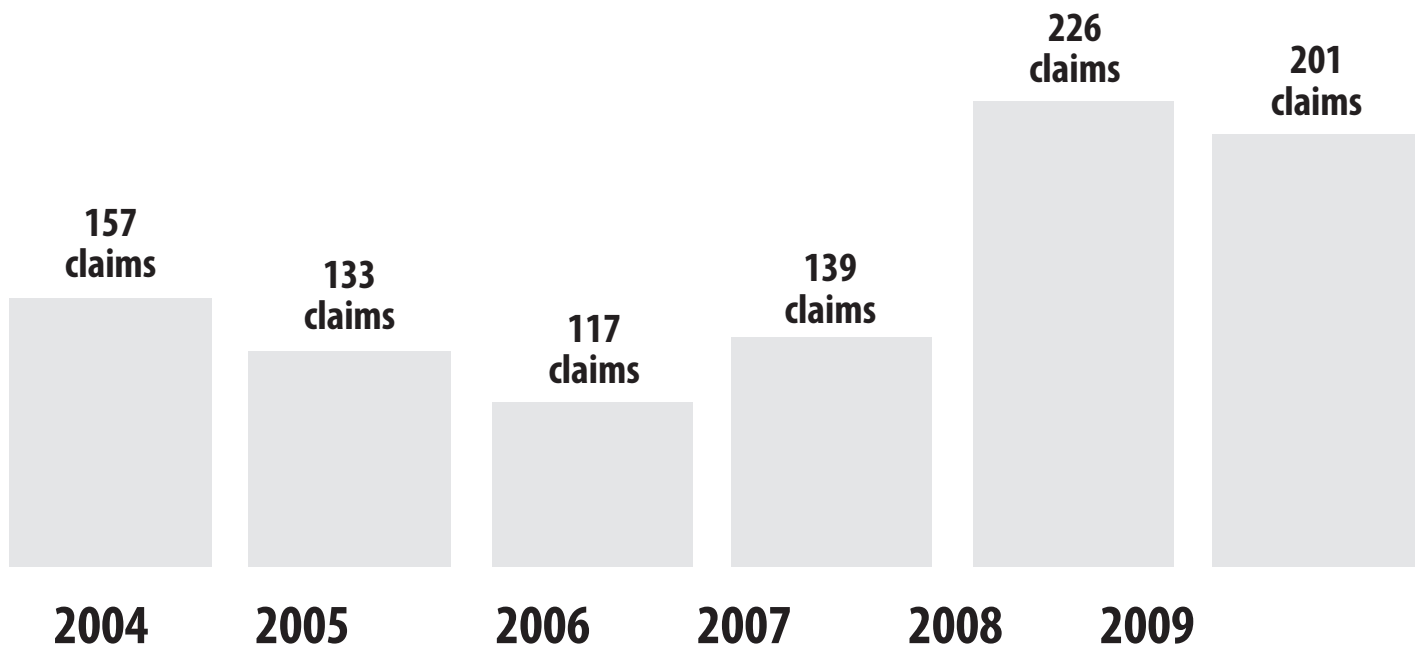
Weston agreed.

“Attorney fees have gone down, literally,” he said.

“It’s difficult for lawyers to deal with so many different pressures,” Graebe said. “Unfortunately, as a result, a lot of the most experienced real estate lawyers are leaving the practice.”

Weston said he still consults and serves from time to time as an expert witness in real estate litigation.

“I don’t do closings anymore,” he said. “I know I’m not the only attorney that got to the point where I said ‘Hey, this isn’t worth it.’”



**Spike in Real Estate Claims**