Title insurance – not the panacea solicitors had hoped for

LawPRO initially hoped that title insurance would result in decreased costs to the errors and omissions program. To obtain exemption from the real estate transaction levies, certain title insurers agreed with The Law Society of Upper Canada (Law Society) in March 2005 to "indemnify and save harmless" Law Society members "from and against any claims arising under the title insurance policy(ies), except for the member's gross negligence or wilful misconduct." The form of agreement was subsequently amended, in 2009, after discussions between the title insurers and the Law Society. There are no reported cases interpreting the new form of agreement.

Unfortunately, on occasion LawPRO has been forced to incur expense to enforce this agreement in its earlier form, as its applicability in different situations has come before the courts. In many other cases, the agreement is working satisfactorily and the reported decisions will help to guide all interested parties in the future.

Furthermore, recent case law shows that title insurance, and the existence of the agreement with the Law Society, do not necessarily protect lawyers involved in title-insured transactions from negligence claims. The courts will look closely at the

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nature and source of the allegations; just because one party involved in the transaction bought title insurance protection does not mean that every lawyer involved is necessarily insulated from every type of claim, from every possible source.

Stewart Title Guarantee Company v. Zeppieri

The first case to consider the 2005 Indemnity Agreement was *Stewart Title Guarantee Company v. Zeppieri.*[1]

Shlomo and Zvia Ziv sued their lawyer, Enio Zeppieri, for negligence regarding a real estate purchase. The Zivs purchased title insurance. Initially, the Zivs' suit was based on alleged negligent advice concerning an easement, which was an excluded risk under the policy. In 2007 they amended their claim to include an allegation that the conveyance contravened the Planning Act and that Zeppieri had failed to obtain good title to the property for them.

Zeppieri called upon the title insurer to honour the 2005 Indemnity Agreement and cover his ongoing costs of defending the Zivs' action. The title insurer refused.

The title insurer first took the position that it was only obliged to pay defence costs once the action was disposed of by trial or settlement. It denied that it was obliged to pay defence costs on an ongoing basis.

Justice David Brown rejected the title insurer's argument: It had agreed to "indemnify and save harmless." While "indemnify" might mean to reimburse for defence costs at the conclusion of the litigation, "save harmless" meant to pay defence costs on an ongoing basis. Justice Brown accepted the solicitors' submission that the obligation to "save harmless" means that a Law Society member should never have to put his hand in his pocket in respect of a claim covered by the terms of the 2005 Indemnity Agreement.

The court also noted that the subject title insurer signed the 2005 agreement in order to obtain exemption for its title insurance products from the $50 real estate transaction levy. The real estate transaction levy was put in place because of the high costs of both claims payments AND defence payments arising from real estate malpractice claims.

The title insurer also argued that it had no obligation to defend, because there was in fact no *Planning Act* problem – any *Planning Act* difficulty had been cured at the time of closing. Justice Brown held that whether or not this was true did not matter. As long as a statement of claim alleges a claim that falls within coverage, the insurer is obliged to defend.

Since there was no coverage under the title insurance policy for the Zivs' claim regarding the easement, Justice Brown encouraged the parties to negotiate an allocation agreement. If no agreement could be reached, then the title insurer was obliged to fund all defence costs incurred by Zeppieri, subject to retroactive adjustment upon final disposition of the litigation.

Freedman v. Toronto (City)

In late 2009, Justice Katherine Swinton applied the *Zeppieri* case in *Freedman v. Toronto (City).*[2] Sheldon Silverman acted for the plaintiffs in a real estate purchase. The plaintiffs purchased title insurance from Stewart Title. After closing, the plaintiffs discovered that the property had a progressively worse tilt. The plaintiffs sued Silverman, alleging that he failed to search for work orders from the City of Toronto against the property. Had he done so prior to closing, they alleged he would have found an order from the city in 1988 requiring an engineer's report about the condition of the property, as well as reports of follow-up inspections. Silverman also sued the City of Toronto. Cross-claims were issued.

The plaintiffs also made allegations which fell outside of the ambit of the title insurance policy, including Silverman's alleged failure to protect the plaintiffs' interests, consult with competent persons to determine the extent of the property's defects, provide competent legal advice, respond to telephone calls from the plaintiffs or to meet with them, advise of the status of the file, keep appointments, maintain adequate records of conversations with representatives of the owners, and respond to communications from representatives of the owners.

Justice Swinton was unable to determine the allocation of defence costs between the various types of claims. She did grant a declaration that the title insurer owed Silverman a duty to save him harmless from his reasonable defence costs incurred in defending claims arising under the title insurance policy – namely, those relating to his failure to make inquiries about municipal orders and encumbrances against the property – and that he was entitled to be reimbursed for his reasonable defence costs incurred to date and in the future until the final disposition of the action and cross-claims relating to those allegations.

