



## Using Title Insurance Safely: Issues to Consider

|     | Done? | Task   | Comments  |
|-----|-------|--|---|
| 1.  |       | Know the policy & routine endorsements                         | Become knowledgeable about the standard (i.e., pre-printed) terms of the policy(ies) and endorsements from the insurer(s) you deal with most commonly. Can the insurer provide you with an annotated policy that will streamline your learning process? Remember that not all title insurance policies are the same: Consider the potential impact of legal service coverage.   |
| 2.  |       | Obtain information from client                                 | Obtain relevant information from your client so you know the type of property, any noteworthy features of particular importance or concern to your client, and your client's intended use of the property. For example, recreational properties are particularly complicated and involve a more detailed intake process. <sup>1</sup> If the client is buying a property for a particular feature (e.g., because of the basement apartment an elderly parent will occupy), the client may really need to know that the subject feature is legal, not just that there will be a right to compensation if it must be removed. (Title insurance generally provides that the insurer may choose to remove the offending structure and provide compensation: The insured-client has no right to force the insurer to bear the cost of reconstruction.) |
| 3.  |       | Consider ordering survey                                       | Decide whether the client should be advised to order an up-do-date survey due to its plans for the property (i.e., if they go beyond what title insurance would typically cover) or if the client is displaying little tolerance for potential post-closing problems (such as fence disputes which are not typically covered by title insurance). But remember that once you and/or your client have knowledge of a problem, it will not typically be covered by a title insurance policy (due to the "knowledge" exclusion), unless you reveal it to the title insurer and successfully request an "insure over".  |
| 4.  |       | Make early disclosure to client (e.g. retainer letter)         | Comply with disclosure requirements under Rule 3.2-9.4 – 3.2-9.7 (formerly 2.02(10)) of <i>Rules of Professional Conduct</i> . <sup>2</sup> Explain to the clients the searches you will NOT be doing if title insurance is used (such as building compliance in most cases involving single-family residential properties). Warn the client that title insurance brings a right to compensation, not a guarantee of a problem-free property. Consider sending the standard form policy in advance, along with a copy of "Working with a Lawyer when you buy a home". <sup>3</sup>  |
| 5.  |       | Confirm if client does NOT want title insurance                | In this case, "client" means purchaser and any mortgage lenders. It is prudent to obtain a written waiver. A sample is available at: <a href="http://www.titleplus.ca/files/WaiverTI032011.pdf">http://www.titleplus.ca/files/WaiverTI032011.pdf</a>  |
| 6.  |       | Do title search  | In addition to looking at deleted instruments to watch for any pattern of value fraud (since title insurance does not always cover a lender for it), actually print and read the active instruments on title.   |
| 7.  |       | Consider need for abutting parcel searches                     | Review the following for a quick reminder of relevant aspects of the <i>Planning Act</i> : <a href="http://www.titleplus.ca/files/PAarticle062014.pdf">http://www.titleplus.ca/files/PAarticle062014.pdf</a>  |
| 8.  |       | Do executions search   | Search names of vendor and mortgagor, plus guarantor (if any) unless waived by lender. It is prudent to search in advance of closing so any similar name matches may be addressed.  |
| 9.  |       | Undertake off-title due diligence as required by title insurer | If you have to contact the insurer to request instructions, don't just ask, "Must I do XX search?" If the insurer says "no", then ask, "And will my client be covered for XX under the policy even though no search is required?" An insurer may be quite justified in telling you that a certain search is not required by it, but that is because the policy does not cover for that issue and therefore, the insurer does not care about the search.   |
| 10. |       | Undertake additional off-title searches (if any)               | If necessary to address issues of particular interest to your client (i.e., even if not required by the title insurer). In the alternative, if highly relevant but client does not want to bear the expense, obtain instructions from the client waiving the search (preferably in writing). Don't forget that commercial title insurance policies often cover much less than residential policies, so it is even more important that the lawyer do a wide range of off-title searches in addition to those required by the title insurer.  |

<sup>1</sup> See [http://www.practicepro.ca/LawPROmag/Title-insurance-and-recreational-properties\\_What-you-need-to-know.pdf](http://www.practicepro.ca/LawPROmag/Title-insurance-and-recreational-properties_What-you-need-to-know.pdf)

<sup>2</sup> That title insurance is not mandatory and not the only option available to protect the client's interests; that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer; and if discussing TitlePLUS® insurance, the relationship between the legal profession, the Law Society, and LAWPRO.

