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Features

Dear Moshe:

Posted 2/9/2005
By MOSHE LAZARUS

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Dear Moshe:

This may sound ignorant, but what is title insurance, and why do I have to get it? My wife and I have fallen in love with a house that's a little bit beyond our means, and we are trying to think of ways to cut costs and make it work. So, if we can at all avoid it, title insurance is one of those expenses it seems we can do without. What do you say?

Answer:

First of all, there is no reason whatsoever to apologize for or be embarrassed about your question. To the contrary, I think that you are quite wise to take the time to try and understand the nature and necessity of the expenses you will incur in purchasing your home.

Far too often, people fail to ask their attorneys questions like yours (either due to apathy or insecurity), and as a result do not at all understand the documents they are asked to sign or expenditures they are instructed to make in connection with the closing. Needless to say, this self-imposed ignorance can easily lead to their being taken advantage of by unscrupulous advisors or representatives (which, unfortunately, happens more frequently than you'd imagine).

Thus, you need not be embarrassed for asking the question you have asked, and, in fact, would be well advised to continue asking questions of this nature until you are satisfied that you are comfortable with each and every aspect of your transaction. Doing so will make the process of purchasing a home far more enjoyable, and will help insure that your interests are being protected and that your needs will be met.

That being said, let's discuss your question. In a nutshell, title insurance protects a person who acquires an interest in real property from damages in the event that the interest he has actually acquired is less than that insured by the policy.

Ordinarily, there are two distinct title insurance policies obtained in connection with the purchase of a home, an owner's title insurance policy and a lender's title insurance policy. An owner's title insurance policy insures the owner of real property that he has actually succeeded in acquiring the ownership interest he intended to acquire. A lender's title insurance policy, on the other hand, insures a lender who holds a mortgage on real property that its mortgage is in fact a valid first lien against the property.



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As a matter of course, any lender making a loan secured by real property will require that the borrower obtain (and pay for) a lender's title insurance policy on the lender's behalf. Thus, if you intend to borrow money to finance the purchase of your home, and will grant the lender a mortgage to secure payment of the loan, you will in fact be required to obtain and pay for a lender's title insurance policy in connection with the purchase of your home. I am afraid that there is simply no way to avoid this expense.

An owner's title insurance policy, however, is another matter entirely. You see, an owner's title insurance policy is designed solely for the protection of the property owner, and there is no requirement (legal or otherwise) that the owner avail himself of such protection. To the contrary, each property owner is entitled to decide for himself whether or not the protection provided by the owner's title insurance policy warrants the expense obtaining the policy would entail.

As such, you are in fact not required to purchase an owner's title insurance policy, and, to the contrary, are free to choose whether or not you'd like to do so. However, as is the case with all decisions of this nature, it is important that you carefully consider all of the pertinent information, and that you make an informed and educated decision. In order that you may do so, please allow me to provide you with some general information regarding obtaining title insurance, as well an explanation of the risks failing to do so would entail.

The process of obtaining title insurance begins soon after the contract of sale has been executed, when the title insurance company is asked (usually by the purchaser's attorney) to perform a title search regarding the property. A title search is an examination of all public documents and materials relating to the property for the purpose of determining certain essential information regarding the ownership of the property.

Upon completion of the title search, the title insurance company will typically issue a title report, which sets forth all of the information they have discovered regarding the property. The title report identifies the true owner of the property, indicates whether or not there are other parties who have an interest in or right to the property, whether or not there are liens or encumbrances against the property, whether or not there are restrictions regarding the use of the property, and other important information regarding the property.

Of course, the information set forth in the title report can make or break the transaction. If the title report indicates that all is in order with respect to the ownership of the property (that is, that the seller does in fact own the property free and clear of any liens or encumbrances and that he is entitled to sell the property), the transaction can proceed without delay or complication.

However, if the title report indicates that there is some blemish regarding title to the premises (for example, that the seller in fact does not own the property, or that other parties have rights to or liens against the property which would supersede the purchaser's interest, or that there are restrictions against the use of the property which would limit the purchaser's enjoyment of the property), the purchaser must act to protect himself accordingly. Depending upon the nature of the defect, the purchaser may demand that the seller repair the defects set forth in the title report prior to closing, renegotiate the purchase price to account for the diminution of the purchaser's rights due to such defects, or, in some instances, elect to terminate the contract.

In any event, the information set forth in the title report regarding the ownership of the property serves as the basis for the owner's title insurance policy. The title insurance policy will insure the purchaser that ownership of the premises is as indicated in the title report, subject to all of the defects and blemishes set forth in the report (unless they are repaired prior to closing).

Thus, if it later turns out that there were blemishes or defects in the ownership of the premises not set forth in the title policy, the owner may recover under the policy for damages suffered due to such defects or blemishes. [However, it is important to note that the protection provided by an owner's title insurance policy is somewhat limited, in that it protects the purchaser only from defects or blemishes which were not set forth in the title report, and will not provide protection regarding damage suffered due to defects or blemishes which were set forth in the title report.]



So, in summation, the title report serves to notify the purchaser of the limits to and the shortcoming of the ownership interest it will acquire at the closing, and the title insurance policy protects the purchaser from damages suffered in the event that there are defects or blemishes in title other than those set forth in the title report. Each of these functions is of course quite important, and, it may be argued that they are in fact essential.

As a matter of course, it is not very common that residential purchasers suffer damages due to blemishes in title for which they are entitled to recover under their owner`s title insurance policy. Nevertheless, it is quite rare (and in fact nearly unheard of in our area) for a purchaser to refrain from obtaining a title insurance policy when purchasing real property.

As you now understand the nature of title insurance and the risks against which it protects, you are able to make an informed decision regarding whether or not you`d like to obtain title insurance. I will conclude by telling you that I always encourage my clients to obtain an owner`s title insurance policy when purchasing a home, and in fact would decline to represent a purchaser who refused to do so. However, as I indicated previously, the choice is ultimately yours.

I wish you much hatzlacha with your decision, and in all that you do.

Disclaimer: The advice contained in this column is general in nature, and may vary greatly depending on the particulars of a given situation. For this reason, one should not act in reliance on the information contained in this column without first consulting with an attorney. •

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