



TITLE INSURANCE REPORT

Financial Services Commission of Ontario

Market Conduct Branch

November 2008

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INTRODUCTION

The Financial Services Commission of Ontario (FSCO) is an arm's-length agency of Ontario's Ministry of Finance. In addition to insurance, FSCO regulates pension plans, credit unions, *caisses populaires*, mortgage brokers, loan and trust companies, and co-operatives.

FSCO is dedicated to being a vigilant, fair-minded and forward-looking regulatory agency with a constructive and responsive presence in Ontario's financial services marketplace. FSCO's broad mandate includes enhancing consumer confidence and public trust in the regulated sectors, and making recommendations to the Minister of Finance on matters affecting the regulated sectors.

In order to enhance the public's trust in the regulated sectors, FSCO needs to ensure that consumers have an unbiased source of information. As title insurance is an important product for consumers, and since title insurance is becoming more popular, FSCO has created a consumer awareness brochure entitled *Understanding Title Insurance*. This brochure provides an overview of title insurance in Ontario, so that consumers can make smart purchase decisions. The brochure is available on FSCO's website at www.fSCO.gov.on.ca under the *Publications* section.

In addition to being informed on title insurance, consumers also need to be confident that the title insurance industry is competitive and complies with provincial statutes. As the Ontario insurance regulator, FSCO is responsible for ensuring that insurance companies follow the Insurance Act and have fair business practices. To address these obligations, FSCO performed a market conduct review of six title insurance companies in August 2007.

SCOPE OF REVIEW

FSCO's market conduct review focused on determining:

- If the title insurance industry is competitive;
- If title insurers have proper claims handling procedures;
- If consumer complaints are being appropriately addressed by title insurers;
- If consumers are receiving sufficient information on title insurance products at the point-of-purchase; and
- If consumers are being well served by title insurance companies.

BACKGROUND

In order to obtain sufficient information on the title insurance products and programs being offered in the Ontario market, FSCO conducted on-site reviews of six insurance companies, which represent the majority of the title insurance premiums written in Ontario. The on-site reviews were conducted in August 2007 by members of FSCO's Market Conduct Branch. The reviews revealed that four of the insurance companies primarily sell title insurance. Title insurance was a secondary line of business at only two insurers, the Lawyers' Professional

Indemnity Company (also known as LawPRO) and Travelers Guarantee Company of Canada. FSCO's reviews focused on evaluating several areas of each company. The insurers provided information both verbally in interviews, and through written documentation. This report provides a summary of the reviews' findings.

MARKET PRACTICES

(i) Insurers

The Ontario title insurance market is comprised of seven title insurance companies. Two of the companies, FCT Insurance Company Ltd. and First American Title Insurance Company, are owned by the same U.S. parent company. FCT Insurance Company offers residential policies and First American Title Insurance offers commercial policies.

The following table provides a list of title insurers who are licensed in Ontario.

Company	Classes of Insurance
Chicago Title Insurance Company	Title
FCT Insurance Company Ltd. <i>(also known as First Canadian Title)</i>	Title, liability (limited to lawyers' professional liability) and property (limited to vehicle title insurance and personal property title insurance).
First American Title Insurance Company	Property (limited to vehicle title insurance and personal property title insurance) and title.
Lawyers' Professional Indemnity Company (also known as LawPRO)	Liability (limited to lawyers' professional liability) and title.
Lawyers Title Insurance Corporation	Title
Stewart Title Guarantee Company	Title
Travelers Guarantee Company of Canada	Title, aircraft, boiler and machinery, credit, fidelity, liability, marine, property and surety.

(ii) Products

All of the title insurers offer similar types of policies. In general, there are two different types of title insurance policies:

- *Owner's policy* - protects the property owner's title to his/her property.
- *Lender's policy* - protects the lender by ensuring the mortgage is valid and enforceable.

Title insurance can be purchased for both residential and commercial properties. It provides the purchaser of the property protection from various title-related losses such as:

- Title defects;
- Existing liens or encumbrances on the property;
- Security interests against the property's title;

- A lawyer's errors and omissions relating to an opinion on the property's title; and
- Any other matters that can affect an individual's ownership or right to use the property.

Some typical causes of loss generally covered by a title insurance policy relate to:

- Surveys
- Fraud and forgery
- Title defects
- Work orders
- Zoning bylaws and contraventions
- Building permits

Title insurance policies also provide payment for legal fees and costs to defend claims against the property's title. However, it is important to know that all lawyers practicing real estate law in Ontario are required to carry professional liability insurance (errors and omissions insurance). A lawyer's professional liability insurance may provide coverage for title-related issues/claims that relate to the services a lawyer provides in a client's real estate transaction and for which the lawyer is liable.

Title insurance policies normally exclude environmental issues, well and septic issues, native land claims and expropriations.

