INTRODUCTION

If a client is purchasing title insurance in order to secure or assure his or her interest in a property, there is a significant role regarding the acquisition of the insurance for the solicitor handling the conveyancing on behalf of the client. The need for legal advice and representation regarding title insurance arises because of the nature of title insurance.

Title insurance may be described as an agreement to indemnify[1], up to the face amount of the policy, a specific insured, regarding a specific interest in a specific property, in the event that a loss ever arises from one or more specified causes[2]. Title insurance does not guarantee the state of title to the property, but instead provides the insured with an indemnity against risks covered under the policy. No claim can be made by the insured under the policy unless an actual loss occurs, relating to one or more of the insured risks.

Given the technical, land-related nature of title insurance, a lawyer has a valuable role to play in ensuring the nature and extent of the client's coverage. In Ontario, title insurance has not yet become as prevalent as in the United States and it is difficult to evaluate the role of the solicitor from direct experience. Therefore, we must look at the role that American lawyers play in a title insurance regime for guidance in determining the duties of an Ontario solicitor.

THE U.S. EXPERIENCE: AN OVERVIEW

The role of real estate lawyers in transactions involving title insurance varies throughout the United States. In some cases, the purchaser's or lender's lawyer appears to handle the transaction much the same way as a lawyer would in Ontario, but also arranges for the client to receive the benefit of a title insurance policy. This involves the lawyer giving the title opinion to the insurance company, instead of to the client.

In some cases the lawyer applies to the insurance company for coverage[3], while in other cases the lawyer is actually an agent of the company, able to issue the policy within the parameters of his or her agency contract.[4]

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[1]Werner, "The Basics of Title Insurance" in James M. Pedowitz, ed., *Title Insurance: The Lawyer's Expanding Role* (Chicago: American Bar Association, 1985) 3 at 5.

[2]Deborah J. Cook, "Iowa's Prohibition of Title Insurance - Leadership or Folly?" (1983-84) 33 *Drake Law Review* 683 at 690.

[3]This appears to be known as the "approved attorney system". The approved attorney will generally represent both the insured (as purchaser) and the insurer: John P. Travaskis, Jr., "The Role of the Lawyer as an Agent or Approved Attorney" in James M. Pedowitz, ed., *supra*, 299 at 304.

[4]Theodore C. Taub, "Rights and Remedies under a Title Policy" in American Bar Association, ed., *Title Insurance and You: What Every Lawyer should Know* (Chicago: American Bar Association, 1979) 69 at 70. It has been

There are also "Bar-related Funds", organized by lawyers, to allow them to provide title insurance directly without dealing with the commercial title insurers.[5]

In some parts of the United States, the role of the lawyer is viewed as redundant.[6] There are certainly areas of the United States where lawyers are not involved in a residential transaction. Instead, all of the necessary work will be undertaken by the real estate broker, the lender and the title insurer.[7] In these cases, the documentation for closing is prepared by the real estate broker and the lender, and title issues are addressed by the title insurer.

THE ONTARIO REGULATORY FRAMEWORK

In Ontario, all aspects of a residential real estate transaction are normally handled by a lawyer, once the agreement of purchase and sale is signed. A conveyancing solicitor's first and most obvious role is to assure title for his or her client. In the future, this may often involve advising the client of the advantages and/or disadvantages of obtaining a policy of title insurance, thus requiring Ontario solicitors to develop expertise in reviewing title policies so as to properly advise a client on which method of assuring title best suits his or her needs.

Section 3(3) of Regulation 666, R.R.O. 1990 provides that a policy of title insurance cannot be issued without an opinion from a lawyer not employed by the title insurer. In a purchase situation where title insurance is being obtained, the purchaser's lawyer usually gives an opinion on title to the title insurer, similar to his or her role in giving an opinion to the mortgage lender. However, he or she also must advise the client regarding the insurance policy in most cases.

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suggested that such agents generally move away from the practice of law, and that they should be representing only the title insurer: Travaskis, "The Role of the Lawyer as an Agent or Approved Attorney", *supra*, at 306.

