

FIRST TITLE – CLAIMS EXAMPLES

- The quickest way to understand what Title Insurance is all about is to look at real examples of the risks it covers and see how the Insurer would deal with a claim arising out of those risks.

Claim example	Description of Risks covered by Title Insurance
Driven to detraction - the absent survey	Right of legal vehicular access to and from the land.
Wet and Wild - out on a LIM	Information contained within public records which a LIM report did not disclose.
Creating a rumpus	Building permit had not been obtained to recent addition on the property.
In the "deep end" - the misplaced pool	A pool unintentionally encroaches onto the neighbours land.
Deeper in it - the misplaced septic tank	No septic tank was located within the boundary of the property.
Double Decker - the protruding decks	Decks encroached onto the setbacks of the property.
Side Splitting houses	Side of house encroached onto neighbours land.
Down on the levy - the unpaid body corporate levy	Defending a claim made by the Body Corporate.
Dishonourable undertakings	Discharge of mortgage not completed.
Discharging the mortgage - something doesn't add up	Delay in discharge of mortgage
Deceptive permit	Building permit was obtained for one set of additions only.
Unpaid rates	Title Insurance looks after recovering unpaid rates.
Lack of independent advice	Defending the enforceability of the mortgage.
That is no wife, that is my lady	The "other blonde" bombshell
The fraudulent tenants	Using your house for their benefit

[Driven to detraction - the absent survey](#)

Situation: When the building company that sold the land to X and Y collapsed before completing the home, its mortgagee stepped in to complete the home and allow the sale to settle. The mortgagee excluded itself from any liability under the revised agreement for sale and purchase.

The house was designed with a garage at the back to which access was obtained over a concrete drive that ran along the side of the house. The purchaser's assumption that they had rights to use the drive was shattered when the neighbour, who owned the land on which the concrete drive was laid erected a fence down the centre of the drive cutting off access to the garage. It transpired that the boundary to the property bought by X and Y was in the centre of the drive and the neighbours had the legal right to build the fence where they did.

X and Y did not have any right of way easement and therefore had no legal or effective access to the garage.

Insurer's response: If X and Y had taken out a title insurance policy when they purchased the property, they would have a valid claim under the policy. The claim would be that a circumstance exists that would have been disclosed had a survey been obtained before purchase. The survey would have disclosed that the drive used for access was not on the property and there was no right of way easement.

Alternatively:

- the drive would be considered a structure owned by (or which X and Y believed they had purchased and therefore owned) that encroached on neighbouring land - this gives X and Y a claim under the section providing coverage for encroachments
- the policy provides coverage against another person having an easement or right of way that affects "your title" to the land. The word title is used, not in the narrow sense of the certificate of title to the land, but in the broader sense of a person's rights of ownership that permit that person to use and enjoy the land as a home. In this case, the adjoining owner clearly has a right of way that affects the "title" to the land in its broadest sense for X and Y thought they had the right to use and enjoy the drive but clearly the neighbour had the rights to that part of the property.

First Title would have dealt with the claim in a number of ways:

1. by endeavouring to purchase a legal right of way from the adjoining owner; or
2. if this could not have been achieved, moving the garage to the front of the house - if this were practical; or
3. compensating the insured for the diminution in value of the property as a result of now having an inaccessible garage at the rear.

In the ordinary course of events, the purchasers might have had a claim against the lawyer who failed to advise X and Y to obtain a survey of the property. Although lawyers in many countries overseas advise clients to obtain a survey as a matter of course (in some countries the mortgage lender will insist on this) lawyers in New Zealand do not always do this. A claim against the lawyer for negligence would fail if the lawyer had exercised the normal standard of care required of conveyancing lawyers in New Zealand.

(facts taken from a similar situation featured in the edition of Fair Go broadcast originally on 11/4/2001)

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[Wet and Wild - out on a LIM](#)

Situation: X was concerned about flood risk for a property being purchased and obtained a LIM report. The report obtained contained the statement "no flood risk recorded". After 18 instances of flooding in the 12 months after the purchase, X discovered the LIM report was wrong. The Council files in fact included a large file on this property and its flooding problems.

