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Learn all facets of title insurance

One of the main attractions of title insurance for Ontario consumers is that in the event an unexpected title problem crops up after closing, whether or not it arises out of a mistake made by the purchaser's lawyer, the homeowner does not have to get involved in lengthy and expensive litigation against his or her own lawyer.

For the most part, if the title problem is an insured risk under the policy, the title insurer will calculate the damages and pay them, or take whatever steps are necessary to cure the problem.

Often, title problems arise because of outstanding liens on title, zoning or building bylaw violations, errors in land descriptions, building encroachments, or improper fence placement.

With the title policy as protection, it should not be necessary for a homeowner to sue his or her lawyer or anyone else for a title problem. Unfortunately, it doesn't always work out that way.

Back in December 2000, Jeff Strachan and his wife Krista Snedden purchased their rural home in Caledon for \$270,000.

At the time they first inspected the one-acre property, the ground was snow-covered, and they did not notice that it was swampy and subject to flooding. As well, they did not know an underground river runs directly beneath the land.

When they got their lawyer's reporting letter after closing, they discovered for the first time that the house had been built on property zoned "hazard land."

Although the vendors had signed a disclosure statement showing the hazard zoning, it was never shown to Strachan, and the zoning details were omitted from the MLS listing by the real estate agent.

In the summer of 2002, the Strachans applied to Caledon for a permit to build an in-law apartment for Krista's parents, but they were turned down. They discovered they would never be able to add to the house because of the zoning.

The couple turned to their title insurer, First Canadian Title, to be reimbursed for the difference between the true value of the property and what they actually paid for it. The insurer took the position that no damages had been suffered, but eventually arbitrator Sidney Troister awarded the Strachans \$45,000 plus costs for the reduction in value of the property.

Following the award, the Strachans sued their real estate lawyer and real estate agents for damages based on losses they claimed were not covered in the arbitrator's award or under the title insurance policy. These include the inability to improve or rebuild the property, and the difficulties they have experienced in trying to sell, insure or refinance it in other words, all losses except for the reduction in value.

They claim that the hazard land designation has stigmatized the property, and that has caused losses exceeding the \$45,000 awarded by the arbitrator.

In an unusual twist to the litigation, the Strachans' former lawyer, as a defendant, has added the title insurer to the Strachan lawsuit, bringing it into the litigation as a "third party" to the main action.

In the event the Strachans succeed against the lawyer in his lawsuit, the lawyer is asking the court to order the title insurer to contribute to the payment.

The case has not yet come to trial and none of the claims has been proven in court.

It is unusual in Ontario for a title-insured homeowner to sue his title insurance company. It is even more unusual for the insured homeowner to sue his lawyer, and then have the lawyer pursue a third party claim against the title insurer who has already paid out damages based on the reduction in value of the property.

Last year, all seven Ontario title insurers signed an agreement with the Law Society that they would not sue any lawyer for making a mistake in the event they had to pay out a claim on a title insurance policy.

The strange circumstances of the Strachan case in which the lawyer is suing the title insurer, and the company is denying responsibility are an interesting twist to the agreement with the Law Society.

Prior to the widespread introduction of title insurance in Ontario in the 1990s, lawyers would routinely order zoning searches for property purchase transactions.

In the Strachan case, the lawyer did not order the search since the title insurer did not require it as part of the lawyer's "due diligence" in the purchase transaction.

As a result, the Strachans wound up purchasing a property zoned as hazard land without knowing it.

The ongoing lawsuit raises the interesting question of whether a lawyer should perform zoning and other searches, even if the title insurer does not require it.

Last week, I asked Mary DeSousa, communications director of First Canadian Title, to comment on the case. She declined, saying the matter is still before the court.

The lesson of the case so far is that while title insurance protects the homebuyer from title-related issues, it does not cover every possible loss.

Homebuyers should inform themselves about what risks title insurance covers and what risks it does not cover.

In particular, they should be aware if their title insurance policy contains what is known as "legal services coverage," and whether homeowners are sheltered from having to sue their lawyers if a problem arises.

Any questions or concerns about title insurance protection should be fully explored with the real estate lawyer before closing.