

Commercial title insurance: What you need to know

A discussion regarding title insurance (or any insurance for that matter) requires the understanding that it is insurance. It does not fix problems, it underwrites risks. As lawyers, it is incumbent upon us to be able to convey this clearly to our clients, whether lenders or more likely borrowers/purchasers. In the days of yore, the lawyer conducted a comprehensive array of searches for every transaction. This allowed the lawyer to identify issues and ensure any issues were addressed prior to closing a transaction. Times have changed. Quick closing dates, ease of access to information, sophisticated and cost sensitive clients, and of course title insurance, have altered the way a commercial transaction is carried out.

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Commercial title insurance is a different product than a residential policy. For the most part, residential policies can be characterized as being “one size fits all” or “off the rack.” Yes, there are times when a residential policy may require an amendment or an exclusion to accommodate a particular situation, but often times, assuming the lawyer is using the document production software (e.g., LawyerDoneDeal’s RealtWeb or Due Process’ the Conveyancer) the software will assist in identifying these concerns (assuming data has been correctly entered). The bottom line is that ordering a residential title insurance policy is a fairly straightforward process.

If a residential policy is “off the rack,” a commercial policy is a tailored, custom-made article. Every situation is unique. The type and details of the transaction will dictate what is included or excluded from the final policy and its endorsements. Prudent lawyers will have their thinking caps on early and will evaluate the situation to determine the most commercially reasonable approach to each situation. Granted, tight deadlines can have an impact on the structure of the deal.

Commercial deals require tailoring and adjustments; for the most part commercial transactions are not compatible with the document production software to enable automatic ordering. This means being on your toes and understanding what needs to be done, when it needs to be done and what the policy does and does not cover. It will also require you to adjust your client acknowledgement form for title insurance – indicating that the client understands what is not covered. Once you add a lender into the fold, it can become a quagmire for the uninformed.

It is my hope this paper will provide some guidance in navigating a commercial title insurance policy from the point of view of the transactional lawyer.

What is commercial title insurance?

Title insurance is a form of indemnity insurance which insures against financial

loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens. Title insurance is a product originally developed in the United States as a result of a deficiency of the U.S. land records laws. It is intended to protect an owner’s or a lender’s financial interest in real property against loss due to title defects, liens or other matters. The policy will defend against a lawsuit advanced against the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the dollar amount of insurance provided by the policy. The first title insurance company, the Law Property Assurance and Trust Society, was formed in Pennsylvania in 1853. Title insurance may be relatively new to us, but it’s not a new thing!

Typically the real property interests insured are fee simple ownership or a mortgage. However, title insurance can be purchased to insure any interest in real property, including an easement, lease or life estate.

There are two types of policies – owner and lender. Just as lenders require fire insurance and other types of insurance coverage to protect their investment, nearly all institutional lenders also require title insurance (a loan policy) to protect their interest in the collateral of loans secured by real estate. Buyers purchasing properties for cash or with a mortgage lender often want title insurance (an owner policy) as well. A loan policy provides no coverage or benefit for the buyer/owner and so the decision to purchase an owner policy is independent of the lender’s decision to require a loan policy.

It is important to remember that title insurance is retrospective. It insures covered risks prior to the policy date that arise after the Policy Date. The Policy Date is normally defined as the date of registration of the Transfer or Charge. Title insurance can provide coverage for either a lender or an owner and a lender.

The insurance policy, with its endorsements will indemnify the lender or owner against an actual loss or damage suffered for covered risks. A typical owner policy covers: defects in title; liens or encumbrances on title; unmarketability of title; and lack of access.

A lender policy will cover the above, as well as: invalidity or unenforceability of a mortgage; the priority of any lien or encumbrance.

Generally speaking, a policy will cover survey related issues, municipal work orders, building permit issues, tax arrears, zoning matters, fraud (see comments below), survey errors, boundary disputes and unregistered easements. The coverage is subject to a number of qualifications depending on the amount insured, but all must pre-date the Policy Date.