Findings:

There are a range of residential and commercial title insurance products offered by several insurers. Consumers have the benefit of choosing from several different options.

(iii) Premiums

Over the last few years, the Ontario title insurance market has grown rapidly. In 2006, the total value of the Ontario title insurance direct written premium market was approximately \$200 million.

Premiums for residential title insurance policies vary among insurers, but most vary among a relatively narrow range.

The variance in premium prices may be explained by the fact that each of the title insurers has focused on maximizing its presence in a specific market segment. As a result, individual policy pricing is reflective of the risks for each specific market segment. The various market segments include homeowners, residential lenders, commercial properties, commercial lenders, developers and mortgage refinanciers.

Findings:

Although FCT Insurance Company Ltd. and Stewart Title Guarantee Company transact the majority of title insurance purchases in Ontario, the market appears to be stable and competitive.

(iv) Claims and Underwriting

All of the insurers have documented claims handling procedures for the administration and maintenance of claim files. Independent adjusters may be retained for fraud investigation or where specific expertise is required to complete on-site fieldwork. All of the insurers also maintain active claims registries for tracking claims transactions and payments.

Each insurer reported an increasing number of claims for losses that are not covered by a title insurance policy. On average, the insurers reported that denials account for 10 to 15 per cent of all reported claims. The most common reason for denying a claim is that the peril is not covered by the policy, or that losses fall under policy exclusions. Examples of claim denials include home maintenance issues (e.g. broken pipes and leaky basements), and policy exclusions (e.g. sewer back-up and asbestos).

Findings:

All of the insurers have documented claims handling procedures for the administration and maintenance of claim files. The insurers reported an increase in the number of claims for losses that are not covered by a title insurance policy. This is partially attributed to heightened media coverage on fraud and title insurance. It also indicates that consumers may not fully understand title insurance products.

(v) Lawyers' Professional Liability Insurance

It is important for consumers to check their title insurance policies for a full list of exclusions, restrictions, and terms and conditions, as title insurers will only provide coverage for the risks or perils that are specified in a policy. Title insurance policies may also vary, as some title insurers may offer more comprehensive coverage.

All lawyers practicing real estate law in Ontario are required to carry professional liability insurance (also known as errors and omissions insurance). A lawyer's professional liability insurance may provide coverage for title-related issues/claims that relate to the services the lawyer provides in a real estate transaction for which the lawyer is liable. A lawyer's professional liability insurance may provide liability coverage for losses that a title insurance policy does not cover.

Both consumers and title insurers can seek compensation from a lawyer's professional liability insurer in the event of legal negligence, fraud or willful misconduct. Title insurers may also pursue legal action on other title risks, such as realty taxes, utility arrears and fraud.

In Ontario, the lawyers' professional liability insurer, LawPRO, has a contract in place with title insurance companies. The contract eliminates a \$50 real estate surcharge that would otherwise apply. This real estate surcharge is typically passed on to purchasers of real estate as a disbursement. The title insurers have agreed not to pursue subrogation claims against lawyers for claims covered under a title insurance policy, except for gross negligence or willful misconduct by the lawyer.

Findings:

During FSCO's reviews, the title insurers reported having some success in recovering tax and utility arrears, and very poor results on recovering fraud claims.

Title insurers typically sign a contract agreeing not to pursue legal action against lawyers for any liability matters covered by the title insurance. It is unlikely that any insurer would pursue legal action against its primary distributor on any other grounds. This is an ordinary commercial practice in the insurance sector. Having a contract in place reduces costs for consumers, since consumers do not have to pay for both title insurance and the real estate charge.

(vi) Consumer Complaint Handling

When handling claim disputes, title insurers generally follow the procedures they have established under their complaint handling protocols (CHP). This includes an escalation process for resolving disputes. For unresolved complaints, consumers are notified of a third party dispute resolution mechanism (e.g. The General Insurance Ombudservice or private arbitration).

Collectively and individually, the insurers reported a low number of complaints. In addition, FSCO's own statistics indicate that title insurance complaints represented less than 1 per cent of all reported property and casualty industry complaints during a two year period, from July 1, 2005 to June 30, 2007. Most of these complaints are related to claims for occurrences that are not covered by a policy (e.g. leaky basements) or exclusions that are listed in a policy (e.g. a defect is known prior to closing).

At the time of the review, each of the insurers had a documented CHP that was communicated to staff, as well as a complaint recording and tracking system. However, Travelers Guarantee Company of Canada was the only insurer that posted CHP information on its website, so that it could easily be accessed by consumers.

Findings:

The low complaint numbers reported by title insurers reflect FSCO's experience. All insurers are encouraged to make their CHPs more easily accessible to consumers.

