

TITLE ISSUES

PRACTICAL ACCESS: TRAPS FOR THE UNWARY

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That noted ecclesiastic, J.P. Morgan, once commented to Elbert Gary: "I don't know as I want a lawyer to tell me what I cannot do. I hire him to tell me how to do what I want to do." The concept of "access" is an illustrative example of this tension but unfortunately its worth as verbal coinage has lessened from what Judge Hand referred to as "...the power of reiterated suggestion and consecrated platitude."

Embedded in the firmament of title policy insuring provisions, the guaranty of a right of access has traditionally been deemed a close kin of the classic guaranty against loss from forgery in the original-carved tablet of title insurance coverage. Notwithstanding that the assurance of access was not approved and implemented by the American Land Title Association until the 1960's,¹ the issue of access is concededly an elemental one, as much a part of the warp and woof of real estate transactions as any other vital concern.²

Unless the title insurer has taken exception to the right of access, and subject to the insurance policy's exclusions from coverage and conditions and stipulations, the insurance with respect to this issue is afforded through the insuring provisions contained therein, "...against loss or damage...sustained or incurred by the insured by reason of...4. Lack of a right of access to and from the land" (ALTA Owner's and Loan Policies, 1992). In the plain language of the ALTA Residential Owner's Policy, 1987, the issue is dealt with as a title risk covered in the event "You do not have any legal right of access to and from the land."

The language in the latter-cited policy is meant to be explicative of the true meaning of the phrase "right of access." The spirit and intent of the phrase is to distinguish between the legal right of access and actual physical access, only the former of which is protected through the insuring provision clause. The "right of access" is thus distinguished from "access" alone. In the words of a leading authority:

"If the public records show a legal right of access to the insured property, the quoted right is available and there is no such breach of the policy. The justification for this rule is twofold: First the insured can assess the quality of a particular access through a simple inspection of the property and second, a remedy usually exists against another party, for example, the vendor or her agent for misrepresentation of the fact of access."³

The acknowledgment of this distinction has led one seasoned

counsel to warn that "In advising the insured and recommending coverage, the practitioner must be careful to distinguish between a right of actual physical access to property and the nature, scope and quality of that right of access."⁴ Case law strongly warrants this advice.⁵ "The man on the street," one court has stated, "buys a title insurance policy to insure against defects in the record title. The title insurance company is in the business of guaranteeing the insured's title to the extent it is affected by the public records."⁶

Recognition by the real estate attorney of the qualitative distinction between legal access and practical access and a title insurance policy's inapplicability to the latter is a significant step in representation of the client. Once recognized, the practitioner can concentrate on various aspects of the practical access continuum. Assuming the problem is not otherwise revealed as a matter of record in Schedule B of a commitment for title insurance, the following, though perhaps not Rosetta-stone pointers, may help in terms of suggested areas of focus:

1. What is in fact the quality of access with respect to the public right of way adjoining the land (or the access easement which leads to such public right of way)? The client should be requested to make a visual inspection and then plumbed for information concerning this subject. Procurement of both a survey and an appraisal made in connection with the prospective purchase of the property may be useful in this regard, as might an architect's letter in the context of new construction.
2. Is the current owner of the parcel in question utilizing some means of access other than one leading directly to and from a public road? Due to some historical curio or the topographical layout of the land, the property may be serviced by a driveway traversing an adjoining private parcel. Since title insurers traditionally loathe insuring easements on a prescriptive basis (due to difficulty in establishing the required elements), has an easement been placed of record in such form as to allow a title company to consider insuring such instrument? What expenses would be entailed by the installation of a driveway leading directly to and from a public road? A personal inspection and examination of a survey and an appraisal are here also useful. Conversely, particularly in the context of an unimproved parcel, is the only practical mode of access over an adjoining private parcel by means of a hitherto formally established ingress and egress easement that has yet to be utilized? Although non-use may not be tantamount to an abandonment, such act hinging more on the question of intent,⁷ the title insurer may again be hesitant to insure such instruments due to

the open questions that result, including whether the Marketable Title Act can be utilized to negate the original grant.⁸

3. Is there an existing vehicular passageway along and across one side of the premises, evidencing the possibility of a common driveway? If there is a recorded grant of easement to use that portion of the driveway situated on the adjoining property a request should be made of the title company to insure the right of access. If there is no such recorded grant, the title insurer will again likely not be able to countenance a request to insure. Further, if the purchaser has applied for a mortgage contemplated by the originating lender to be sold on the secondary mortgage market, the absence of a recorded grant may be found to be an impediment to final approval of the loan.

