

Six ways to protect your client's property title



Identifying title risks, advising clients, and diligently documenting steps can save clients and lawyers from costly claims. Despite best efforts, issues may arise, and title insurance offers some protection for both clients and lawyers. Understanding the nuances of title insurance policies, including their coverage, exclusions, and how they interact with legal due diligence, is vital.

This article highlights key points from a presentation by Brendan Fagan, Chief Underwriter and Director of Underwriting at TitlePLUS, who spoke about easements, covenants, and registered agreements.

Coverage is related to loss

Title insurance does not cover instruments merely because they exist on title but can cover losses related to non-compliance with the conditions, covenants, or other obligations contained within those instruments. Additionally, the policy may cover losses from matters that are tangential to these instruments.

Right-of-way, a costly oversight

Here's an example of a recent claim brought to TitlePLUS. A homeowner selling their property encountered a title issue involving a right-of-way for pedestrian access to a parking lot. The seller's property had a right-of-way on title, but the neighbouring property's title lacked the corresponding "subject to" right-of-way. Although originally included in the builder's transfer, this right-of-way had been omitted during three consecutive conveyances. The land registry office stated that an application would be required as it has been over ten years since the omission. To ensure the sale proceeded without delay, TitlePLUS issued a new policy for the purchaser insuring over the issue. Post closing, an application was filed to correct the legal description of the neighbouring land with the consent of the neighbour as well as their mortgagee.

Key takeaway: Always verify that any rights-of-way are correctly recorded in both the dominant and servient titles to prevent future disputes.

Unregistered easements

The standard residential policy typically provides coverage against the risk of someone asserting an interest in an insured's land. This includes legal defense costs if a dispute arises, and, if the claim is upheld, coverage may extend to losses from a reduction in the property's value. However, not all risks are insurable. For instance, unregistered easements are often excluded from coverage in transactions involving vacant land.

Key takeaway: Thoroughly review title insurance policies to identify exclusions and limitations.

Clearly explain these to your clients in plain language to manage their expectations and help them make informed decisions.

Municipal agreement violation, how title insurance steps in

TitlePLUS also recently handled a claim where heavy rainfall caused a homeowner's basement to flood. The issue was traced to the builder's failure to comply with municipal grading requirements. TitlePLUS retained an engineer to identify and confirm the issue and covered the engineering and construction costs necessary for remediation.

Restrictive covenants, avoiding lawyer negligence

Lawyers must identify potential conflicts with clients' intended uses and advise accordingly. For instance, a lawyer failing to warn a client about a covenant restricting additional structures could face a negligence claim if the client planned to build another. Conversely, if it is discovered post-closing that a property violates a restrictive covenant -- such as having two structures in a single-structure zone -- the title insurance policy would typically cover the resulting losses, as this would constitute an existing title defect as of the policy date.

Key takeaway: Carefully review restrictive covenants for potential conflicts with a client's intended uses and document your advice to mitigate liability risks.

Review of search requirements

Search requirements can differ based on the property type and value of the property. For example, the searches needed for multi-unit residential properties may vary from those for single-family homes. Similarly, commercial properties may have distinct search requirements compared to residential properties.

Key takeaway: Confirm the type of property your client is purchasing and ensure you fully understand the associated search requirements in advance.

A proactive approach to due diligence, combined with careful policy review, ensures smoother transactions and better outcomes for all parties involved. The full CPD titled Real Estate Due Diligence: NOSIs, Easements, Covenants, Fraud, and Common Electronic Registration Issues is available on the PracticePro CPD page. ■