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THE TOP THREE TITLE ISSUES REALTORS® NEED TO KNOW

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Nothing is worse in the eyes of a real estate professional than discovering an issue with the title to real estate on the heels of a scheduled closing. Title issues come in a multitude of varieties, forms and fashions, and depending on the severity of the issue, can stop a real estate deal dead in its tracks, as well as render the title essentially worthless.

The good news is that a solution for nearly every issue exists. The remedies available depend greatly

on the issues and factual circumstances. In any event, identifying the problem as soon as possible is essential to resolving the issue in the most efficient and inexpensive manner. Before committing to purchase an interest in real estate, due diligence in the form of reviewing a title commitment and current survey is imperative to discovering and resolving potential issues with real estate titles. A thorough review of a title commitment and current survey will reveal most title issues, including three of the most common title issues encountered by real estate professionals:

(i) blanket

easements, (ii) boundary issues and (iii) errors and omissions in the chain of title. Below is a brief overview of these top three title issues, along with some suggested solutions and practice pointers for the real estate professionals who encounter them.

BLANKET EASEMENTS

A blanket easement, also known as a floating easement, is basically an easement that is not limited to a specific portion of the servient tract over which it was granted but, instead, encumbers the entire tract. In some instances, the grantor and grantee intend the easement to be blanket in nature. A conservation easement or flowage

easement are both examples of easements generally intended by the parties to be blanket in nature. Other times, blanket easements arise contrary to the parties' intentions and as a result of the instrument granting the easement failing to limit or describe the area over which the easement is located. Regardless of the scenario, a blanket easement generally constitutes a significant title defect, because the easement holder's rights significantly limit or prohibit the right of the landowner to use and enjoy the servient tract.

Signature

Often times, an unintended blanket easement will arise from an instrument containing ambiguous language, such as language conveying an easement over "a twenty foot (20') wide portion of the Northwest Quarter (NW1/4) of Section Ten, Range Three West, Township Four North." While, by the terms of the grant, the easement area is limited to a twenty-foot wide portion of the subject tract, the instrument essentially grants a blanket easement over the entire tract because it fails to specify which twenty-foot wide portion of the tract is encumbered by the easement. Blanket easements on this nature create significant title issues, especially from a development standpoint.

Continuing with this example, consider a scenario where the landowner has entered into an agreement to sell the servient tract to a developer who intends to develop a shopping center on the tract, contingent upon a satisfactory review of the title. Assume also the blanket easement is one for the installation and operation of an underground pipeline, and the instrument prohibits construction of buildings, fixtures and other above-ground improvements within the twenty-foot wide easement area.

Since any development within the 20-foot wide easement area is prohibited and the easement area could consist of any 20-foot wide portion of the servient tract, title to the tract is defective because any development is prohibited as a result of the blanket easement.

So what's the solution? The good news is there may be several, all of which depend on the facts and circumstances surrounding the grant and use of the easement. For example, if the pipeline has not been installed, one solution commonly utilized is to obtain and record an amendment or modification to the easement instrument from the holder that terminates the easement as it applies to the entire tract and establishes the specific 20-foot wide easement area. Additionally, the accommodation doctrine recognized in many jurisdictions generally provides that where an easement instrument does not establish a definite location of the easement area, the grantee does not acquire a right to use the servient tract without limitation, and the owner of the servient tract processes the right to establish its location, provided such right must be exercised in a reasonable manner, with due regard to the rights of the easement holder. If the owner of the servient tract can produce evidence establishing the parties intended the easement to apply to a certain 20-foot wide portion of the tract, the owner may also seek to have a court reform the instrument to limit the easement area to a specific portion of the servient tract. If the pipeline has been installed, the common law in many jurisdictions provides the undefined boundaries of an easement granted for a specific purpose can become fixed by use of the land for the prescribed purpose with the consent or acquiescence of the owner.

BOUNDARY ISSUES

Boundary issues are common title issues that generally result from the true boundary being located somewhere

other than where the owner believes it to be. The discrepancy in boundary line locations may also be the result of natural forces, such as accretion or avulsion caused by waterways. Other times, boundary lines may change as a result of the owner's action or inaction. Boundary line issues attributable to the owner include changes in the location of boundary lines that result from adverse possession or agreements with adjoining landowners. Additionally, some states recognize the doctrine of boundary by acquiescence, which is similar to adverse possession and arises when adjoining landowners tacitly agree to recognize a boundary other than the true surveyed boundary shared by the parties.