In conjunction with both the foregoing paragraph and that immediately preceding, notwithstanding a potential bona fide purchaser defense, purchaser's counsel would do well to bring to the surface any existing sub rosa agreements in connection with maintenance and the like by appropriate affidavits and other modes of inquiry.

4. If a structure is to be built on an unimproved parcel, is there a restrictive covenant shown on the plat of subdivision, or contained in any other instrument, that requires a contemplated driveway be laid only in a particular direction and connected to only one of two or more adjoining roads? Does this requirement comport with the topographic state of the land? If the property is already improved, is any such covenant being violated?
5. Might a title insurer's access endorsement address a particular concern and thus be prudent to request? A common version of such endorsement reads as follows:

THE COMPANY HEREBY INSURES THE INSURED AGAINST LOSS OR DAMAGE WHICH THE INSURED SHALL SUSTAIN BY REASON OF ANY INACCURACY IN THE FOLLOWING ASSURANCE:

1. SAID LAND IS CONTIGUOUS TO A PHYSICALLY OPEN STREET KNOWN AS _____.⁹

THIS ENDORSEMENT IS MADE A PART OF THE POLICY AND IS SUBJECT TO ALL THE TERMS AND PROVISIONS THEREOF AND OF ANY PRIOR ENDORSEMENTS THERE-TO. EXCEPT TO THE EXTENT EXPRESSLY STATED, IT NEITHER MODIFIES ANY OF THE TERMS AND PROVISIONS OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT EXTEND THE EFFECTIVE DATE OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT INCREASE THE FACE AMOUNT THEREOF.

Consideration should be given to tailoring the endorsement's verbiage to the context of the transaction. Does more than one road adjoin the land in question? Is access in fact permitted de jure and de facto to and from each such road? Inasmuch as the insuring provision pertaining to access draws no distinction between pedestrian and vehicular access, the endorsement is perhaps also a propitious occasion to address concerns as to the latter. Further, the endorsement may be expanded to utilize the phrase "ingress to and egress from" a particular road, although this phraseology is likely already encompassed in such insuring provision.¹⁰ Request for a de facto access endorsement would not be germane if the parcel is unimproved. Nor will an improved residential tract ordinarily elicit concern for such

additional coverage unless special circumstances otherwise warrant it. Tangential to the access endorsement issue is the recognition that the title insurance policy does not insure that the adjoining public way connects with other such public ways so that a particular destination can be reached in a certain manner-nor is any distinction drawn between access by means of a street and access by means of an alley. The client ought be questioned about this concern so that a special endorsement might be requested or, alternatively, an explanation of the problem can be given.

6. Does an existing or contemplated driveway interfere with existing easements and/or physical utility lines? In this connection both the municipality's public works/engineering department (or the county's, if unincorporated) should be contacted, as should the utility companies' J.U.L.I.E. personnel at 1-800-892-0123 (if within Chicago, the city's DIGGER personnel can be reached at 312-744-7000).
7. If a portion of an owner's land is to be sold, ought the seller or purchaser be concerned with either a reservation or grant of easement over the newly-adjoining tract to take advantage of a more utilitarian mode of access?¹¹
8. In the event a portion of the existing driveway encroaches onto an adjoining private parcel, the title insurer, for the reasons stated above, may be quite reticent in extending its insurance upon such occurrence. To what extent would the forced elimination of the encroachment impair the land owner's ability to traverse the driveway? Is there sufficient room to widen the driveway on the other side? A title insurer unwilling to insure over the encroachment may yet countenance an endorsement covering relocation expenses.
9. Does the land abut a public road only at a point? Under any reasonable construction, the title insurer should show its "lack of access" exception in Schedule B if the parcel in question has contiguity only at such point. But if the abutment at a point is only an alternative, albeit preferred, mode of access, the practitioner should be on guard as to the palpable problems entailed by a client's mistaken plan. A variation of this issue occurs when the abutment is more than at a point, yet less wide than that which may be preferred. Such a problem should be addressed at the inception of the transaction, as the title insurance policy may likely be less of an avenue of recourse as the insured might otherwise wish.
10. In less densely populated areas a not infrequent occurrence is the existence of a paved right of way, the width of which does not span the entire breadth of the dedicated road adjoining the land in question. In such instances, the individual tract's driveway will obviously be constructed to run into the dedicated right of way to meet the existing pavement. Although borne of necessity, the risk is always present that a future widening of the pavement by governmental authorities may result in uncompensated loss or damage to the individual extended driveway (and any appurtenances constructed along its sides). A variation of this problem occurs in subdivisions with private roads, particularly where such roads run through the lots themselves. Care should be taken by the lot owner to avoid the laying of a driveway over a neighbor's lot merely because the preferred direction of the driveway is more convenient. Finally, the contractor should always be pressured to carefully guard against locating the driveway without the confines of any access easement as created and defined of record.

