

Buyer be smart: Consider owner's title insurance



By **DONALD SNYDER JR**

When I first started practicing law way back in the 1980s, the common local practice was that attorneys representing home buyers would order the required loan policy of title insurance for the mortgage lender, but would not obtain an owner's policy of title insurance for the purchaser. Instead, the buyer's attorney would often rely on an examination of the abstract of title and affidavits of title and guarantees delivered by the seller's attorney. The buyer's attorney would then provide the buyer with an attorney's report or certificate of title. A lot of things have changed over four decades. Today, there are added risk factors, including more abstract companies, documents being electronically indexed by county clerks (raising the possibility of keyboarding and transcription errors) and, unfortunately, fraud seems to be more prevalent.

An owner's policy of title insurance protects the home buyer against loss should the condition of the title to the real property be other than as insured. Title insurance covers certain risks that might not be detected even after a diligent search and evaluation of title, such as: forged or fraudulent documents; mis-indexed documents or errors in the recording process; errors in the title search or abstract of title; lack of competency, capacity or authority of a party; failure of mortgage lenders or other creditors to properly discharge liens even though paid in full; seller's attorneys failing to re-

solve title issues as promised; etc. With an attorney's opinion of title, if the condition of title is other than as stated in the opinion, the homeowner would need to prove negligence in order to successfully make a claim on the attorney's professional liability insurance. This could be a difficult, time consuming and expensive process and most likely would not be successful if the attorney reasonably relied upon erroneous or fraudulent information in issuing the opinion. Moreover, unlike title insurance, an attorney's opinion of title does not include protection against payment of legal expenses incurred in defending a title claim.

So why does a home buyer need an owner's policy of title insurance if the mortgage lender is getting a title insurance policy? A lender's policy of title insurance only covers the amount of the loan, which is usually less than the full property value. In the event of a claim against the title, there is no provision for the payment of legal expenses in defending against the claim for an uninsured party and the lender would not typically be concerned about a claim unless the loan became non-performing and the claim threatened the lender's ability to foreclose its mortgage. In New York, when an owner's policy is purchased simultaneously with a loan policy, the cost of the loan policy is discounted, which reduces the additional cost of the owner's policy. The title insurance premium is only paid once. Coverage under the policy continues so long as the homeowner has an interest in the insured property. Should the homeowner die, the coverage automatically continues for the benefit of the homeowner's heirs. If the home-

owner provides warranties of title in a conveyance of the property, the coverage continues. Similarly, if a buyer gives the homeowner a mortgage to purchase the insured property, the homeowner's coverage continues to protect the lien of that mortgage.

Some attorneys argue that the risk of a claim on the title is so small that a home buyer shouldn't go to the expense of purchasing an owner's title insurance policy. However, would any reasonable homeowner consider going without fire insurance even though the risk of a fire is small? The point is, even though the chances of having a house fire might be small, a total loss from a fire could be financially devastating.

You may have heard recent reports about title theft in the news. Here's only one example of how a home buyer could experience a total loss of title. A title thief forges a deed to himself or impersonates the seller and then sells the property to an unsuspecting purchaser. Many times, sellers don't ever meet their attorney in person or attend closing. Instead, the seller's attorney sends the documents out for signature. With a fraudulent deed in the chain of title, there would be a complete failure of title. If the innocent purchaser obtained an owner's title insurance policy, then that purchaser would have a claim on the title policy to recover his or her investment.

Buying a home is a big investment. It's important to make sure home buyers are fully informed about the benefits of owner's title insurance.

Donald E. Snyder, Jr. is senior counsel in the real estate practice at Harter Secrest & Emery LLP. He can be reached