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The Essentials of Title Insurance

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published 05/29/2020

In recent years, title insurance has become increasingly popular among purchasers of houses, condominiums, cabins and other residential land.

If you are purchasing a home, you may be encountering title insurance for the first time. You may be wondering what title insurance is and how it can protect you. You may be trying to determine whether it is something that you actually need or just another insurance policy that you will pay for and never use. In our experience, many purchasers ask these same questions.

As title insurance can be a difficult concept to understand, we have set out to describe relevant aspects of title insurance, as well as the alternatives to title insurance, in order to help better inform purchasers.

Title Insurance Generally

As its name suggests, title insurance is a class of insurance which protects purchasers from losses stemming from defects in the title to their new property. Title insurance also protects purchasers from losses stemming from other specific matters that may affect their title or the right to use and enjoy their property. Protection is afforded against defects that exist at the time of purchase, but are unknown to the purchaser, as well as specific future risks.

Covered Risks

Title Defects

As noted above, title insurance protects purchasers against the risk of loss stemming from title defects. What does this really mean? In order to fully understand the risk of occurrence of a defect in title, it is important to have a general understanding about the nature of the land titles system and real estate transactions in Manitoba.

The Manitoba land titles system operates on the basis of a register administered by the Land Titles Office which records all of the interests in property under the system. The interests in

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property are given priority based on the time of their registration.

To finalize the purchase of your property, your lawyer will file a Transfer of Land signed by the vendor at the Land Titles Office. Once registered, the Land Titles Office will issue a new title to the property in your name which establishes your ownership interest. In theory, on registration, your interest is protected against all prior interests in the property, subject only to those actually registered against title before your Transfer of Land. Despite the protection afforded by the land titles system, there are still risks to your ownership interest for which title insurance offers protection.

Some of these risks exist because there are exceptions to the protection that a title provides. For instance, *The Real Property Act* (Manitoba) (the "**Act**") sets out various overriding interests that do not need to be registered with the Land Titles Office to take priority over a title, including certain leases and rights-of-way or easements.

There is also the possibility that someone could register a claim or an interest against your title during the "registration gap". The registration gap is the period of time after the closing of the purchase and before the Transfer of Land is registered (or, more specifically, assigned priority for registration) by the Land Titles Office. Any interest registered during this period would take priority over the purchaser's ownership interest. While there is still the potential for such a registration, in Manitoba, the registration gap is relatively short.

Another risk to your title is title fraud. Title fraud typically occurs through impersonation or forgery and may involve a transfer of the title to your property and/or the registration of a new mortgage, all without your knowledge. If successful, the fraudster will walk away with the proceeds from a sale or mortgage of your property.

Additionally, although rare, there is also a risk that an error at the Land Titles Office could affect the validity of your title.

Other Risks

Title insurance also offers protection against the risk of loss stemming from certain off-title matters. Most policies cover losses stemming from encroachments by or onto the purchaser's property as well as losses stemming from outstanding work orders and construction done without proper permits. Other losses often covered by title insurance include those stemming from zoning by-law violations, subdivision or development agreement violations, lack of legal access to the property, tax arrears and outstanding water bills.

Duty to Indemnify & Duty to Defend

Subject to the limits and exclusions set out in the policy, a title insurer will reimburse you for actual losses that you suffer stemming from the covered risks.

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Your insurer will also defend you against any lawsuit based on a covered risk by assuming the conduct and cost of your legal defence. Insurers typically have various options for dealing with a lawsuit brought against you, including the option to settle the claim or to address the underlying issue.

It is important to note that title insurance is a “shield and not a sword”. While a title insurer will reimburse you for your actual losses and/or defend you in the event of a lawsuit based on the covered risks, it will not assume the conduct or cover the costs of a lawsuit that you bring against a third party.

Other Benefits

In a traditional real estate transaction, mortgage proceeds and other purchase funds are not released until the new title has issued and it is certain that no new interest or claim has been registered during the “registration gap” discussed above. Depending on the time of year, it can take anywhere from about one to fourteen days after registration for the Land Titles Office to issue a new title. This delay in the release of funds can be frustrating and inconvenient for all parties involved.

