


Title insurance:

THE FINE PRINT



\$50 transaction levy payable on some title-insured transactions

The widespread use of title insurance among real estate lawyers has led to a misconception that all title-insured transactions are exempt from the real estate transaction levy surcharge.

In fact, the opposite is true.

Under the terms of the LawPRO insurance policy, **Endorsement No. 2: Real Estate Transaction Levy Surcharge**, only those title-insured transactions in which the title insurer has agreed to waive its right to maintain a negligence claim against the lawyer, and agreed to indemnify and save harmless the lawyer against any claims under the title insurance policy, are exempt from the \$50 per transaction levy surcharge.

This release and indemnity provision usually appears in the lawyer's subscription agreement with the insurer.

If there is no such release and indemnity and save harmless agreement in place with the title insurer for claims that may arise, the lawyer must pay the \$50 levy surcharge for any and all title-insured real estate transactions insured with that title insurance company.

Why does LawPRO require payment of the transaction levy on title-insured transactions for which there is no release and indemnity provision, and exclude other title-insured transactions from the requirement to pay the levy?

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Because the \$50 levy surcharge represents additional premium to help offset the higher risk – and cost – associated with real estate practice.

In the mid-1990s, when the levy surcharge was introduced, real estate claims accounted for close to 50 per cent of LAWPRO 's claims costs. Although that number has declined to approximately 30 per cent in 2002, real estate practice continues to be a high risk area of practice. The transaction levy surcharge ensures that the total premiums paid by real estate lawyers matches the risk (and losses) they represent to the insurance program.

When a title insurer agrees to waive its right to maintain a negligence claim against the lawyer and to protect the lawyer for claims arising out of the transaction, the risk inherent in the transaction is, in fact, transferred to the title insurer and out of the LAWPRO liability insurance program. Thus the exemption from having to pay the \$50 levy.

However, where the title insurer refuses to release and indemnify the lawyer for claims arising out of the transaction, LAWPRO is responsible for any claims – title-related or not – that arise out of that transaction. In fact, this type of transaction represents exactly the same risk to LAWPRO as a real estate transaction on which there is no title insurance coverage whatsoever. Thus the requirement to pay the \$50 levy surcharge.

Transactions insured through TitlePLUS are exempt from the \$50 levy surcharge because all TitlePLUS lawyers are provided with the required release and indemnity protection in the lawyers' TitlePLUS agreement. TitlePLUS covers both the title-related

risks and the legal services of the lawyer in a transaction. Claims for errors or omissions made by the lawyer in the transaction thus are handled through the TitlePLUS program, and do not represent a risk (or cost) to the LAWPRO liability insurance program.

TRANSACTION SURCHARGE PAYABLE ON MANY MORTGAGE OUTSOURCING PILOT PROGRAMS

The pilot programs involving lender outsourcing of mortgage services (see pages 22/23 of this issue of LAWPRO magazine) come with an added complication for lawyers involved in these programs: As well as requiring their clients to pay the additional costs that come with these programs, they must pay the real estate transaction levy surcharge of \$50 per transaction.

The only exception would be where the lawyer has obtained a title insurance policy that covers both the **lender and consumer client**, AND the title insurer has agreed in writing to waive its right to maintain a negligence claim against the lawyer, as is more fully described in the accompanying article. Note some programs require only a lender-only title insurance policy, and accordingly a \$50 transaction levy surcharge would be payable, unless a title insurance policy had also been purchased in the name of the purchaser client in the transaction.

Real Estate Transaction Levy Surcharge

Reproduced below is the relevant section of the 2003 LAWPRO Professional Liability Insurance Policy. The full text of the policy and endorsement are available at: www.lawpro.ca/insurance/LAWPRO_policy2003.asp#Endorsement2.

“C. EXCLUSIONS

No levy surcharge is payable by a member under this endorsement in respect of a real estate transaction if:

- (v) the real estate transaction closes on or after January 1, 1998, and a title insurance policy(ies) is(are) issued in favour of all of the transferees and chargees obtaining an interest in or charge against the land which is the subject of the real estate transaction, provided that:
 - (a) the member does not act for the transferor in respect of the transaction;
 - (b) the title insurer(s) issuing the title insurance policy(ies) has(have) in all cases (except for the member's gross negligence or willful misconduct):
 - (i) agreed to indemnify and save harmless from and against any claims arising under the title insurance policy(ies); and
 - (ii) waived its right to maintain a negligence claim against; the member(s) acting as solicitor(s) for the transferee(s), chargee(s) and/or the title insurer(s); and
 - (c) the member(s) is(are) not obliged to pay any deductible amount to the title insurer(s) in respect of one or more claims made under the title insurance policy(ies) where the deductible amount is or may be the subject of recovery under the POLICY.”