Insurer's response: Coverage for this situation is provided if an insured property "is otherwise subject to an affectation, proposal, instrument or notice relating to the Land by Government or by a statutory or local authority which is recorded in Public Records." This cover is available even if X had not obtained a LIM report.

The claim would be dealt with as follows:

1. if the problems could be fixed so no further flooding occurred, First Title would endeavour to fix them; and
2. if the problems could not be fixed then First Title would settle the claim at that time by paying a sum equal to the diminution in value of the property caused by the now public knowledge that it had a flooding problem.

This situation raises some very interesting issues relating to LIM reports and title insurance policies.

- The matter would have been quite different if the LIM report had disclosed the flooding. First X would not have been able to claim under the policy because of her knowledge of the problem. It is more likely however that X would have exercised rights under the agreement for sale and purchase and would not have proceeded with the purchase.
- While we advise that it is not necessary to get a full LIM report for each property, we also advise that if a physical inspection of the property suggests that there might be a defect that if discovered would cause you to not proceed with the purchase, then you should visit the Council and check on this specific issue. Apart from being far less expensive than a LIM report it also puts the Council on notice of a specific concern. In this case, had X done so it is likely that a personal search by Council staff would have unearthed the flooding file. It appears that a subsequent approach to Council had this result.
- Even if a clean LIM report is obtained, it should not be relied upon and there is merit in also taking out a policy.

(taken from a situation featured in the edition of Fair Go broadcast originally on 26/4/2001)

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[Creating a rumpus](#)

Situation: The purchasers obtained a LIM report but did not obtain the full set of building plans held by the Council. Had they done so they would have noticed that no basement rumpus room was included in the plans. In response to a direct question, the vendors advised that it was not a recent addition. In fact it was and the vendors, who had done the work had not obtained a building permit. The cost to remedy the work, obtain a building permit and make the house safe was estimated to be between \$40,000 and \$80,000.

Insurer's response: We would cover the cost of remedial work required to obtain a building permit up to the amount of the policy limitation of \$50,000. In this case it appears that the cost to remedy would exceed this limit. If the work had been undertaken by the vendor and breached the representations in the Agreement for Sale and Purchase, we would also cover the cost of enforcing the agreement against the vendor. We would have a direct interest in covering this cost for we would be subrogated to the owner's rights to claim against their vendor. We would also have covered the cost of obtaining a building inspection to ascertain the problem and its extent.

(taken from a situation featured in the edition of Fair Go broadcast originally on 11/4/2001)

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[In the "deep end" - the misplaced pool](#)

Facts: The Insured was selling and the purchaser raised questions about the siting of a pool. On closer inspection it was revealed that the pool had been built by the Insured on land inside the fence line that he believed he owned. The land had been used by the owners of his property for the last 80 years but was actually included in the title to an adjoining property.

Insurer's response: In the Canadian claim, the title insurer covered the cost of obtaining the evidence that was required to enable the land to be brought into the Insured's title. In this case, the Insured's solicitor was employed to carry out the work.

Relevance for NZ: The claim indicates that in some circumstances, even if an Insured is responsible for creating the encroachment, the encroachment may be insured. This would be the case if the Insured did so believing he or she had ownership rights in the portion of land in question and did not know otherwise when the property was purchased.

There are provisions under New Zealand law for land to be acquired by adverse possession. If the same circumstances arose here, the insurer would look at whether a claim for adverse possession would be successful and if so, would fund the cost of these proceedings. If this was not possible, then it would be dealt with like other encroachments and either steps taken to legally acquire the land or compensation for diminution in value would be paid.

(example taken from an actual claim processed by First Canadian Title)

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[Deeper in it - the misplaced septic tank](#)

Facts: A mortgagee under an insured mortgage upon exercising the power of sale, discovered that a well and a septic tank were not located on the property.