[5]Douglas E. Miles, "Bar-related Title Insurers: Their Benefits to the Bar and the Public" in *Docket Call*, reproduced as Exhibit "D" to John P. Trevaskis Jr., "Economic Considerations"- in American Bar Association, ed. *supra*, 45 - 46. See also Michael J. Rooney, "The Role of the Lawyer as a 'Member" of a Bar Guaranty Fund" in Pedowitz, ed., *supra*, 333 - 414.

[6]Miles, *op. cit.*, at 45; Bob Aaron, "Title Insurance Poses Threat to Ontario Registry System" *The Lawyers' Weekly* (December 1, 1995) 4. According to the Ontario Real Estate Lawyers Association, in Southern California fewer than 5% of purchasers or vendors retain lawyers: Susan Lightstone, "Dirt Law in the '90s" (August - September, 1995) *The National* 21 at 24. However, there is a countervailing view that where lawyers are not currently involved in conveyancing in the United States, they never were: Edward G. Frackowiak, "Title Insurance may be solution to some Problems" *The Lawyers' Weekly* (January 5, 1996) 4.

[7]For example, this appears to apply in Denver (Charles Donahue, Jr., Thomas E. Kauper, and Peter W. Martin, *Cases & Materials on Property: An Introduction to the Concept and the Institution*, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1993) at 658) and Kansas (Carolyn Rosenstein, "Title Insurance" [unpublished]).

THE THRESHOLD ISSUE: TITLE INSURANCE OR OPINION?

The decision regarding how to assure title is certainly an issue upon which it is reasonable for a client to expect advice from the lawyer. Concerns such as relative risk coverage, cost, and future security may be relevant. The decision should in most cases be made relatively early in the transaction, where possible, especially if the client wants to obtain the maximum cost benefit.[8]

The following is a brief review of some of the issues which may be discussed with the client when he or she is making the decision about how to assure title, and is not meant to be exhaustive.

Future Security

Clients who have traditionally received an opinion on title may be concerned about their lack of protection in the event that the solicitor retires from practice or leaves the jurisdiction. In Ontario, the mandatory Errors and Omissions policy of solicitors is a "claims made" policy. The insurance coverage of the lawyer must be in place when the claim is made; insurance coverage when the work was done is irrelevant. Frequently a problem with title does not emerge until many years after closing (for example, when the property is being sold). Therefore, the lawyer who acted on the purchase, or that lawyer's partners, would need to have an errors and omissions policy in place when the problem materializes in order for the client to have ultimate recourse against an insurer.

Also, because the lawyer's coverage is an "errors and omissions" (or malpractice) policy, the claim must be asserted against the lawyer. If the lawyer cannot be located or has died, it may be difficult to assert a claim. Because the coverage belongs to the lawyer, not the client, the client cannot make a direct claim against the mandatory insurer. Even if the lawyer still has insurance coverage, the client may not be compensated if the lawyer has given his or her insurer grounds to deny coverage (such as a delay in reporting the claim causing prejudice) or if the aggregate ceiling for coverage is hit because of multiple claims.

Type of Coverage

Whether better coverage will be available under a title insurance policy than under an opinion on title depends on the individual policy when compared to the normal extent of the lawyer's opinion. It is not unusual for opinions on title to contain significant qualifications, especially where an up-to-date survey has not be obtained.

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[8] In many cases, the savings experienced by the client who chooses title insurance result from a streamlining of the off-title search process. In other words, the insurance company may be prepared to assume certain risks without the lawyer undertaking certain expensive searches. Where the decision to use title insurance is not made until relatively late in the transaction, the search disbursements will likely already have been incurred.

However, apart from the issue of coverage for specific risks under each regime, clients should be made aware that much of the solicitor's work depends on information provided by others (such as municipalities and utility companies). Also, it depends on the validity of previously registered documents. In the absence of evidence to the contrary, it is reasonable for the lawyer to assume that there has been no fraud, improper execution of documents, undue influence or other past activities that could cloud or otherwise harm title.

In other words, when giving an opinion the lawyer can only act reasonably based on the information provided by a variety of sources; he or she cannot necessarily guarantee its accuracy and efficacy. Under a title insurance policy, it does not matter who made a given error or how a title defect came into existence. If the risk is covered, compensation should be forthcoming.