<sup>3</sup> Published by the Law Society of Upper Canada and the Ontario Bar Association: [http://www.oba.org/CBAMediaLibrary/cba\\_on/pdf/workingWithLawyerBrochure.pdf](http://www.oba.org/CBAMediaLibrary/cba_on/pdf/workingWithLawyerBrochure.pdf)

|     | Done? | Task  | Comments   |
|-----|-------|---|--|
| 11. |       | Consider endorsements required                                | Such as a rural property, condominium or future use endorsement for purchase policies, or a line of credit endorsement if the lender will be making subsequent advances.   |
| 12. |       | Order title insurance   | Provide full and detailed information to the title insurer. If you or your client knows anything bad about the property, disclose it to the title insurer and request an "insure over" (which may, or may not, be granted, in whole or in part). If you are also obtaining title insurance to protect the interest of a mortgage lender, you may need to obtain a separate policy for the lender (although, for example, the TitlePLUS title insurance policy covers both the purchaser and the lender in one policy). If there will be multiple mortgages registered on closing, you may require multiple lender policies.  |
| 13. |       | Review draft coverage for your specific transaction           | May be available as a draft or pre-approved policy or as an insurance binder. Does it cover the correct insureds (i.e., purchaser and mortgage lender) and property (including all relevant parking and locker units in the case of a condominium, and in the case of a freehold property, all PINs that form part of the property and easements benefitting the subject property)? Is it the right type of policy (e.g., residential versus commercial, purchase versus mortgage only or both)? For multi-unit dwellings, does it include zoning and building coverage? Does it have the correct policy date, since coverage will typically start on the policy date and there is very little coverage for events happening after the policy date? <sup>4</sup> Normally the policy date should coincide with the closing date when documents are registered on title, but if the policy includes gap coverage to allow for later registration, you will want the policy date to be the date that funds are advanced, not the date of registration. |
| 14. |       | Review any property-specific exceptions to coverage in detail | These are typically found in a schedule. Do you understand what they mean (e.g., forced removal versus marketability coverage)? Do they make you think you now have to do additional work to protect your client? Are there any sub-limits to coverage being introduced (e.g., a maximum of \$30,000 in coverage for building compliance issues in some Ontario municipalities, from some title insurers)?   |
| 15. |       | Confirm premium will be as expected                           | In some cases extra premium may be charged for certain endorsements. Your client may want you to try to negotiate with multiple insurers for lower premium rates on larger commercial transactions.  |
| 16. |       | Meet with your purchaser client                               | Explain what title insurance is and review the coverage, exceptions, standard-form exclusions and the endorsements. Remind the client that it is essential to disclose anything bad or adverse they know about the property. Explain in detail if any "insure over" requests were denied, or only allowed in part. Obtain your client's informed consent to close the deal in reliance on the coverage that will be provided by the title insurance policy (subject to any additional investigations you have undertaken and on which you are opining). If the purchaser waived coverage but you are obtaining it for the lender, confirm with the purchaser (preferably in writing) that he/she is paying for the lender's title insurance coverage, but obtaining no coverage personally.  |
| 17. |       | Make any necessary disclosure to lender                       | If any exceptions or exclusions will have a potential impact on your lender client, you must also obtain informed consent from it, separate from the purchaser's consent. Documenting the relevant communication is important. Lenders may designate some common types of exceptions, such as utility easements, as standard approved exceptions.  |
| 18. |       | Close the deal  | Be sure that you either have an issued policy or that coverage is bound on set terms (e.g., pre-approval has been granted) before you even consider closing the deal.  |
| 19. |       | Pay the premium and obtain issued policy(ies) promptly        | This reduces the risk of the client needing to put in a claim and coverage not being in place, raising the possibility of a dispute with an insurer in the face of an unissued policy. Also, do a final double-check that there are no typos or clerical errors that need to be fixed pre-issuance.  |
| 20. |       | Review the issued policy(ies) immediately                     | Does it match the terms of coverage promised by the title insurer before closing, as reflected in the draft policy or insurance binder? If you spot any errors, immediately request a correction endorsement.  |
| 21. |       | Report to the purchaser and lender                            | Provide details of the title insurance coverage and enclose issued policy. Remind client about need to file any title insurance claim promptly. Enclose any disclosure that you reviewed with client pre-closing and/or confirm relevant instructions.   |

Disclaimer: This checklist includes techniques which are designed to minimize the likelihood of being sued for professional liability. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

© 2014 Lawyers' Professional Indemnity Company.

\* LawPRO, the LawPRO logo, practicePRO and TitlePLUS are registered trademarks of Lawyers' Professional Indemnity Company. All rights reserved.

<sup>4</sup> Typical post-policy date coverage includes fraud and encroachments by neighbours.