(vii) Distribution

In the insurance sector, consumers normally purchase insurance products, such as home and auto insurance, through insurance brokers and agents. Unlike other types of insurance, consumers typically make arrangements to purchase title insurance through lawyers. However, lawyers have not been licensed as insurance agents for these activities, since they are acting in their professional capacity. This includes advising clients on their options and arranging insurance according to clients' instructions.

Each title insurer focuses on specializing in a specific segment of the title insurance market. These market segments include homeowners, residential lenders, developers and new construction, mortgage refinancing and bundled real estate transaction services. Insurers may establish working relationships with lawyers, real estate and mortgage professionals, as well as lenders, to promote their products.

Findings:

Although title insurers market to lenders for lenders' policies, they market owners' residential policies to lawyers. Title insurers tend to treat lawyers as clients, instead of focusing on consumers, who actually buy their products.

(viii) Marketing

In Ontario, lawyers are governed by the Law Society of Upper Canada (LSUC). The LSUC protects the public interest by ensuring that lawyers follow Ontario's laws, as well as the LSUC's rules, regulations and guidelines.

LSUC rule 2.02 specifies a lawyer's obligations when advising clients on title insurance. According to rule 2.02:

- Lawyers must advise their clients that title insurance is not mandatory and other options are available.
- Lawyers cannot receive any compensation, whether directly or indirectly, from title insurers, agents or intermediaries for recommending a specific title insurance product to a client.
- Lawyers need to inform clients that they cannot receive any compensation from title insurers, agents, or intermediaries.
- If discussing TitlePLUS insurance, lawyers need to fully inform clients of the relationship between the legal profession, LSUC and LawPRO.

Title insurers conduct a variety of events and activities that are geared towards lawyers. The majority of title insurers provide free education or training workshops on their products, as well as electronic title application and delivery systems. Some insurers also host seminars on title insurance and other related topics of interest. Title insurers may arrange golf, sporting or dinner events for their distributors. They may also provide promotional materials or prizes at trade shows and other functions.

One insurer provides payments to lawyers who use its computer system – these payments may or may not be passed on as savings to consumers.

Insurers claim these promotional activities are not contingent on lawyers selling their products. They are offered in appreciation for past business, and to build stronger client relationships.

Each of the title insurers provides training materials, consumer brochures, and on-line help for policy ordering to lawyers who arrange for their products. Several insurers also offer seminars (e.g. fraud prevention or identification), in-house training and newsletters/bulletins. Some insurers also conduct on-site visits to lawyers' offices as part of their audit or quality control reviews.

The majority of title insurers provide lawyers free education or training on their products. However, little effort appears to be focused on educating consumers. Insurers need to improve their efforts in educating consumers on title insurance.

Findings:

Each title insurer reported that it does not pay lawyers commissions for selling title insurance products. However, some title insurers do make a practice of providing lawyers with nominal referral or marketing incentives for promoting their products; or offer lawyers free hospitality incentives, education or training seminars and promotional activities.

In contrast to the U.S.A., title insurers in Ontario are not conducting as extensive promotional activities. Their promotional activities are similar to those provided by insurers in other lines of insurance business.

Most title insurers seem to provide lawyers consumer-oriented brochures and other materials about their products. However, there is no guarantee that these materials are being passed on to consumers.

As mentioned earlier, the majority of title insurers provide lawyers free education or training on their products. However, little effort appears to be focused on educating consumers. Insurers need to improve their efforts in educating consumers on title insurance.

The Financial Services Commission of Ontario recently published a consumer guide entitled *Understanding Title Insurance*.

(ix) Managing Conflicts of Interest

FSCO's review also considered whether or not there are any inherent conflicts of interest in the sale of title insurance, or between the provision of title insurance and the mandatory professional liability insurance required by lawyers. LawPRO is wholly owned and controlled by the LSUC, the governing body of lawyers in Ontario. This relationship places lawyers in a position to recommend a LawPRO product in which they have an indirect interest, which they are required to disclose.

All Ontario lawyers are required by law to obtain professional liability insurance. Title insurers have designed their insurance policies to cover some risks that may otherwise be covered by lawyers' mandatory professional liability insurance, as well as other risks that are not covered. Thus, all title insurance policies benefit lawyers since title insurance policies will cover claims that would otherwise be made against their professional liability insurance policies.

The matter of the potential of conflict of interest in the product sale was reviewed by FSCO at the time the title class of insurance was added to LawPRO's licence. It remains FSCO's opinion that the disclosure requirements under LSUC rule 30, now rule 2.02, address this issue. Rule 2.02 specifies a lawyer's obligations when advising clients on title insurance.

The LSUC is responsible for dealing with any contravention of the rule, and in disciplining lawyers.

Findings:

LawPRO has policies and procedures in place to reasonably ensure that lawyers who arrange TitlePLUS for their clients comply with LSUC's disclosure requirements. LSUC rule 2.02 also ensures that lawyers meet their professional obligations when they arrange title insurance for clients.