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# Best practices & title insurance: **Lessons learned from managing claims**

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There is little doubt in the real estate bar today that title insurance is both widely accepted – and here to stay.

It is estimated that more than 50 per cent of residential real estate purchases in Ontario are now title insured – up from an estimated 30-plus per cent last year. This growth is being driven in part by the new home/condominium market where at least 50 per cent of purchasers buy title insurance.

As well, an estimated 80 to 90 per cent of refinance transactions are now title insured, prompted largely by lenders who want the added protection a title insurance policy can provide.

With increased use of title insurance comes an increase in claims. Industry-wide statistics on the overall incidence and costs of title insurance claims are hard to come by. At TitlePLUS, less than one half of one per cent of our policies have reported claims; most of these claims have a value of less than \$1,000. This solid performance can be attributed to both an efficient claims handling system, and to stringent underwriting criteria: TitlePLUS will not insure any transaction that “walks in the door.” While striving to be competitive in the title insurance industry, we also are mindful of risk.

But from the claims we receive and resolve, we can draw some conclusions on what precipitated the claim – and can advise you on some simple “best practices” to help lawyers avoid the stress and client dissatisfaction that comes when the home buyer discovers all is not as it appeared. As well, because of our experience with professional liability claims, we have firsthand experience with claims that have been denied by other title insurers, resulting in home buyers then suing their lawyer under the lawyer’s professional liability insurance policy.

## Understand and explain the title insurance coverage to your client

Chances are your clients are interested in title insurance because it can save them money: Survey coverage, if available, can save them hundreds of dollars. The savings that come from not having to conduct various off-title inquiries are also selling points. And in most instances, using title insurance is an excellent option for the lawyer and home buyer client alike.

A typical example of the benefits of title insurance is as follows: A home buyer opted for title insurance in place of an up-to-date survey back in May 2000, when he purchased a home with three expansive decks. The vendor provided a statutory declaration attesting to the legality of the decks and the insurer provided survey coverage. Recently, the buyer decided to sell the property in question. The new purchaser’s lawyer advised the policyholder that no permits had ever been obtained for the decks, and requested that permits be issued, any infractions rectified and final inspections completed prior to closing – which was only one week away. The sale closed on time, with the insurer (TitlePLUS) providing assurances that it would rectify the outstanding permit issues after closing.

But while you’re explaining the many benefits of title insurance, make sure you also fully explain what title insurance does and does not cover. Your clients should understand what you will **NOT** be doing as a result of getting title insurance, unless instructed by the client to do otherwise. In the course of explaining title insurance coverage, you may learn about particular issues or concerns the client has regarding the property in question – issues that may make certain searches advisable even if they are not expressly required by the title insurer. For example, your client may be buying a property because of an addition that does not appear on an existing survey, and might prefer you to check on the addition’s compliance with building and zoning requirements rather than potentially having to make a claim under her title insurance policy after closing or when she is selling the property. Remember too that the insurer has a number of options for resolving a claim – and the client may not be happy with the insurer’s decision to, for example, simply remove the non-compliant structure and pay the diminution in the value of the property (if any).

### EXPLAIN THE BENEFITS OF FRAUD COVERAGE

The growing incidence of real estate fraud has reinforced the benefit of title insurance, especially for mortgagee clients. Title insurance is, in our view, the best protection for post-closing fraud that a client can obtain. Your opinion – which is backed by your professional liability coverage if your client does not opt for title insurance – cannot match this protection.

### UNDERSTAND AND EXPLAIN TITLE VS. LEGAL SERVICES COVERAGE

Most policies in the marketplace today do not provide coverage for the legal services provided by the lawyer in the transaction. Instead, they cover only specific title, compliance and related property interest risks.

Understand too that a waiver of subrogation from a title insurer is **NOT** the same as an indemnity, and it certainly is **NOT** legal services coverage. Most title insurance policies do not provide express coverage for errors or omissions of the lawyer acting in the transaction, leaving open the door to potential lawsuits against lawyers if the error or omission gives rise to a type of loss not covered by the policy.