11. Care should likewise be taken as to the true status of the roadway adjoining the land. Although a plat of subdivision or other instrument may make it appear that such roadway is "public" in nature, the pertinent governmental authority may have other ideas. Such authority may argue that the roadway was never accepted by it and that it therefore has no obligation to improve and/or maintain the right of way. The roadway may also be violative of size requirements, thus allowing a justification for refusal to issue building permits. Development costs may skyrocket due to such unanticipated events. It is again important to remember that the policy for title insurance addresses the right of access and does not guarantee the public nature of the right of way. Provided that the right of access itself is not attacked, the insurer has no liability, notwithstanding that the insured's expectation of quality of access has been egregiously diminished.¹² It goes without saying that, if an adjoining right of way for the benefit of the land is indeed private in nature, the title company should be requested to insure it.

12. The immediately preceding paragraph evidences what should be one of the chief concerns of the practitioner with respect to the access question – namely, the extent to which governmental strictures regulate and indeed prohibit access. Of particular moment is the "Exclusions From Coverage" portion of a policy for title insurance, which removes liability on the part of a title insurer with regard to such matters including, but not limited to, traffic control and flow regulations and the requirement for permits for curb cuts. State, as well as municipal and/or county requirements, may come into play.¹³ Instances have occurred, for example, in which a land owner has sold off a part of his frontage, leaving less than the minimum required, thus rendering the structure on an improved parcel a non-conforming use or preventing the issuance of a building permit on an unimproved tract and also undermining any governmental agreement to maintain a portion of the land used for access. Recorded restrictions affecting the land should generally be shown in Schedule B, but such obligation may be constricted if the recorded instrument is not within the chain of title as to the affected parcel. Further, and by way of example, the failure to show a recorded document of a governmental entity limiting access to only one or a certain number of points along a public road, or even totally prohibiting access, may result in the position that the right of access is secure except for that which is excluded from coverage. It goes without saying that post facto arguments about these matters should be avoided if at all possible. If counsel feels that, in the course of transactional planning, the fee for services to be rendered does not warrant such intensive investigation, it would still be well-advised to notify the client of this important issue and to urge such party to make his or her own investigation and inquiry.

The foregoing areas of focus are by no means exhaustive.¹⁴ Although the subject itself may not be of Mingan complexity, its variegated aspects are enough to challenge the most wizened of real estate veterans. But it is not enough to say that the topic of practical access is merely a challenge for, as has been seen, it can have a profound impact on the quality of a client's purchase. "It was, you may say, satisfactory" goes a line from T.S. Eliot's 'Return of the Magi.' The line is intended as a deliberate understatement to achieve a meaning opposite to the utterance. Counsel should perhaps dread such a remark from a client, who may not have received all he or she thought was bargained for. This may be the conundrum that is the attorney's eternal cross to bear, as reflected in an old ethnic proverb that

bears the ring of a Zen koan: "It is not your obligation to complete the task but neither are you allowed to desist from it."

FOOTNOTES

¹ William H. Baker, Jr., "The Revised ALTA Policies" *Title News* August 1965, p. 4.

² This observation must be tempered by the realization that courts may treat title to real estate as merchantable though not accessible. See *Sinks v. Karleskint*, 130 Ill. App. 3d 527 (Fifth Dist. 1985). The protection afforded a vendee in this respect is thus ordinarily provided by the contract clause that requires the vendor to furnish a standard title insurance policy, the relevant portion of which is hereinafter addressed.

³ Burke, *Law of Title Insurance* § 2.4, p.51 (1986)

⁴ Martin S. Hall, "Managing Transactional Risk Through Title Policy Endorsements" *CBA Record* September 1992, p.14.