Determining whether boundary issues exist before purchasing real estate is an absolute necessity because unresolved issues can eventually result in the record owner being divested of title to all or a portion of its property, as well as the improvements located thereon. The only means for confirming whether a boundary line issue exists is a current survey. A survey, however, is only as good as the surveyor who prepared it. When selecting a surveyor, keep in mind that, like real estate attorneys, not all surveyors were created equal. Thus, it is equally important the surveyor selected has sufficient experience, is licensed in the state where the property is located and is of good repute. Along those lines, consider retaining a surveyor who is a member of the National Society of Professional Surveyors and familiar with the area where the property is located.

If the current survey reveals a boundary issue, several methods for resolving the issue are available. An obvious solution to the issue is for the landowner to either convey or purchase the encroachment area. Another common solution is a boundary line agreement between the adjoining owners, whereby the owners agree to the true location of the boundary, regardless of the parties' past or future actions, or the existing location of boundary markers (such as drainage ditches or fences). An easement agreement may also be utilized if the encroaching fixture or improvement will remain in its current location. Alternatively, a quitclaim deed from the adjoining owner may also be used to extinguish any interest the adjoining owner may have acquired through adverse use or acquiescence. If a quitclaim deed is utilized, however, encroaching fixtures or improvements should also be removed in conjunction with the conveyance or the issue will likely resurface at a later point. If these remedies are unavailable, boundary issues may be resolved by a quiet title action or an action for a declaratory judgment.

CHAIN OF TITLE ERRORS AND OMISSIONS

Title issues commonly arise from errors and omissions in the chain of title and are often the result of sloppy drafting and undocumented conveyances. Incorrect and invalid legal descriptions; mistaken, misnamed and omitted

parties; and ineffective acknowledgements are common examples of chain title issues arising from careless drafting. Chain of title issues caused by undocumented conveyances are commonly the result of undocumented intestate transfers between family members, as well as failures to open a probate estate for a decedent/landowner. Some chain of title issues are not substantive issues or constitute title defects—other times, the result may be a complete failure of title.

In many instances these issues can be corrected through a correction instrument, modification agreement, or scrivener's error affidavit. Because these corrective measures generally require one or more of the parties or their attorneys to execute the remedial instrument, time is very much of the essence. If the issues are not discovered until many years after their creation, the remedies available are significantly limited. Below is a list of some practice pointers for real estate professionals to avoid or remedy chain of title issues:

1. **Use a Valid Legal Description.** An instrument purporting to affect the title to real property must contain a valid legal description, which are usually in the form of a platted, lot and block description or a metes and bounds description. Tax parcel numbers and property addresses are generally invalid legal descriptions. Most importantly, if the legal description is referenced as an exhibit, don't forget to attach the exhibit.
2. **Attach the Legal Description.** It is easy to make a typographical error when retyping a legal description. An instrument affecting title to real property must contain a valid legal description, and in order to be valid, a metes and bounds legal description must "close." Often times, errors or omissions in retyped descriptions can result in the legal description failing to close, rendering the instrument ineffective. If possible, copy and paste the legal description from another instrument in the chain of title, a title policy or a survey. If you must retype the description, have someone read aloud the original legal description used by you while you follow along reading the retyped description you prepared.
3. **Correctly List the Parties.** Always review the chain of title to ensure the current grantor is the same party listed as the grantee in the immediately preceding conveyance instrument. For individuals, driver's licenses and birth records should also be reviewed to confirm correct spelling is used and ensure the parties' names are listed correctly. Also, be sure to include suffixes such as "Jr." and "Sr." and confirm whether the individuals are

married. With respect to corporations, limited liability companies and limited partnerships, review the entity's filings with the appropriate secretary of state's office to ensure correct spelling. As for trusts, the trust documents should be reviewed to confirm proper names and spellings. If the applicable state law provides for trust certificates, also consider having the trustees execute and record a certificate of trust verifying the names of the trust and the trustees.

4. **Use a Proper Acknowledgement.** In some cases, a defective acknowledgement can render the instrument ineffective. Arkansas for example has a form acknowledgment set by statute. Be sure to review applicable state law to ensure the instrument's acknowledgment conforms to any state-specific requirements.
5. **Correct the Record.** As noted above, many issues can be resolved by correcting the errors and omissions in the chain of title via a corrective instrument. However, before preparing a corrective instrument and tracking down the requisite person or persons to sign the instrument, check with a title insurance underwriter to confirm the corrective instrument will have its intended effect.

At the end of the day, the question is whether the title to the property will be insured in connection with a conveyance. Accordingly, consult with an underwriter to confirm your plan and form of corrective instrument will result in an insurable title.



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