

TitlePLUS claims: What the numbers tell us



When studying claims trends at LAWPRO, we prefer to look at longer rather than shorter periods of time to ensure we have sufficient numbers to be able to identify trends. When it comes to title insurance, the need to wait is even more important, given that many claims do not surface until a title-insured property changes hands. Now 13 years old, the TitlePLUS program has a sufficient volume of claims that can be analyzed for trends.

The following analysis looks at claims from policy years 2000 through 2009 and categorizes those claims into four principal causes of loss, based on the frequency (number) of claims in each area of loss.

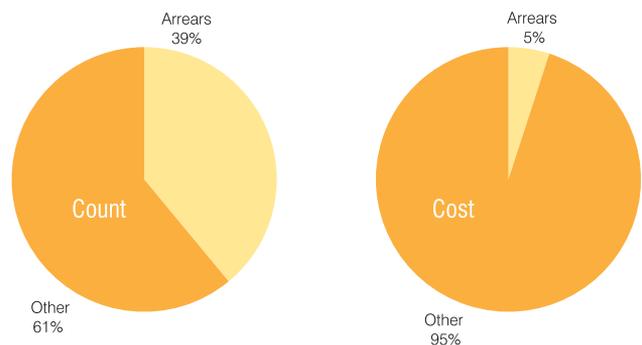
Arrears

THE NUMBERS

By number of claims reported, these are the most common claims in the TitlePLUS program, accounting for one-third of claims from 2000-2004 and rising to almost half of all claims for 2005-2009.

However, they are also the most straightforward to deal with and generally not as costly as other types of claims, as they are nearly

Arrears claims 1999-2009



all handled by internal staff. Arrears-type claims account for only five per cent of overall TitlePLUS claims costs. The average cost of these claims is about \$1,400.

THE DETAILS

Falling into this category of claims are any kind of payment arrears for which the owners of a property are responsible and which form a lien on title, but which are for a time period pre-dating the purchase of the property. Realty taxes or unpaid utilities account for about 90 per cent of these arrears claims, but this category also includes condo common element fees, local improvement levies and other retroactive assessments.

By far the two most frequent claims scenarios are:

- Homeowners receive a notice from the city that their home in a relatively new development has finally been assessed for property taxes dating back to the time of completion. It can commonly take a few years for municipalities to complete this assessment. The problem is, the current owners only just moved in and the previous owners lived there for most of the taxed time period. Since taxes “run with the land”, the current owners are responsible.
- Previous owners not estimating the correct amount of water or utilities charges or sometimes not paying them at all, leaving the current owners stuck with the bill.

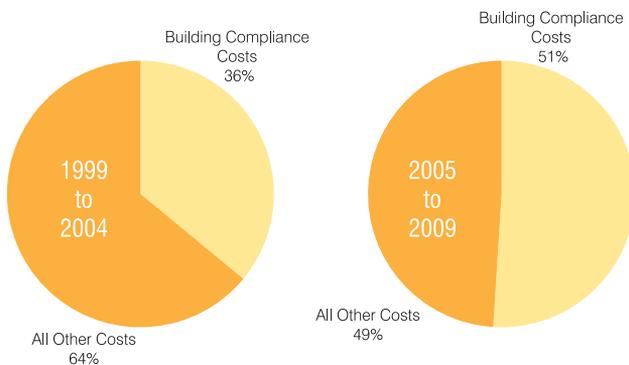
In the past, homeowners would have absorbed these costs themselves or tried to locate the previous owners and persuade them to pay the arrears (or sue them). Removing this relatively common problem from the homeowners’ hands can make the price of their title insurance policy worth it – even if it’s the only claim they ever have to make.

Building compliance issues

THE NUMBERS

The second most common type of claims in the TitlePLUS program – accounting for about 25 per cent of claims reported – falls into the broad category of building compliance issues.

Rising cost of building compliance claims 1999-2009



But while the numbers have held steady, the cost of resolving these claims is rising steadily. In the first half of this decade, building compliance claims accounted for about 36 per cent of costs. For the 2005-2009 period, these claims represented more than 50 per cent of all claims costs. The average cost of these claims has almost doubled to \$27,000 in 2005-2009 from about \$14,000 in 2000-2004, as construction costs have increased steadily during that time.