One of the ways to avoid delays due to the registration gap is to title insure. As most title insurance policies have built-in coverage for losses stemming from the registration of new interests or claims during the registration gap (also known as “gap coverage”), lawyers may release the mortgage proceeds and other purchase funds on closing.

Exclusions, Exceptions and Limits

Title insurance policies do contain various exclusions or exceptions. Most importantly, title insurance policies exclude coverage for losses stemming from risks that are created, allowed, or agreed to by you and risks known to you on the policy date. They also typically exclude coverage for environmental matters and First Nations land claims.

All title insurance policies also have a policy limit which is generally the purchase price of the property. This limit does, however, increase in proportion to the fair market value of the property (up to a maximum amount) and decreases by any amount that the insurer pays to cover a claim.

Limits on specific claims are often set out in title insurance policies. For example, claims involving losses resulting from an encroachment by a fence are generally subject to a limit of several thousand dollars. Some policies also limit claims involving losses due to construction without proper building permits.

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Cost

Unlike most insurance policies, the premium for a title insurance policy is only paid once and it is paid at the time of the purchase of your property. The policy will protect you for as long as you own the property and will also protect anyone who inherits the property from you.

The premium amount is based on the value of the property being insured and is generally adjusted for other variables including the type and location of the property. Most policies are in the range of a few hundred dollars.

Your lawyer will have the majority of the information that a title insurer requires and will typically purchase title insurance on your behalf. Your lawyer will charge the title insurance premium back to you as a disbursement and will provide you with a full copy of the policy along with the rest of your real estate documents after closing.

Alternatives to Title Insurance

Although title insurance may offer the most comprehensive protection, there are alternative measures of protection against the types of losses discussed above. To make an informed decision about title insurance, you should also understand the nature and extent of such protection.

The Assurance Fund

In accordance with the provisions of the Act, the government maintains a fund known as the "assurance fund". The purpose of the assurance fund is to compensate property owners who suffer a loss of interest in their property as a result of fraud or an error or omission by the Land Titles Office. Property owners can claim compensation for the value of their lost interest, reasonable expenses incurred in bringing the claim for compensation, and a further limited amount for other losses.

The assurance fund does have its limitations. For instance, the Act imposes a two-year time limit on claims for compensation which begins when the property owner knew or ought to have known about the loss. Additionally, while the assurance fund may provide coverage for losses stemming from certain title defects, it does not provide coverage for losses stemming from any off-title defects or from claims or interests registered against title during the registration gap.

Surveys, Zoning Memoranda and Other Searches

Many off-title defects can be identified by obtaining a survey of the property and a zoning memorandum. A survey identifies the boundaries of the property as well as the location of

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any buildings or structures on the property and will therefore reveal any encroachments, among other things. If an up-to-date survey is provided to the relevant municipality, it will provide a zoning memorandum which confirms whether the property is in compliance with the applicable zoning by-law. Upon request, many municipalities will perform additional searches which may identify outstanding work orders, open permits, and other issues relating to the property.

While a survey, zoning memorandum and additional searches do provide a purchaser with valuable information about the property, they can be costly and time-consuming to obtain. Additionally, issues identified by such searches can be costly and time-consuming to fix.

Western Law Societies Conveyancing Protocol

The Western Law Societies Conveyancing Protocol is a system for closing residential real estate transactions developed by the Law Societies of Manitoba, Saskatchewan, Alberta and British Columbia. When lawyers adhere to the protocol in closing a transaction, it allows for the release of mortgage and sale proceeds upon confirmation of closing. The professional liability insurance coverage for Manitoba lawyers serves to compensate purchasers for claims resulting from actual loss due to the registration of an interest or claim against title during the registration gap.

While the Conveyancing Protocol does provide “gap coverage” and enables a more timely transfer of funds, it does not provide protection against off-title risks or future risks to your title. Furthermore, it cannot be used in every transaction.

Conclusion

We recognize that buying a home can be stressful and requires making many important decisions. It is our hope that our comments will help give you some clarity when considering the purchase of title insurance. Please do not hesitate to contact us with any questions about your purchase.

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