For example, assume the Building Department made an error in responding to the lawyer's search letter, giving a "clear" response for work orders when in fact there was a work order. If the client later attempted to pursue a claim because of the cost of satisfying the work order, the lawyer would defend on the grounds that he or she had not been negligent. The search had been made and the lawyer acted reasonably in relying on the municipality's response. When the client looked to the municipality for confirmation, he or she would likely discover that the search response contained a waiver of liability on the part of the municipality. None of these problems would arise if the purchaser had insurance covering work orders.

Length of Coverage

In some cases, title insurance may also provide longer coverage than a solicitor's opinion on title. Most standard-form owner's policies (including the standard-form policy of the American Land Titles Association and the First American Title Insurance Company ("FA")'s Ontario Plain Language policy) define the term "insured" to include, in addition to the insured named in the policy, "those who succeed to the interests of the named insured by operation of law". Those who succeed to a property by operation of law (as opposed to a purchase) will continue to be covered under the existing policy.[9] Therefore, beneficial owners of land have a cause of action against the insurer under the title policy and the insured's heirs will be covered.

The draft TitlePLUS policy does not define the term "insured". Instead, the policy provides coverage to the person(s) named in Schedule "A" to the policy and under the "Continuation of Coverage" section, to anyone who inherits the land and the spouse of the insured if title is transferred to the spouse. Therefore, in the draft TitlePLUS policy, the spouse of the insured is also covered if he or she takes title at a later date.

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[9] Werner, *op. cit.*, at 38-39.

This type of extended protection would not necessarily be available under a solicitor's opinion on title, unless a new opinion was obtained when the property was transferred.

Pre-existing Policy

Where a title insurance policy has already been issued for the property, the lawyer should consider whether in fact a new policy (or opinion) is required. As discussed above, not every conveyance of a property necessarily vitiates the existing policy coverage.

This issue is more complicated where there is a corporation on title. Subject to consideration of other liabilities or tax issues, it may be that a transaction can be structured in a way that a more specific type of coverage can be purchased, at a lesser price, because the original policy is staying in place. It is unlikely that this will be a consideration for residential properties.

ELEMENTS OF SOLICITOR'S RETAINER RE: TITLE INSURANCE

Specific title insurance issues arise once the client has selected the title insurance option. A review of the American title insurance experience indicates that in Ontario, a solicitor should be retained to give advise on a variety of issues relating to the policy itself and the insurance transaction (in addition to the purchase transaction). However, some issues which are significant in the United States are not as important in Ontario, at least at present.

Choosing the Insurer

Either the client, upon advice from the lawyer, or the lawyer must select the insurer.[10] This appears to be a significant issue in the United States, and often involves considering the following: claims ratios; statutory reserves for claims[11]; the reports of independent ratings agencies; which insurer is considered "good" at particular types of properties, or who has the most technical expertise for the particular transaction; or, which insurer most recently insured the property.[12]

These types of issues will in all likelihood be less significant in Ontario, given the regulation of the entire Ontario insurance industry by the Ontario Insurance Commission

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[10]For a detailed discussion of this issue, see Fred I. Feinstein, "The Role of the Lawyer" in Pedowitz, ed., *supra*, 238 at 246 - 260. See also Mary T. McDonald, "Long-term Prospects: Fannie Mae Switches to Third-Party Ratings in Search for Reliable Title Insurance" (1995) Feb. *ABA Journal* 53.

[11]Kevin J. Cooney, "Protecting your Client: Negotiating Residential Title Insurance Coverage" (1991) May/June *Probate & Property* 49 at 51.

[12]Anthony B. Kuklin, "Title Insurance isn't everything" in American Bar Association, ed., *supra*, 35 at 49.

and the non-proliferation of title insurance companies throughout the province. Also, because there are public land records available to all, a purchaser will not be driven to a particular title insurer because it controls the best records for the property in its 'title plant".

Authority to Bind the Insurer

Where the prospective insured is dealing with someone other than the insurer directly, it must be confirmed that the person purporting to represent the insurer has authority to bind the insurer to the coverages negotiated. If this is not the case, the policy will not be enforceable in the future.

