

Real estate claims on the rise: Poor communication is the culprit

By Caron Wishart, vice-president, Claims

When the costs associated with real estate claims first started moving upwards in 2004, we took note that this was an area to watch. But when that same upwards trend gained momentum in 2005, we undertook a more detailed analysis of claims in this practice area, with a view to giving the real estate bar a “heads up” on what could shape up to be a reversal of the trends of the early part of this decade.

Although the number of real estate claims has remained relatively stable, the cost of those claims has increased to 40 per cent of all claims costs in 2005 from just under 30 per cent in 2004 and 23 per cent in 2003. For the first time in several years, in 2005 real estate claims costs again exceeded litigation claims – good news perhaps for the litigation bar, but bad news for real estate practitioners.

Although costly fraud claims account for some of this increase, we are also seeing much larger losses in individual real estate files than previously – likely reflecting higher property values and active real estate development opportunities.

Is this a blip or a sign of things to come? From a statistical point of view, it's too early to know for sure, but we do know this is a situation worth monitoring, and communicating on with lawyers in real estate practice.

One could also ask how this can happen given the prevalence of title insurance in the market. Analysis of the underlying causes of loss indicates that claims made against lawyers do not arise out of technical or

search errors. They arise out of failure to give good legal advice.

As the chart on the next page indicates, communication errors and inadequate investigation of facts account for 55 per cent of the number of claims reported. Clients retain lawyers in real estate transactions because they want guidance and because they want to be looked after. The legal advice given in connection with the real estate transaction is the most valuable contribution that a lawyer can make.

How can you ensure that you are giving your client the advice needed? Pay attention at the two most significant points in a real estate transaction – the beginning and the end.

In the beginning...

It is important that a lawyer pay attention to the “big picture” of the transaction. Does the deal make sense? Are there indicia of fraud? Are you being asked to paper the deal? Are there conflicting clauses in the agreement or mortgage instructions? Are the people involved in the transactions the people you are meeting with?

Ask yourself the following questions. If anything in the intake process causes you concern, do you have a process to:

- identify the indicia of fraud?
- ensure that your clerk or assistant brings concerns to you in a timely manner?

- ensure that you have a process to bring your concerns to the client's attention?
- deal with a transaction if the other party is not represented?

This is by no means a definitive list of the questions you should be asking. The TitlePLUS client intake form can alert you to other matters of concern. The form is available at www.titleplus.ca, click on **Products and Services**.

In the end...

The other significant time in a real estate transaction is at the end, as you are preparing for the closing. At this point you need someone to pay attention to the details. If there are several people in your office, then assign the person who is best at detail work to become involved at this stage. If you are a sole practitioner with limited support, then try to do this at the time of day when you are best able to do this task. Once again it is important to keep asking yourself if the transaction makes sense.

- Are the funds being properly directed? If you are acting for a purchaser and some of the funds are being directed back to the purchaser that should raise a red flag.
- Is your client asking you to take a personal risk? For example, has a client indicated on three separate occasions that he or she has forgotten his or her ID? If you do not confirm ID, you could end up with a negligence claim against you in the event that a fraud is being perpetrated.

- Has the deal changed significantly? If so, who needs to know about those changes? The client? The lender? The other side?
- Are there inconsistencies between the closing documents and the terms in the Agreement of Purchase and Sale? If so, those matters need to be resolved.

If you are focused at the beginning and end of a transaction, the likelihood of a negligence claim against you is diminished. Once you have identified issues, it is also important to ensure that you have the processes and procedures in place to deal with those matters. You will then be able to provide your clients with the legal advice that they expect from you.

Create your own checklist

If you have not already done so, take a few moments to create your own checklist for indicia of fraud. Please refer to the Summer 2004 issue of LawPRO magazine for assistance. The magazine is available online at www.lawpro.ca/fraudreport.

You can probably create the checklist in less than an hour and achieve a permanent improvement to your office procedures – and reduce the likelihood that you'll become part of LawPRO's claim statistics.

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Real estate claims – causes of loss (2003-2005)