⁵ See, e.g., *Krause v. Title & Trust Co. of Fla.*, 390 So. 2d 805 (Fla. App. 1980); *Hocking v. Title Ins. & Trust Co.*, 234 P. 2d 625 (Cal. 1951); *Title and Trust Company of Florida v. Barrows*, 381 So. 2d 1088 (Fla. App. 1979) ("Title insurance only insures against title defects."); and *Gates v. Chicago Title Ins. Co.*, 813 S.W. 2d 10 (Mo. App. 1991). See, also, "Absence of Effectual Subdivision, or of Street or Easements, as Within Title Insurance Coverage," 40 A.L.R. 2d 1247 and "Defect in, or Condition of, Adjacent Land or Way as Within Coverage of Title Insurance Policy," 8 A.L.R. 4th 1246. Cf. dicta in *Mariott Financial Services v. Capitol Funds*, 217 S.E. 2d 551 (N.C. 1975), aff'g in part, rev'g in part 209 S.E. 2d 423 (N.C. App. 1974), wherein the court still denied the insured's claim based upon an exclusion from coverage. A recent overview of this subject can be found in Joyce D. Palomar, *Title Insurance Law* § 5.07 (1994).

⁶ *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So. 2d 852 (Fla. 2 D.C.A. 1976).

⁷ A recent restatement of this principle is found in *Egidi v. The Town of Libertyville*, 251 Ill. App. 3d 224, 621 N.E. 2d 615 (1993). See also *Erday's Clothiers, Inc. v. Spentzos*, 228 Ill. App. 3d 540, 592 N.E. 2d 615 (1992).

⁸ 735 ILCS 5/13-118 et seq. A land developer who relies on a putative prescriptive easement that may later prove valid is still bound by the limitations of the use as prescriptively acquired.

⁹ In the appropriate context this language can be re-worded to read: "The easement described as Parcel _____ in Schedule A is contiguous to a physical-ly open street known as _____."

¹⁰ Consideration should be given to the appropriateness of a "Continued Access Endorsement" which may read: "This policy affirmatively insures that the insured shall have continued right of access to the property referred to in Schedule A thereof over the points of ingress/egress shown on the survey made by _____ and dated _____, subject to Exclusions From Coverage."

¹¹ An interesting case dealing with an easement by implication and which addresses some of the practical issues discussed in this article is *Granite Properties Limited Partnership v. Manns*, 140 Ill. App. 3d 561 (5th Dist. 1986). See, also, "Way Of Necessity Over Another's Land, Where A Means Of Access Does Exist, But Is Claimed To Be Inadequate, Inconvenient, Difficult, Or Costly," 10 A.L.R. 4th 447 (1981).

¹² In *First National Bank of Chicago Heights, as Trustee under Trust 3111 v. City of Chicago Heights*, 63 Ill. App. 3d 963 (First Dist. 1978), ingress and egress was denied on the grounds that "A property owner has no special right of access to a street that is not yet improved or opened by a city or in long time public use." The land owner in this case had an alternative mode of access. Cases of recent vintage dealing with such dedication issues include *Schwebl v. Seifer*, 208 Ill. App. 3d 176 (Second Dist. 1991); and *First Illinois Bank of Wilmette, as Trustee v. Valentine*, 250 Ill. App. 3d 1080 (Second Dist. 1993). The issue of whether the abandonment of a public highway creates a private easement in the road is addressed in *Rexroat v. Thorell*, 89 Ill. 2d 221 (1982).

¹³ See, e.g., 605 ILCS 5/4-210; 605 ILCS 5/6-301 et seq.; 605 ILCS 5/8-102 and 8-104 et seq.; and 765 ILCS 205/2.

¹⁴ Decisions addressing other kindred types of access issues include: *Wehde v. The Regional Transportation Authority*, 237 Ill. App. 3d 664 (Second Dist. 1992) (railroad rights of way); *DeCastillo v. Bargo*, 693 S.W. 2d 547 (1985); *Wickenhauser v. Selhime*, 75 Ill. App. 2d 413 (Fifth Dist. 1966) and *J.C. Penney Company, Inc. v. Andrews*, 68 Ill. App. 3d 901 (Second Dist. 1979) (spite strips); and *Cook v. Mighell Construction Co., Inc.*, 40 Ill. App. 3d 1032 (Second Dist. 1976) (vacated rights of way).