Insurer's response: The insurer covered the cost of moving the septic tank to ensure it was located on the land the mortgagee was selling

Relevance for NZ: Many properties outside of city areas rely on septic tank for their sewage disposal. The insurer's response in New Zealand would have been the same whether the sale was being undertaken by the mortgagee under an insured mortgage or by an insured owner. In each case the owner or mortgagee would have had to have acquired their interest unaware of the problem. If it proved impossible to move the septic tank on to the insured property then the insurer's options would have been:

- to take steps to acquire and bring the additional land within the Insured's title;
- acquire an easement in perpetuity for the right to locate the septic tank on the adjoining property;
- if none of the above could be achieved, to compensate the Insured for the diminution in value of the insured property.

(example taken from an actual claim processed by First Canadian)

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[Double Decker - the protruding decks](#)

Facts: This example relates to two separate claims. In each case a deck or landing was built without the relevant building permit and encroached into either the side or rear yard setback required by the local authority. In one case a purchaser from the Insured identified the matter. In the other, a neighbour's complaint to the Council drew the Insured (and the Councils) attention to the problem.

Insurer's response: In each case the Insured's solicitor was retained to apply to the Council for the appropriate permit/dispensation.

Relevance to NZ: Most local authorities in New Zealand have similar yard setback requirements and the same issues and same problems would have applied here.

(example taken from an actual claim processed by First Canadian)

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[Side Splitting houses](#)

Situation: After settling the purchase, the buyers discovered that the whole of one side of their house was actually sited across the boundary and on the neighbouring property.

Insurer's response: If the purchaser was insured then the situation would be covered and we would endeavour to resolve the matter in one of the following ways:

- acquire the adjoining strip of land and include it in the title to the insured property;
- if that could not be achieved, physically move the house so that it sat within the correct boundaries - any costs incurred by the insured while this took place, such as rental on replacement property, would also be covered; or
- if neither of the above could be achieved and the house was required to be altered, we would cover the cost of alteration and pay a sum equal to the diminution on value of the property after the alteration.

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[Down on the levy - the unpaid body corporate levy](#)

Facts: Less than two weeks after settlement, the insured was notified by the body corporate of a special assessment that would be levied against his unit for specific costs associated with combating a termite problem. The charge was not disclosed in the equivalent of the section 36 certificate.

Insurer's response: The insurer accepted liability and made payment of the amount claimed.

Relevance to NZ: Although a certificate under section 36 is deemed to be conclusive proof and may be relied upon by a purchaser as the statement of the amount owing, the Canadian equivalent had similar wording but the assessment fell between the statutory provisions. The body corporate had only commissioned a report on the need for the work and at the time the section 36 certificate equivalent was issued, no liability had arisen. The liability arose between the date of the certificate and settlement.

It may be possible for a similar situation to arise in New Zealand - even if it is covered by section 36 and the purchaser is not liable, the purchaser is likely to incur additional costs in defending any claim by the body corporate. These costs would be met by the insurer.

(example taken from an actual claim processed by First Canadian)

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[Dishonourable undertakings](#)

Facts: As part of the pre settlement undertakings against which the policy was issued, a lawyer for the vendor undertook to obtain and register a discharge of the mortgage. This was not done and could not be enforced because the lawyer who gave the undertaking had since been disbarred and had not honoured his undertaking.

Insurer's response: The insurer covered the costs of arranging for the discharge to be obtained and registered.

Relevance to NZ: The vast majority of settlements in New Zealand take place unattended and on the basis of undertakings given between solicitors. If an undertaking is not honoured, the party relying upon it will incur costs in taking steps to ensure that the matters undertaken are in fact carried out. These costs need not be a burden for an insured purchaser.

(example taken from an actual claim processed by First Canadian)

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[Discharging the mortgage - something doesn't add up](#)

Facts: A mortgage was insured on the basis that the existing mortgage it was to replace was to be paid out. The insured requested a repayment figure from the exiting mortgagee who subsequently refused to discharge the mortgage after having been paid the amount requested. The borrowers had withdrawn a further sum, which was secured by the mortgage after the pay out figure was given.

