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A survey can save you major hassles: Stewart Title responds

Two weeks ago in this column, I reported on the decision of an Ontario judge in a title insurance case involving Barbara Nadvornianski, who held title to a Toronto house in trust for her husband and his business partner.

After the closing of the purchase, it was discovered that an easement for water and sewer pipes ran through the front yard and under part of the house. As a result, plans for renovating the building had to be changed substantially.

Claiming that the existence and location of the easement caused them financial losses, the Nadvornianskis sued Stewart Title, claiming that the loss was covered under their title insurance policy. Stewart took the position that since Barbara was only a trustee owner without any financial interest in the property, she had no "insurable interest" in the house, and they denied the claim.

On this basis, the insurer asked Justice Douglas Shaw to toss out the claim against it without going to trial. After hearing submissions, the judge dismissed Stewart's application and ruled the case had to go on to trial.

In writing about the case, I referred to a commentary in the Real Property Reports by Toronto lawyers Jeffrey W. Lem and Matthew Singerman in which the authors warned that the Nadvornianski case may mark the beginning of a trend by title insurers to deny coverage on technical grounds. They warned that Ontario solicitors should factor in the risk of coverage denials as a criterion in selecting among title insurers.

After the column appeared, I heard from Lorne Colt, legal counsel with Chicago Title Insurance Company in Toronto. He pointed me to an underwriting notice the company released last year which states that it has always been Chicago Title's position that its policies are not invalid because the named insured is a trustee. This position applies whether or not the insurer is made aware that the named insured is merely a trustee.

I also heard from Karen Decker, senior counsel for Stewart Title Guaranty Company. She pointed out to me that following the release of the Nadvornianski decision, Stewart issued a bulletin to its clients noting that policies issued in the name of trustees are valid, and trustees can make claims on behalf of beneficial owners.

Beneficiaries not named in a Stewart Title policy can also make claims directly to the insurer, but will need to provide evidence of the trustee-beneficiary relationship.

I'm having trouble reconciling this bulletin with the position Stewart took in the Nadvornianski case, but that's my problem.

Stewart Title also advised that when a policy is issued in the name of a trustee owner, a schedule to the policy should name both the trustee and the beneficiary.

Decker also requested that I point out that Stewart Title is a leader in claims payments in the title insurance industry.

According to figures published by the government regulator, Stewart has the highest ratio of claims paid to premiums earned of all of the federally-regulated U.S.-controlled title insurers in Canada. (TitlePLUS, owned by the Law Society of Upper Canada of which I am an elected director is exempt from reporting its title insurance figures to the Office of the Superintendent of Financial Institutions.)

Based on published figures for the first nine months of 2006, title insurers on average are paying out 26 to 27 per cent of premiums in claims. By contrast, Stewart has been paying out 40 to 44 per cent of its premiums in claims much of this due to title fraud.

When the Nadvornianski case gets to trial, the focus of attention will be on the easement under the yard and part of the house. The title insurance policy acknowledged that the land is subject to the easement and excluded coverage for losses due to the easement. Both sides seem to agree on that point.

In my opinion, it is unfortunate that Stewart Title did not simply let the case go to trial based on the easement exclusion in the policy, rather than attempt to have the case dismissed on the technical issue of whether Barbara had an insurable interest in the property.

Stewart Title asked me to say that if its primary defence (the easement exclusion) is proved correct then it would be difficult to suggest that its denial of coverage was unreasonable or improper.

Unfortunately, I cannot agree with that statement. The initial denial of coverage was based on the trustee issue, not the easement issue, and Justice Shaw dismissed Stewart's request to end the case without a trial on the trustee issue only.

Last week, Barbara's litigation lawyer, Morris Cooper, explained to me that his position is that his client's claim is not based on the easement itself. Instead, he told me, it arises from the failure to obtain a survey which would have disclosed the exact location of the easement.

Cooper told me that Barbara's real estate lawyer neglected to examine the title deed containing the easement. The title insurer, he said, is responsible for the consequences of the absence of a survey.

Ultimately, the trial judge will have to decide whether the loss arose from the existence of the easement or the failure to obtain a survey, which would have shown that the easement ran underneath the house. It's a case that many stakeholders in the residential real estate field will be watching with great interest.

In any event, the point made by Lem and Singerman remains valid: When buying title insurance, it is still appropriate to factor in the risk of coverage denial as a criterion in selecting among title insurers.

The Nadvornianski case also underlines that a title insurance policy is not really a substitute for a land survey.

If there had been a survey in this case, the dispute and insurance claim would never have arisen.

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