In practice, other title insurers often waive subrogation; depending on the circumstances, other title insurers will indemnify lawyers for their defence costs, in situations where the title insurer has denied coverage and the client has responded by suing the lawyer and/or the title insurance company. You should remember, however, that this type of indemnity is **NOT** a matter of contract, and is not an automatic right. Remember too that a waiver of subrogation does not prevent your insured clients from suing you and the title insurer.

Unlike other title insurers, TitlePLUS **does** provide coverage for the legal services of the lawyer in the transaction; in other words, the errors or omissions a lawyer may make in the course of the transaction are covered when a lawyer uses TitlePLUS title insurance in a transaction.

Typical is the example of a lawyer who acted for a private lender on a second mortgage transaction. The lawyer purchased a TitlePLUS mortgage lender-only policy for his lender client. Prior to closing, the lawyer received oral instructions to proceed with the transaction, even though a statement from the first mortgagee (a financial institution) was not available. The client instructed him to obtain the statement immediately after closing. The transaction proceeded, the mortgage went into default immediately after closing. The mortgage statement received from the first mortgagee after closing revealed that the first mortgage had been in arrears at the time the second mortgage funds were advanced. The TitlePLUS insured took the position that she had instructed the lawyer NOT to proceed without a statement from the first mortgagee. The lawyer's recollection of his instructions, as noted above, conflicted with those of his client. The property was sold by the first mortgagee, and no funds were available to go toward the second mortgage. The losses in this example are not strictly related to title, and would not have been covered by other title insurers. Because of TitlePLUS legal services coverage, however, the claim was resolved without a professional liability insurance claim being made against the lawyer.

### **Cross the “t-s” and dot the “i-s” in your title insurance application**

Securing title insurance is no excuse for not taking the time to get it right. An error in your application could lead to a denial or reduction of coverage, with the potential for a claim to your liability insurance. If you have identified a specific title issue for which you want title insurance, communicate clearly to the insurer's representative that you want coverage for this problem; if the insurer agrees to “insure over” the issue, it should be identified in the coverage provided under the policy or added as affirmative coverage in an endorsement. If you do not specifically request

an “insure over” for the problem, you may find that the problem has been made an exception to coverage. Similarly, you must disclose all material information to the title insurer when applying for a policy, or risk denial of coverage later when a claim is made.

Ensure too that you describe fully the client's property and attendant interests in the legal description that you provide in the application process. We recently handled one case where a title insurer denied coverage because the lawyer had failed to include in the description of the property the parking and storage units of a condominium purchase; as these units were separately deeded and were not described in the application, the insurer took the position that they were not covered by the title insurance policy for that unit.

### **Assist and inform your clients when they make a claim**

Your client may well ask you for help in making a claim and dealing with the insurance company's adjuster or examiner. Review the policy provisions again, to ensure your clients understand their coverage and the insurer's responsibilities; as well, review the provisions for making a claim, as failure to comply with the policy could lead to a reduction or denial of coverage.

If you are retained to help make a claim, obtain the Proof of Loss or Claims Notice forms, and help your clients complete them and return them promptly. As well, do not attempt to repair or compromise a claim without the authorization of the insurer. A claim for expenses incurred without authorization may be denied by the title insurer. Remember too that the insurer has various options for resolving a claim, and that a settlement you negotiate may not reflect the insurer's views of the appropriate resolution to a claim, leading to a reduction in the claim payment or even a denial to fund the settlement based on the fact that your actions have prejudiced the insurer.

### **Conclusions**

Title insurance is, without a doubt, a valuable practice tool for the real estate bar. It enables lawyers to conduct real estate transactions more efficiently and effectively, saving clients time and money. But it is not a magic bullet. It does not absolve you of the need to provide the legal advice, expertise and services that your clients sought in the first place. Used with care and understanding, title insurance can and does enhance the transaction for all parties. Used carelessly, title insurance can come back to haunt you.

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