Insurer's response: The insurer paid the extra amount required by the existing mortgagee to ensure that the new mortgagee received the discharge.

Relevance to NZ: Most bank securities secure all of the borrowers obligations to the bank. It is not uncommon for these to change from the date a repayment figure is given to the date the loan is repaid. Often a repayment figure is given assuming recent direct debits or automatic payments will not be reversed. If they are the existing lender will often retain the security until its exposure is repaid in full. Even if in the particular circumstances an existing lender can be forced to produce the discharge, there may be costs incurred in achieving this. These costs will also be covered by the policy.

(example taken from an actual claim processed by First Canadian)

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[Deceptive permit](#)

Facts: A building permit for additions 12 years ago was signed off by the Council. Immediately after the work was done, further additions were made for which a permit was

not obtained. The Council is now requiring a permit be obtained for the additional work carried out by the former owners.

Insurer's response: The insurer covered the costs of the work required to enable a permit to be issued.

Relevance to NZ: Even if a LIM report is obtained, it is often not clear if it covers all of the actual work that has been done - particularly if it appears to have been done around the same time. This part of the policy is subject to a financial limit of \$50,000. Most remedial work required is likely to be within that limit.

(example taken from an actual claim processed by First Canadian)

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[Unpaid rates](#)

Facts: The insured received a rates bill showing arrears that related back to before the settlement date. Requests to the vendor for payment of his portion have fallen on deaf ears.

Insurer's response: The insurer has paid the rates arrears and is taking action against the vendor to recover what has been paid.

Relevance to NZ: Most solicitors for vendors will give an undertaking as to the payment of rates that is either on behalf of their vendor client or is qualified on the grounds that it is based on verbal advice from the local authority. Even if the purchaser has an unequivocal right to recover from the vendor, it can cost to enforce this right. An insured purchaser can now claim from the insurer. The insurer, under the normal rules of subrogation that are included in the policy, takes over the purchaser's rights to recover from the vendor. It is now the insurer's problem not the Insured's.

(example taken from an actual claim processed by First Canadian)

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[Lack of independent advice](#)

Facts: An insured mortgage in the process of being enforced, is being challenged as to its validity and enforceability by one of the co-borrowers on the grounds that he did not receive independent legal advice. He claims that the appropriateness of a high interest rate was not explained and that, as a sufferer from certain physical and mental infirmities, he was unduly influenced by the other into granting the mortgage.

Insurer's response: The insurer retained the lender's solicitor to defend the enforceability and has since paid out in full the amount due under the mortgage and the legal expenses incurred in defending the claim.

Relevance to NZ: If the same circumstances arose in New Zealand, the same result would have followed. Challenges to validity and enforceability and undue influence are among the most common and (if proved) effective defences raised to restrain enforcement.

(example taken from an actual claim processed by First Canadian)

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[That is no wife, that is my lady](#)

Facts: The insured mortgage was purportedly given by a husband and wife. The wife, who lives in the property, has not been residing with the husband for over three years advised the bank that she did not sign the mortgage. It appears that the mortgage was signed by the husband's other woman who posed as his wife.

Insurer's response: Although the mortgage is not in default, the insurer has confirmed that any claim made by the wife would be covered under the policy.

Relevance to NZ: It also happens here and if the mortgage were insured, the lender would be covered.

(example taken from an actual claim processed by First Canadian)

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The Fraudulent Tenants

Facts: Tenants fraudulently represented that they owned the property that they mortgaged.

Insurer's response: The Insurer has dealt directly with the tenants who have acknowledged their fraudulent conduct and are repaying the loan. If they default and the lender loses through its inability to enforce the mortgage, it will be covered.

Relevance to NZ: As with the previous example, it could happen here. While the same legal differences may come into play, the essential element is that it becomes the insurer's problem to sort out and not the lenders.

(example taken from an actual claim processed by First Canadian)

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