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## Why you should get title insurance

Not long ago, an Ontario lawyer acted on a home purchase under a power of sale. The first mortgage had gone into arrears and the mortgagee had sold the house. Title showed that there was a lien for a furnace registered in second position, after the bank's mortgage.

Typically, when a bank or trust company has a mortgage in default, and sells the property under power of sale, everything subsequent to its mortgage - including all of the owner's rights and those of any second mortgagee - is cut out by law. The only things that usually stand ahead of the first mortgage are statutory liens, like taxes.

The lawyer in this case assumed the furnace lien was equivalent to a second mortgage, and was therefore cut out by the mortgage default proceedings under a power of sale. Unfortunately, the lawyer failed to consider the Personal Property Security Act which gives priority to a furnace lien filed by a gas company. The lien actually came ahead of the first mortgage.

The amount outstanding on the furnace lien was \$3,500, and since the standard deductible on the lawyer's insurance coverage is \$5,000, the lawyer would have had to pay off the entire furnace personally.

Except for one thing. Prior to closing, the purchasers accepted their lawyer's advice and purchased a title insurance policy from TitlePLUS. The title insurer paid off the furnace at no cost to the homeowner or the lawyer.

The fact is that no matter how well a lawyer does his or her job, surprises can occur - a day, or even a decade after the closing. Title insurance protects purchasers against unpredictable and undetectable issues such as forgery, fraud, missing heirs of prior owners, or restrictive covenants. It also provides coverage for building bylaw violations and work orders, major encroachments, legal rights of access and other title-related problems that could devalue a property or even make it impossible to sell in the future. Title insurance can also insure against the lack of an up-to-date survey.

Under Law Society rules, lawyers are required to offer purchasers the option of closing with or without title insurance, and providing an explanation of each scenario. Most of us provide clients with a verbal or written explanation, or an excellent booklet called Working with a lawyer when you buy a home.

For purchasers who have opted for title insurance and later become aware of a title-related problem, the policy works much like car or home insurance. The title insurer investigates the claim and will either fix it (for example, by paying to move the shed that is on the wrong side of the property line) or provide compensation for any losses or damages suffered as a result of the problem.

The title insurer could also pay the costs of a legal defence if the matter ends up in court.

A key difference between title insurance and a lawyer's traditional opinion on title is the direct access to a solution. Without title insurance, the homeowners might have to negotiate with their lawyer if a title-based problem crops up, or even sue to be compensated. With title insurance, access to a solution is usually a phone call away.

Typically, title insurance costs between \$188.75 and \$242.75 including all taxes and fees, but in my practice it usually saves clients money by eliminating some out-of-pocket expenses such as Toronto's \$100 work order search fee. In cases where the policy is also used in place of a new survey, the savings can be as much as \$700 or \$800.

Purchasers have a choice of user-friendly title insurers in today's market. Some lawyers use the Canadian branch of Texas-based Stewart Title. Many of us use TitlePLUS, a made-in-Canada product developed by Ontario real estate lawyers. It is owned by the Lawyers Professional Indemnity Company, an arm of the Law Society of Upper Canada. Lawyers, however, are prohibited from receiving commissions or fees from the sale of any title insurance products.

TitlePLUS is the only insurer that offers legal services coverage in addition to the title insurance coverage. This covers any error or omission on the part of the lawyer handling the transaction and specifically covers failure to register documents or remove encumbrances from title, as well as improper adjustment of any items (like taxes) on closing.

My preferred title insurer is TitlePLUS. It is available to lawyers on-line, through a sophisticated but easy-to-use program. It has a built-in questionnaire and check-list designed to ensure that lawyers do all the necessary work for their clients. It also makes clear which searches the lawyer does not have to do because the policy provides coverage. By standardizing the lawyer's tasks and streamlining them through the computer software, it has helped to raise practice standards across the province's real estate bar.

TitlePLUS has repeatedly allowed transactions to close on time, particularly when a mortgage lender is squeamish about a potential problem. TitlePLUS insured a vacation property where a dock and boathouse were built in a river without permission. It provided coverage for a mortgage lender where the house was partly built over an adjacent road allowance. On a sale where the garage encroached into the neighbour's property, a TitlePLUS policy covered the lender and purchaser.

In one case, a discharge of a mortgage held by a private individual was not available on closing. No payments had been made on it for 15 years, but the discharge necessary to clear title was going to be delayed. TitlePLUS provided coverage to allow the transaction to close on time.

What happens when you don't use title insurance? The Browns found out the hard way. After closing, a bank representative knocked on their door and told them they didn't own the property they had just bought. No-one knew that the previous owner had fraudulently discharged the \$160,000 mortgage on their house. When the bank said it wanted to repossess, the Browns took it to court and won. Unfortunately, it cost them \$40,000 in legal fees to defend their title. Had they used a TitlePLUS policy, the insurer would have paid the full legal bill.

If your lawyer isn't using title insurance, find out why.