What title insurance is not

Commercial title insurance starts with a policy jacket and endorsements are added to it. This is contrary to the residential policy, which is a comprehensive policy. A commercial policy gets assembled depending on the type of property, the value of the property and the amount of the loan. In a commercial policy, environmental matters are not covered. Do your diligence or ensure you client has done it. If your client is doing this work, ensure this is documented. I would encourage everyone to read the case of *Outaouais Synergist Inc. v. Lang Michener LLP*, 2013 ONCA 526 as it highlights the importance of being clear in what is being done and not being done and who is doing it.

A few examples of areas that are not covered in a commercial title insurance policy that frequently cause lawyer’s issues are listed below:

Future Use – the policy covers continuation of the existing use as of the Policy Date. Coverage does not extend to changes in use. Be sure you know what your client’s intention for the property is. If the client is going to do something different with the property – advise the insurer.

Property Valuation issues are not covered.

Fraud – matters relating to non-title issues may not be covered.

It is important to note that there is also coverage provided under a lender policy that is not covered under an owner policy. Understanding what is and what is not covered in a particular policy is critical for the lawyer, so that the lawyer can explain to



an owner that their lender may be covered for such things as Fire Department compliance, Electrical Safety Authority and Technical Standards and Safety Authority, but the owner is not covered for these. Business interruption losses are also not covered under a title insurance policy.

One more thing to remember, there needs to be a loss suffered for the policy to “kick in,” for example, if taxes were not up to date, but the lender does not suffer a loss as a result – there is no claim.

Endorsements

The true benefits of the commercial title insurance policy are found, not in the jacket, but in the endorsements.

Some lenders have a set of standard endorsements that attach to every policy, which is helpful. Some endorsements that are commonly found in a title insurance policy include: Access Endorsement, Future Insurance Endorsement, Contiguity Endorsement, Leasehold Endorsement, Government Response Endorsement, Survey Endorsement and Super Priority Liens.

What searches do you need?

No matter what – title insurance is not a substitute for work or searches – it is a tool that can assist a lawyer in getting a deal done. Many insurers will accept a statutory declaration from the borrower that taxes,

utilities, and other items are current. Where commercially reasonable – there is no substitute for the search results. Companies offering commercial title insurance for the Canadian market include FCT; Stewart Title Guaranty Company; TitlePLUS title insurance and Chicago Title.

Something unique – TitlePLUS title insurance

While most commercial insurers provide policies with unlimited policy amounts and must be tailored to fit the situation, TitlePLUS insurance offers commercial title insurance policies up to a maximum limit of \$2,500,000. What makes this policy unique is that it is a full all-inclusive policy that also covers legal services. As previously described the typical commercial title insurance policy is a stripped down policy with a number of endorsements added to it and it is the lawyer’s role to determine what endorsements are required. The TitlePLUS policy requires a comprehensive list of due diligence searches. The process requires the lawyer to send in an order request describing the parameters of the transaction; TitlePLUS staff will review the structure and report back to the lawyer as to what searches will be required to obtain coverage. The legal services coverage can be a very desirable element in the policy and TitlePLUS insurance is the only insurance that generally offers this type of coverage. In keeping with the TitlePLUS program’s efforts to highlight the role the lawyer plays in a transaction, ordering this policy provides

the opportunity to identify and resolve issues prior to closing a transaction, which really is part of our role after all.

How does commercial title insurance help the lawyer?

In days of short turnaround times, sophisticated parties and cost conscious clients, a title insurance policy can assist the lawyer in closing a deal. It is a tool that helps us do our jobs – it does not do our job for us.

Pitfalls and notes

- Most commonly missed are building and zoning issues (a search is done but there is no follow up).
- Most common types of claims are tax arrears, but in particular insurers are seeing more instances of super priority lien claims.
- What type of property is it? The insurer needs to know what type to provide correct coverage – commercial/ industrial/retail/commercial condominium/multi-unit.
- Not realizing what “construction” means. If the property is “under construction” coverage can be afforded for lien claims.
- Make sure to insure for the correct amount.
- Insurance companies waive right of subrogation against lawyers (except for the lawyer’s gross negligence or wilful misconduct).
- Speak with the insurer when ordering the policy; they can assist in identifying issues to provide correct coverage.
- Read the issued policy to see if you need anything added.
- Be sure to be clear with your client – put in writing what the policy covers, what searches you are doing or not doing and what your role is in the transaction. ■

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