

How the real estate bar entered the insurance business, or what happens when a lawyer is also an insurance intermediary

Many of us deal with licensed insurance agents or registered brokers every year to purchase coverage, whether life, auto or home policies. When someone in Ontario wishes to obtain title insurance, the real estate lawyer effectively functions as insurance intermediary (although not technically an agent or a broker). Lest anyone think there is anything improper in this role, a review of sub-section 2(2) of the *Registered Insurance Brokers Act* reminds us that Ontario lawyers are permitted to arrange insurance for clients so long as it is in the course of acting for them.¹ And of course, the *Rules of Professional Conduct* expressly contemplate the lawyer ordering title insurance for clients, subject to the prohibition that the lawyer cannot receive compensation, directly or indirectly, for fulfilling this role.²

On the one hand, there is limited upside to this journey into the insurance world, as the lawyer does not receive any particular financial benefit for arranging the title insurance. On the other hand, is there any actual downside for, or burden on, lawyers undertaking this role? From dealing with negligence claims and operating a title insurance business, LAWPRO has a unique view of the various issues that can arise.

When a real estate lawyer chooses to provide the service of ordering title insurance for his/her clients, the lawyer is viewed by the title insurer like an insurance intermediary, even if non-commissioned. An agreement with the title insurer may be required, with many obligations being imposed on the lawyer. The title insurer may wish the right to view relevant documents on files it has underwritten (as the lawyer has effectively helped with that underwriting) and may

want assurances about how the law firm operates, who the employees are and so forth. Furthermore, absent a specific contractual obligation, if at some point you come to be considered an unacceptable risk, the title insurer does not have to continue accepting applications from you on behalf of your clients.

Nor does a title insurer have to accept applications from you in the first place. A diligent title insurer could ask for consent to search your E&O records and/or discipline history, plus seek representations and warranties about certain features of your office systems and practice standards.

It comes as a shock to some lawyers to learn that they have been cut off by a title insurer and that as a result of that decision or otherwise, other title insurers may not wish to receive applications from them. This issue can arise when looking for a new title insurer and you are asked to warrant that you have not had applications declined by any other title insurer.

U.S. attorneys involved in real estate have lived with this reality for many years. For that reason, some will always choose to do business with more than one title insurer: After all, you don't want your real estate practice to be shut down overnight because you are suddenly viewed as an undesirable risk as an insurance intermediary.

The American Land Title Association (ALTA), an industry group for title insurers and agents, is considering best practices. Those acting in the role of insurance intermediary (and closing deals) may be called on to facilitate electronic verification of trust

account reconciliation, adopt written privacy and security plans to protect information, maintain fidelity insurance coverage in addition to malpractice coverage, and create procedures for resolving consumer complaints, among other requirements.

In Ontario, lawyers view their compliance with the Law Society by-laws and *Rules of Professional Conduct* as their main obligation. It can come as a surprise to realize that title insurers, while happy to piggyback their risk management on the obligations under the *Rules*, may actually evaluate the lawyer quite differently: Are you submitting premiums as quickly as the title insurer would like? Are you drafting exceptions in accordance with the title insurer's standards? Do you produce enough applications that it is worthwhile for the title insurer to bother training your new staff? The questions could go on. Some issues can require careful balancing between your obligations as a licensee of the Law Society and the practical realities of your (unpaid) relationship with the title insurer.

Please consider the above comments so you can properly wear the hats of both a real estate lawyer and an insurance intermediary. ■

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¹ *Registered Insurance Brokers Act*, R.S.O. 1990, CHAPTER R.19, at s. 2:
 2. (1) No person shall act as an insurance broker unless the person is a registered insurance broker under this Act.
 (2) Subsection (1) does not apply to,
 (a) lawyers, accountants or actuaries acting in their professional capacity...
² *Rules of Professional Conduct*, Rule 2.02(11): "A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client."