At least in the purchase market, title insurers in Ontario are generally issuing insurance policies themselves, as opposed to through agents. Therefore, this should not be an issue for Ontario lawyers, so long as they are dealing with the insurer directly.

Type of Policy

Assuming one is acting for the purchaser, one must ensure that the purchaser gets an "owner's policy", instead of just relying on a 'lender's policy" (or is advised of the differences and the possible consequences).[13] Most standard lender's policies provide no protection to the purchaser, even if it is the purchaser who pays for the lender's policy. The fact that a lender insists on its own title policy should be reason enough for the purchaser to have his or her own title policy to provide him or her with a direct cause of action against the insurer.

A careful examination of the policy is required by the solicitor to determine if the owner is covered. For instance, the draft TitlePLUS policy will provide coverage for an owner and a lender in the same policy, whereas FA has separate policies for owners and lenders.

This is a potential pitfall in Ontario transactions where insurance coverage is being obtained in lieu of an up-to-date survey. Often in such cases the insurance coverage is obtained late in the transaction, when there are significant time constraints and the purchaser cannot wait for a survey to be prepared. Title insurance in these cases is often viewed as nothing more than a technical requirement of the lender. It is important, however, that the purchaser understand that he or she is obtaining no protection for survey-related issues and that the premium for the policy is simply an additional mortgage-related cost.

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[13] Feinstein, *op. cit.*, at 242; Rooney, "A Primer for Attorneys" in American Bar Association, ed., *supra*, 3 at 4.

Number of Policies

In some circumstances, the lawyer should advise whether the purchaser should have more than one policy. This becomes an issue if the policy is going to cover more than one site, because of how the total coverage will be allocated under the policy.[14]

Most American standard-form owner's policies (including the American Land Titles Association owner's policy) provide that the amount of the insurance (or the coverage) under a policy is apportioned as to the value on the date of the policy for each separate parcel. Thus, if one parcel becomes more valuable than the other, the apportionment provision in the title policy states that the title company will not be liable for more than the apportioned share for a loss affecting one of the parcels.

However, this is unlikely to have any impact on residential properties, and is more of a concern for commercial properties.

Amount of Coverage and Nature of Protection

The amount of the title insurance policy is usually the value of the property being purchased.[15] However, the insured must understand that there is no guarantee that his or her possession of the property will be undisturbed. If a title problem later emerges, the insured may lose possession of the property and only be reimbursed for the loss up to the policy limit.[16] By that time, the property may be worth much more.

It is also significant that coverage is usually non-cumulative (not "per occurrence").[17]

It has been suggested by at least one commentator that it can be very difficult to make a client understand the significance of these issues, particularly if the policy is calling for one or more apparent "defects" to be "insured over".[18]

Some title insurance policies also contain inflation coverage, which offers some protection to the insured, in terms of the policy cap, if the value of the property fluctuates over time. The FA Plain Language Policy provides coverage for any actual loss suffered based on the increase in the fair market value of the land up to a maximum of 200 percent of the

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[14]Rooney, "A Primer for Attorneys", *supra*, at 10.

[15]One commentator addresses the issue of the insured who decides to under-insure, in order to reduce the premium. In that case, the insurer may seek a co-insurance clause, so that it will only pay a percentage of any loss, based on the relative values of the policy and the land at the date of loss. On the other hand, the insured may want greater coverage than the property value. See Werner, *op. cit.*, at 37.

[16]Rooney, "A Primer for Attorneys", *supra*, at 6 - 7.

[17]Rooney, "A Primer for Attorneys", *supra*, at 10.

[18]James W. McRae, "Title Insurance Alone is Not Enough" (1987) January/February *Probate & Property* 60 at 61.

original amount. Under the proposed TitlePLUS program, the amount of the policy will increase to reflect any increase in the fair market value of the land as of the date of a claim up to two times the original policy amount stated in Schedule "A". Any increase due to post-closing improvements to the property is excluded from inflation coverage because of the definition of "land" in the policy (which only includes improvements on the property as of the policy date).

Nominating the Insured

It is critical that the insured be named properly in the policy, because only the insured may claim under the policy.[19] In most cases, the lawyer will want the registered owner(s) to be the insured(s). As simple as that sounds, the lawyer must beware of differences between the purchaser under the agreement of purchase and sale and the ultimate registered owner, or of situations where changed instructions regarding title are received at the last moment.