Justice Swinton declined to declare that the title insurer was required to save Silverman harmless from all the defence costs in the action and cross-claims.

Yasmin Nakhuda v. Stewart Title Guaranty

A few months ago, in *Yasmin Nakhuda v. Stewart Title Guaranty,*[3] two solicitors – Nakhuda and Katz – brought applications for declarations that the title insurer was obliged to defend them in lawsuits arising from real estate transactions in which the applicants were involved, and in which the title insurer had provided title insurance to one or more parties in the transactions.

The solicitors relied on the March 2005 Indemnity Agreement between the title insurer and The Law Society of Upper Canada.

Justice Michael Penny held that the title insurer had no obligation to defend solicitor Nakhuda where Nakhuda was sued by a party who had no title insurance. Nakhuda represented Denise Francis, Tracy Francis and a man who allegedly impersonated Ray Oake in the transfer of land from Denise and Oake to Tracy. Denise was Oake's estranged spouse. Tracy was Denise's daughter. Immediately after the transfer of the property, Tracy obtained a mortgage from a bank. The entire transaction was a fraud and the net proceeds were misappropriated.

Nakhuda also acted for the bank, which had title insured the mortgage. Oake had no title insurance. Oake sued Nakhuda, Denise, Tracy, the bank and the person posing as Oake for damages, and to remove the transfer and the mortgage from his property.

The title insurer defended the bank under the terms of its title insurance. The bank made no claim against Nakhuda.

Stewart Title denied that the agreement it made with the Law Society in March 2005 entitled Nakhuda to any indemnity on the basis that the plaintiff, Oake, was not covered under any title insurance policy issued by it, and that the indemnity provided under that agreement only applies where an insured under a title insurance policy brings a claim against the lawyer acting on the title-insured transaction. Justice Penny accepted the title insurer's position on the facts of this claim.

On the other hand, Justice Penny held that solicitor Katz was entitled to a defence from the title insurer. Katz's clients, the Ferreiras, purchased a residential property. They also purchased a title insurance policy. A building permit had not been issued by the City of Hamilton. The home was defective in a number of ways. The Ferreiras sued the developers, the City of Hamilton, and the building inspector.

The city commenced a third party claim under the *Negligence Act* against Katz. The City alleged that Katz caused or contributed to the Ferreiras' damages by failing to make appropriate inquiries with respect to building permits and orders to comply and inspections.

Justice Penny rejected the title insurer's argument that "arising under the policy" requires not only that the subject matter be consistent with the policy, but also that the claim against Katz only be asserted by the named insured under the policy (the Ferreiras).

The claim asserted by the city was not independent of the Ferreiras' rights. Katz owed no duty to the city. The city's third party claim under the *Negligence Act* was based on the theory that Katz owed obligations to the Ferreiras and that he breached those obligations, causing all or part of the Ferreiras' loss. The claims of the City against Katz could be said to "arise under the insurance policy" owned by the Ferreiras. Accordingly, the title insurer was obliged to fund Katz's reasonable defence costs.

McFlow Capital Corp. v. Carter

McFlow Capital Corp. v. Carter[4] is the latest case to be decided in this area.

Garry Shapiro acted for a borrower, who agreed to give a first mortgage to McFlow. Shapiro did not act for McFlow. McFlow obtained title insurance from Stewart Title.

As part of the transaction, Shapiro undertook to McFlow to obtain the postponement of the existing second charge, in order that McFlow would enjoy first position. Shapiro unfortunately failed to obtain the postponement. The mortgage subsequently went into default and the property was sold under power of sale. The first chargee was paid in full; McFlow suffered a shortfall.

McFlow sued the title insurer on its title insurance policy. The title insurer issued third party proceedings against Shapiro on the basis that had the postponement been registered, McFlow would not have suffered the loss. Essentially, it was a subrogated claim. Justice Sandra Chapnik held that the third party claim was proper under Rule 29.

Conclusion

These cases show that although the 2005 Indemnity Agreement appears simple, its application has become the subject of litigation in some cases, as difficult fact situations have arisen. LawPRO has done its best to insure that solicitors obtain the protection provided by the agreement, but recent case law illustrates that title insurance does not in every instance protect the solicitors involved in title-insured transactions, especially where the lawyer's client did not obtain the subject title insurance or the allegations go beyond the policy coverage. Understanding the approach of the courts will help real estate practitioners understand where their exposures exist and take appropriate risk avoidance steps.

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[1] 2009 CanLII 2329 (ON S.C.)

[2] 2009 CanLII 82620 (ON.S.C.)

[3] 2010 ONSC 4926 (9 September 2010) [Unreported]. A PDF copy of this case is available on request from debra.rolph@lawpro.ca

[4] 2010 ONSC 5792 (CanLII)