THE DETAILS

Included in this category are any order from a municipality to bring a property into compliance with applicable building codes or other regulations, provided (of course) that the insured did not create the non-compliance. This could involve wiring, a deck, an addition or in rare cases even the entire home.

Scenarios here include:

- open building permits the purchasers were not aware of
- work orders relating to renovations on the house done by the previous owners without a permit
- electrical or fire code violations existing when the home was purchased.

Problems can be discovered in a number of ways. The homeowners may apply for a permit to do some new work only to discover existing permits that were not closed, or the homeowners may notice deficiencies with earlier work and have the municipality confirm that no permit was obtained.

Rectifying these problems may sometimes be as straightforward as requesting a permit and having a municipal inspector confirm the work was done to code. However, in the worst case scenarios the previous owner’s renovation work was substandard and now the municipality is demanding that the property be brought into compliance. Then costs can rise quickly when adjusters and contractors have to be retained to determine the extent of coverage under the policy and the scope of work that is required. In addition,

Recovering costs under our subrogation rights

The TitlePLUS program has always attempted – under its rights of subrogation – to recoup claims costs where it can be determined that responsibility for paying the claim clearly rests with the previous owner or some third party. New processes and parameters to track our successes implemented in 2010 reflect the higher priority assigned to this effort.

Depending on the nature of the matter, our claims staff will assess the likelihood of success of pursuing a subrogated claim. We may seek the opinion of outside counsel. Unfortunately not every case has a clear-cut line of responsibility from the seller to our policyholder. For instance in a building compliance claim, the previous owners may not have been the ones who did the work; it could be several owners back and it may be difficult to establish who is responsible at law.

A multi-step process then commences which consists of a letter sent to the previous owners or their lawyers informing them of their responsibilities on a matter. If that fails to elicit a satisfactory response, we may initiate a proceeding in Small Claims Court or, if the amount is large enough, in Superior Court.

Our goal is not only to recover costs: We also want to establish a reputation for pursuing our rights. We believe the existence of title insurance should not be seen as an escape clause from paying tax arrears or other obligations.

To support our recovery efforts – and to ensure an effective investigation of each claim – LAWPRO asks that lawyers advise their clients to report any title insurance claims as soon as possible and before trying to correct a situation themselves. Homeowners who wait too long to report a claim, or take action (e.g starting repairs) before consulting a TitlePLUS claims specialist can jeopardize our ability to investigate coverage for their claim, as well as prejudice our subrogation rights. This can also negatively impact their policy coverage in some circumstances.

there are the costs of repair, demolition, rebuilding, or whatever the situation requires.

Why do we see so many of these claims? The current popularity of “DIY” shows has many homeowners believing they too can be Mike Holmes and undertake major renovation projects; however, they may not be as enthusiastic about obtaining permits as they are about doing the work. Municipalities facing budget pressures may not have the staff to enforce building code compliance on these “improvements” as rigorously as they’d like.

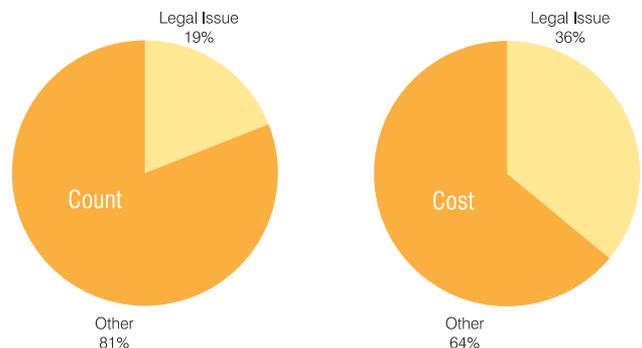
Perhaps more so than other types of claims, this is an area where the protection available to the homeowners exceeds what they would have had in the days when they would rely only on lawyers’ searches. A search would have discovered open permits or existing work orders, of course, but any orders issued after the purchase date relating to pre-purchase work not approved by the municipality would have left the owners on their own to deal with a costly situation and attempting to recoup costs from the previous owners in court.