Where a client intends to take title in a certain name upon purchase but change ownership shortly after closing, the client should be advised that the later change in ownership will likely require a new policy and another premium.[20]

Choosing the Legal Description

Schedule "A" of most title insurance policies contains the legal description for the property being purchased or mortgaged. Since only the lands described are insured, it is essential that the description be accurate. The solicitor must ensure that the legal description contained in Schedule "A" is the same as the real property that is being conveyed to the purchaser or that the purchaser wants insured.

There may be off-site lands that should be included in the description, so easements or rights-of-way located on other properties, but benefiting the subject property, can be insured.[21] The TitlePLUS software prompts the solicitor to list any easements which benefit the subject property, and were described in the agreement of purchase and sale, so that they will be included in Schedule "A" of the policy as insured easements. In the FA policy, the solicitor must confirm that any easements which benefit the land are specifically included in the legal description in Schedule "A" to ensure coverage.

Similarly, depending on the narrowness of the property defined, encroachments from the subject property onto other lands may not be covered. This should be considered if the lawyer is aware of any encroachments by the property being acquired.

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[19]Please refer to our comments above regarding length of coverage and pre-existing policies.

[20]See Marc Weinreich, "Commercial Transactions: Who does the Title Insurance Cover?" (1992) March/April *Probate & Property* 42 at 43 for discussion re: how to name insured.

[21]Werner, *op. cit.*, at 50.

Selection of Policy Date

The lawyer must ensure that the policy date, which generally starts the coverage running, is the date of closing. If the policy date is earlier than the date of closing, the purchaser would not be insured for any changes in title that would have occurred between the policy date and the date of closing (and would effectively have no insurable interest as of that date, since he or she did not own the property).

Exclusions from Coverage

What are the true risks for the owner/insured under the policy? A title policy is only as good as the breadth of the risks it covers. Most defects revealed by the title or letter searches will be dealt with as property-specific exceptions. However, title insurance policies also contain standard-form exclusions. It is equally important that the client understand the breadth and impact of these exclusions.

Lawyers should not become blasé about the exclusions. There is no guarantee to a consumer (i) that a given policy is necessarily broad enough to cover emerging risks, or (ii) that old risks, which were routinely excluded from a standard-form policy, are not for one reason or another becoming more significant. A title insurer is not generally obligated to monitor developments in the law and change its coverage to benefit prospective insureds. So long as a given type of liability is not covered under the policy, the insurer would have no reason to change its "due diligence" inquiries just because a new type of search could more commonly reveal a competing interest in the land. However, that new risk may be significant to an insured.

Review of Insured's Knowledge

Most title insurance policies exclude from coverage any title risk which the purchaser has agreed to accept in the agreement of purchase and sale and any title defects which are known by the purchaser but not disclosed by registered title. The lawyer should review the agreement of purchase and sale, and question the insured as to whether he or she has any knowledge that would give rise to a "knowledge defence" and, in effect, limit the policy. If so, written disclosure must be made to the insurer.[22]

For example, is the purchaser able to describe the property confidently (perhaps in reference to an old survey), so you are satisfied that you have an accurate depiction of the state of the property? Adverse rights apparent on a visual inspection would likely be excluded from coverage.[23]

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[22]Werner, *op. cit.*, at 31.

[23]Werner, *op. cit.*, at 61.

Obtaining an Up-to-Date Survey

In many cases, the main reason for the purchaser choosing title insurance instead of a solicitor's opinion on title is that it will satisfy the lender's desire for "survey" protection without incurring the cost of an up-to-date survey. In other words, the lender will have protection against unregistered easements, encroachments and so forth, but at a more reasonable cost for the purchaser.

However, this is not the only reason why an up-to-date survey is advisable in a real estate transaction. For example, consider the following:

- A survey will help the purchaser assess what he or she may be able to do with the property in the future;

- Not all "survey defects" are necessarily covered by a title insurance policy, even where the policy ostensibly gives survey coverage. For example, the placement of fences and retaining walls may be excluded from coverage, because they are so commonly a source of loss (albeit usually a relatively small amount in the individual case);

- Given that boundary and encroachment issues are a significant source of contention between neighbours, the purchaser may be as much (if not more) interested in knowing that there is little likelihood of dispute as knowing that he or she will be compensated for any loss arising.

