

Does a Tenant Need Leasehold Title Insurance?

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If you own a house, or property on which you operate a business, you probably have owner's title insurance to cover your loss if there are defects in the title. Land is a unique form of property that has many rights associated with it, and many laws dictating how those rights are transferred. Owners can grant leases, mortgages, easements and mineral rights (to name a few). Contractors and government authorities can claim liens. The state can claim parts that border on rivers, lakes and roads. People can acquire rights merely by occupying portions of it for sufficient time. Ownership rights in land are really a collection of different interests which may be held by many parties, and which are frequently transferred. Even the transfer of rights may pose problems. Deeds can be forged, signed under duress or signed by the wrong parties. When you buy land, how do you know you're getting all of the interests, and that the seller is really the owner? You certainly don't want to face the prospect of losing what could be your biggest investment! The answer is title insurance. For a one-time premium, you can buy a title insurance policy which insures that you are the owner and identifies all outstanding interests held by others.

If there are too many outstanding interests, or if there have been irregularities in prior transfers, the title may not be "marketable," according to the standards adopted by the Florida Bar. Frequently it is necessary for the seller to obtain releases of outstanding interests, or cure other defects, to render the title marketable. When you acquire the property, you will usually be issued a title insurance policy that insures you are the owner, subject only to the outstanding interests you have approved. If someone later claims an interest in your property and it's not identified in your policy, the title company will defend you at its expense, correct the problem when possible and reimburse you for any loss (up to the amount of your policy) if the claim is valid.

If you're leasing property, however, you don't need to be concerned about all this, right? Think again. There are valid reasons why a tenant should consider obtaining a leasehold owner's title insurance policy. This provides the same protection to a tenant that a regular owner's title insurance policy provides to the owner of the land (your landlord).

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Consider the worst case scenario. If your landlord's property suffers from a title defect, it could result in the landlord's loss of title. If that happens, the rightful owner can force the tenants to move out. The landlord could make a claim under its owner's title insurance policy, but that protects the landlord, not the tenant. The tenant could assert a claim against the landlord for breach of the lease and seek recovery of damages, but if the landlord no longer owns the property and was a special purpose entity with no other assets, the only asset the landlord will have left is the proceeds of its owner's title insurance policy. Those will be capped at the amount of insurance stipulated in the policy (which may have been issued many years ago when property values were lower), and may not cover anywhere near the damages that the landlord will incur when claims by its tenants are considered.

Do you need leasehold title insurance? Maybe not. If you are leasing a space in a building that is ready to go, and is easy to move into (and out of) in terms of both time and effort, and your lease is only for a few years, it may be simple and relatively inexpensive to find and relocate to a new space.

However, if the lease is long term, chances are that you will be investing a lot in the space. This may include installation of significant improvements, and perhaps even the construction of a building if you are the tenant under a ground lease. The loss of title to these improvements can be a huge economic burden for a tenant. It may take a lot of time to find and move into a new location, as well as build it out to suit your needs. During that period, your business probably would not be operating (certainly not at full capacity), resulting in significant revenue loss. Your damages in this case could be substantial. A leasehold title insurance policy could cover all these losses up to the amount of insurance stipulated in the policy.

The bottom line is that, whenever you are leasing a location for your business, you should consider all of these circumstances and decide whether the potential damages you would incur on account of a loss of title justifies the premium required for a leasehold title insurance policy. If you are obtaining financing to cover the cost of moving into and setting up your business at the new location, you may have a mortgage lender who will require a leasehold title insurance policy to insure their leasehold mortgage. The issuance of both tenant's and lender's leasehold title insurance policies can be done simultaneously at a significant discount (almost two for the price of one), so any tenant granting a leasehold mortgage should get their own leasehold title insurance policy at the same time their lender gets one.

A leasehold owner's title insurance policy will protect you against title defects for as long as you lease your space or building. Some tenants with leverage can even get the landlord to pay the premium by negotiating that into the lease. Under the right circumstances, it makes sense to insure the title to your leasehold interest.