

Title insurance coverage is like a box of chocolates – no two policies are the same

“The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance,” states Rule 2.02(10) of the *Rules of Professional Conduct*.¹

This obligation was brought home in a recent malpractice case where the lawyer did not properly address the protection title insurance would afford the client and did not fully investigate the issue at hand.²

In this case, a city-owned laneway ran through a lot being purchased and underneath a long-standing (86 years) building. The lawyer indicated to the client that it was a minor issue, quickly resolvable after closing and that title insurance could cover it.

The title insurer provided a policy on a “forced removal basis” only. This required the title insurer to respond only in the event the city requested the building removed. Instead, the city wanted to be paid fair market value for the lane, an additional cost that diminished the property’s value. This was not covered by the policy the lawyer obtained, but might have been taken care of by a full coverage policy.

The lesson? Not all title policies are created equal.

What’s really covered?

Understanding specific policy coverages is imperative for advising clients on all potential issues. Only with all the required information can the client decide to accept the limited coverage or direct the lawyer to undertake other searches or due diligence measures to understand the extent of the issue or remedy the matter.

Failure by the lawyer to advise the client in this instance was determined by the court to be negligence. Interestingly, if the lawyer had obtained a TitlePLUS policy on the same terms, both the client and lawyer would have been protected. The TitlePLUS policy, in addition to all other coverage analogous to the other competitor’s policy, has legal services coverage. This legal services coverage directly

Tailor the policy to the transaction

One title insurer may cover an item but another insurer may not. Providing the client with a recommendation on which title insurance to use in their specific transaction is an important part of the unique role of the real estate lawyer.

When considering which title insurance policy to recommend, consider the following:

- Why are the clients purchasing a certain property?
- What is the intended use?
- Which features are important to them?

The answers to these questions will be different for every client, property, transaction and set of circumstances. One client may not care about building compliance issues because they intend to demolish the buildings and build a completely new structure. Another client may plan to live in or use the property as-is, and knowing there are building compliance issues that could entail significant time, effort and money to render compliant, is significant.

¹ As of October 1, 2014, refer to Rule 3.2-9.4

² 2014 ONCA 215 (CanLII), canlii.ca/t/g67xn

indemnifies the client for any loss resulting from the lawyer's negligence regardless of whether or not the loss falls under one of the covered title and compliance risks. There is simply no circumstance in which a purchaser or lender protected by a TitlePLUS policy should be forced to sue their lawyer to obtain compensation for a loss suffered in relation to the transaction where the lawyer was negligent at law.

In another case³, the sophisticated client had instructed the lawyer that he would handle the development issues, but the lawyer was found negligent when he failed to advise the client on the importance of the issue. The lawyer noted a one-foot reserve identified as part of the title search, advised the client of its existence, and did not undertake any further due diligence as it had been agreed the client would deal with these types of issues. As it turned out, the one-foot reserve was a greater obstacle than it normally would be, being much more costly for the client and affecting the viability and profitability of the project. This lawyer was found to be negligent in failing to emphasize the extent of the title issue and its possible consequences. The title insurance policy did not cover this issue, but here again, TitlePLUS legal services coverage would have provided the client (and lawyer) with other options.

Title insurance is not a magic bullet

Title insurance has never been a panacea for lawyers or their clients, nor is it meant to replace all due diligence. Residential policies are standardized and the various insurers have similar offerings. Commercial policies, however, run the gamut from all-inclusive coverage, to a stripped-down policy with endorsements for the specific requirements of the particular parcel of land and transaction. In addition, insurers may provide insurance to fully cover the lender, and partial or no coverage for the purchasers. They may also offer limited recovery coverage in the event of an identified and negotiated issue. Lawyers need to know and understand the differences and they need to ensure that



New “how-to” video series by the TitlePLUS program

The TitlePLUS program has ventured into the exciting world of multi-media content with short instructional videos. These videos will help TitlePLUS subscribers and their staff get the most out of the TitlePLUS application website – titleplus.lawyerdonedeal.com.

The videos will address the common questions we receive from subscribers completing a TitlePLUS application and will offer shortcuts and tips to help save time and avoid data entry errors. The first in the series are:

- how to remove a defect from the Action List
- how to enter a condo plan in an Ontario purchase application
- how to enter registered easements in purchase applications

You can access the how-to series of videos on titleplus.ca.

Are there topics or tips you would like to see videos on? Email your suggestions to titleplus@lawpro.ca

they fully explain the advantages, conditions, and limitations of the particular policy to their clients.

It is in your best interest to ensure all intended clients are protected. TitlePLUS insurance offers one policy to cover both the purchasers and lender, to varying degrees. Other title insurers offer separate policies for purchaser and lender. Ask yourself, have all policies been obtained? Are all purchasers named as insureds? Is the lender named as an insured?

Know what's excluded

Lawyers should be cognizant of the exclusions found in a title insurance policy. Generally, there are five standard exclusions; government action, environmental issues, aboriginal title issues, other uses of the property, and matters which the purchaser has created, accepted or consented to. This latter exclusion can be fairly broad and can include any matter which the client learns of during the negotiations or viewing of the

property, even if the lawyer has no knowledge of it.

Finally, the lawyer needs to understand the extent of coverage that the policy provides. Even in the fairly standardized world of residential policies, insurers' policy definitions vary.

Each property is unique. Real estate is an area of law that requires particular attention to the client's intentions, circumstances and the nature and status of the property in question. Even if the house next door is perfect, the one in question may be saddled with issues the client does not anticipate and may result in a claim against the lawyer when it is later discovered – even if title insurance was obtained. The lawyer's role remains as important in the real estate transaction today as before, and maybe even more important, now that transactions are becoming more complicated and property values have risen sky-high. ■

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³ 2013 ONCA 526 (CanLII), canlii.ca/t/g06wv