Therefore, it is prudent to discuss with the client the benefits of an up-to-date survey, even where survey coverage is being obtained for the purchaser and/or the lender.

However, obtaining an up-to-date survey is a double-edged sword. Once the purchaser has knowledge of title defects revealed by a survey, there will be a "knowledge defence" against the purchaser, as discussed above. Therefore, even where the purchaser chooses to obtain an up-to-date survey on a voluntary basis, it is important that all defects revealed be disclosed to the insurer.

Obtaining Endorsements

Like any other type of insurance, endorsements to the standard-form policy may be arranged. These usually provide additional coverage, either by adding affirmative coverage or restricting the application of exclusions or exceptions. The role of the lawyer is to advise regarding possible endorsements and then to negotiate them with the insurance company, if so instructed.

In order for the insured (i) to be entitled to specific endorsements or affirmative insurance[24], or (ii) to obtain waivers of standard exceptions, the lawyer may need to prepare specific documentation. Examples of standard American exceptions in title insurance policies are unregistered easements, unregistered construction liens and special assessments not shown of record. These exceptions can often be "negotiated out", in the case of unregistered easements, by allowing a personal inspection of the premises by a representative of the title insurance company or providing documentation such as a declaration confirming the accuracy of an old survey and/or a declaration of possession. The exception for unregistered construction liens can be avoided by having an affidavit regarding construction liens signed.[25]

The following are examples of endorsements that are often available under American title insurance policies:

- Inflation Endorsement[26] - automatically increases the policy amount in accordance with a specified schedule;
- Location Note Endorsement[27] - confirms that the improvements are wholly located on the property insured;
- Encroachment Note Endorsement[28] - applies where an encroachment has been revealed by a survey, but the encroachment is a long-standing and relatively minor one;
- Condominium Endorsement[29] - covers, *inter alia*, whether the condominium development was properly created under the relevant statute;
- Zoning Endorsements[30] - ensures the zoning classification and the permitted uses for the property;

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[24]Feinstein gives advice on how to negotiate with title insurers over a title defect that has been identified. See Feinstein, *op. cit.*, at 260 - 266.

[25]Rooney, "A Primer for Attorneys", *supra*, at 14; Donald J. Gralen, "Title Insurance for Lawyers: Additional Coverages" in Pedowitz, ed., *supra*, 142 at 142.

[26]Werner, *op. cit.*, at 38.

[27]Rooney, "A Primer for Attorneys", *supra*, at 15.

[28]Gralen, *op. cit.*, at 148-149.

[29]Gralen, *op. cit.*, at 151.

[30]Werner, *op. cit.*, at 23; Gralen, *op. cit.*, at 150.

- Access Endorsement[31] - ensures access to the property over a specific route.

The proposed TitlePLUS program has the following endorsements in draft form:

- Rural Property Endorsement - provides coverage for work orders affecting the private water or septic system and limited coverage for the initial approval of the septic system;

- Condominium Endorsement - provides coverage for a variety of condominium concerns including any special assessments levied against the condominium unit and whether the unit was properly part of the condominium;

- Future Use Endorsement - provides coverage that as of closing a proposed use of or improvement to the property is possible.

The FA Ontario endorsements include the following:

- Restrictions, Encroachments and Minerals Endorsement - ensures that there are no present violations of restrictive covenants or encroachments;

- Survey Endorsement - ensures marketability of the property if the insured is unable to obtain a minor variance for a zoning by-law infraction;

- Leasehold/Non-Disturbance Agreement Endorsement - ensures that a leasehold interest in property will remain undisturbed subject to the terms of the lease;

- Non-Compliance Endorsement - provides coverage for non-compliance of agreements or restrictions.

In summary, the lawyer for the purchaser should be familiar with the various types of endorsements available and able to advise on their applicability.