In situations where the lawyer knows that the renovations are an important factor in the buyer’s decision to purchase, it’s important that the lawyer advise the client of the option to spend some

extra money to search to confirm if the vendor obtained the required permits from the municipality.

The client may say “we love what they’ve done with the reno,” but it’s best not to let clients rely on the title insurance policy. They may choose to proceed with the purchase anyway, even

Legal issues claims 1999-2009



though they know there may be building department issues, but some clients may not want to purchase a potential future claim.

Keep in mind that what satisfies the building department and the terms of the title insurance policy may not satisfy the homeowners (e.g., having their 10-foot deck replaced with a three-foot deck – or no deck at all).

Legal issues and TitlePLUS Legal Service coverage

THE NUMBERS

These claims are expensive to deal with in relation to their numbers, accounting for about 19 per cent of claims reported but more than 35 per cent of claims costs. Much of that cost can be attributed to the cost of the fraud claims, which on average cost more than \$140,000 to resolve.

THE DETAILS

When looking at these claims, it's important to distinguish between issues relating to legal problems with title or off-title compliance that are specifically covered by a traditional title insurance policy, and *Legal Service* coverage, which is not as broadly available in the marketplace.

The *Legal Service* coverage provided under the TitlePLUS program, for example, expands the coverage for legal issues, in that it offers protection against any error or omission on the part of the lawyer involved in the transaction **over and above** matters strictly relating to problems with title or other risks that are traditionally listed in a title insurance policy. These would be claims that, in the absence of a TitlePLUS policy, would otherwise involve an E&O claim against the lawyer.

Some examples include:

- Lawyer overlooks or does not make the buyer aware of information that may have affected the decision to proceed with the purchase, such as the presence of asbestos.
- Lawyer does not ensure that the buyer's intended future use of the property is protected (e.g., by ensuring a future use endorsement is included in the buyer's title insurance policy). For instance the vacant lot on which the buyer wishes to build may be subject to conservation laws that prohibit development.
- Lawyer fails to ensure that each unit on the property is protected (e.g., by obtaining a multi-unit residential title insurance property). The basement rental unit the owners had counted on for income may be illegal because the property is not zoned for a duplex.
- Tax consequences resulting from the purchase or sale of the property.
- Value fraud situations where it should have been apparent to the lawyer from the registered title that there was an anomaly.

The benefit to the homeowner or lender here is having a direct link to the insurer, sparing the policyholder the trouble and expense of suing the lawyer. The lawyer also benefits, as the claim will not result in a future claims history levy surcharge or any request for a deductible payment if an error or omission is found to have occurred (and assuming that the lawyer was not engaged in gross negligence or wilful misconduct).

In the LAWPRO E&O program over the past 10 years, there have been about 200 claims that cost the E&O program more than \$19 million in which title insurance was purchased; these claims, however, were reported to LAWPRO as E&O claims because coverage was rightly denied by other title insurers as being outside the scope of the title insurance policy purchased. Many of these are situations in which legal services coverage could have proved helpful to purchasers and might have been covered under the *Legal Service* provision in the TitlePLUS policy. Mirroring the experience in other real estate E&O claims (see "Real estate claims trends" on page 16), 77 per cent of these claims were for issues resulting from poor communication with the client or inadequate investigation on the part of the lawyer.

Land and zoning disputes

THE NUMBERS

These claims have stayed fairly consistent in terms of count and cost over the past 10 years, accounting for about 15 per cent of claims reported and claims costs. The average cost of dealing with these claims has risen to about \$14,000 in the 2005-2009 period from about \$11,000 in the 2000-2004 period, due largely to increases in legal and construction costs in that time.

THE DETAILS

Claims in this category tend to involve "tangible" property problems, which can cause significant stress to the homeowner, as they involve physical structures that the homeowner may use every day, or parts of their land that they are now threatened with losing.

Examples include:

- Homeowners discover a shed, driveway, or other structure is encroaching onto their property (or theirs is encroaching onto a neighbour's). This is usually discovered when one of the property owners obtains a survey sometime after the closing date.
- A right of way that the homeowners thought was theirs when they bought a property was not registered on title.
- The homeowners receive a claim of adverse possession for part of their property from a neighbour.
- Zoning violations, such as the homeowners finding out their new property's garage size exceeds local zoning laws.

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