Treatment of Title Defects

As discussed above, Section 3(3) of Reg. 666[32] requires an independent lawyer, not employed by the title insurer, to provide a title opinion prior to the insurer issuing a policy of title insurance. In most purchase situations, it will likely be the lawyer for the purchaser

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[31]Werner, *op. cit.*, at 14.

[32]R.R.O. 1990

and the first mortgagee that is providing that opinion (whether in a traditional paper form or by an electronic communication). The lawyer must then consider how each title "defect" or "cloud" is going to be addressed by the policy. Is the policy going to exclude them or insure over them?

The client should be made aware that his or her claim, if and when a problem arises, is to compensation, not to a risk-free property. Where the purchaser is entitled as a matter of contract to good title, the lawyer will be under an obligation to ensure that all rights are enforced against the vendor, unless specifically waived by the purchaser. Therefore, in Ontario, the normal requisition process will still be utilized to clear up most problems revealed by the title search.

Amount of the Premium

The lawyer for the insured should always determine the amount of the premium before agreeing to coverage.

Most title insurance companies have a base fee for insuring residential properties up to a given purchase price. For more expensive residential properties, the premium varies based on the purchase price (that is, on a sliding scale). For a "straightforward" policy, it is likely that the standard fees will apply (whether the base premium or a premium calculated on the sliding scale) and there will be no need for negotiation.

However, where the insurance company is "insuring over" a title risk or providing additional coverage in an endorsement, it may wish to deviate from its standard premium schedule. The lawyer for the purchaser should then consider attempting to negotiate the premium with the insurer, at least where the amount of the potential premium justifies the cost of the negotiations for the client. In other words, where the lawyer is attempting to persuade the insurer to assume the risk of a particular title problem, it is in the client's interests for the lawyer to attempt to demonstrate that it is so small a risk that it should be absorbed without adjustment to the premium.

It is worthwhile remembering that title insurers also have to cover day-to-day operating costs from premium income. The more background work done on an issue by the insured's lawyer seeking special coverage, the less work there is to be done by the insurance company and perhaps less chance of a special premium being charged.

Reviewing the Final Policy

In some cases, the title insurer will issue a binder (or commitment) before closing, which must then be compared with the actual policy received after closing. The actual policy must also comply with any re-certified or amended report/commitment issued following negotiations or the resolution of existing title problems.[33]

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[33] Feinstein, *op. cit.*, at 281.

Under the proposed TitlePLUS program, the duty would be to review Schedule "A" and the endorsements at the time the Acknowledgment and Direction is prepared and to print a draft Policy immediately prior to issuance. These should be reviewed by the solicitor to ensure that the client is receiving the coverage expected.

Advice Re: Future Conduct of Insured

Especially in Ontario, a title insurance policy will be a new product for most consumers. It is worthwhile for the lawyer to encourage the client to read the policy carefully, especially as it relates to the procedures for making a claim. The client should be well aware of what causes a lapse or termination of coverage.

For example, advice may be given regarding a change of ownership, failure to notify the insurer regarding a claim, the risks of settling a claim without notifying the insurer, the need to be able to document any loss, and so forth.[34] As with most insurance policies, the insured must give notice of a claim to the insurer promptly, and must not settle, or attempt to settle, a claim unless instructed to by the insurer.

The client should be aware how funds will be distributed under the policy in the event of a claim. Where the purchaser and lender are insured under one policy (as is contemplated as being possible under the proposed TitlePLUS policy), the purchaser should understand how payments will be made under the policy. For example, under the draft TitlePLUS policy, all payments automatically are forwarded to the lender, until it is fully paid under its mortgage. This applies even if the lender has not made a claim (presumably because it has not yet suffered an actual loss). The only exception relates to the reimbursement of the purchaser for out-of-pocket costs.

CONCLUSION

Therefore, where title insurance is being obtained there emerges a significant role for the solicitor regarding the policy itself. This requires Ontario solicitors to develop expertise in reviewing title policies. This is in addition to the possible role of the lawyer as "quarterback" of the transaction and fiduciary, in jurisdictions, such as Ontario, where the lawyer has not been relieved of those functions. Although title insurance is intended to protect the purchaser against pure title risks, it is not a substitute for a lawyer's services in a real estate transaction.

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[34] Rooney, "A Primer for Attorneys", *supra*, at 9.