

TUTE Spring 2025

Description

From The Unknown Title Examiner

If anyone has any soapboxes not in use, please forward them. TUTE is quickly wearing out his supply.

Recently, a friend relayed the following situation (which occurred in another state but the situs is irrelevant to the discussion):

Buyer acquired a 1.41 acre vacant lot with the intention of building a home. The lot had been carved out of a larger, 5+ acre tract. Five deeds prior to the conveyance to Buyer, a 1989 deed contained a restriction that the parent tract not be subdivided into lots of less than 2.5 acres. As a result, Buyer was denied a building permit.

Another disgruntled buyer learned that when he applied for a permit to construct a swimming pool in his backyard, it was denied because of the presence of an underground utility easement.

In both cases, the owner's reaction (understandably) was "If I had known about x, I wouldn't have bought the property."

In the subdivision case, the owner's policy contained an exception for the lot size restriction, although there is some dispute as to whether the commitment recited the covenant. Even without an exception, a standard title policy doesn't insure use; it insures ownership of the land described in Schedule A. Although the buyer couldn't improve the land, the restriction didn't void his ownership, so there would be no coverage under the title policy.

In the swimming pool case, the owner's policy contained a survey exception in addition to the utility exception.

Both title insurers would be justified in denying policy claims under the circumstances.

These 2 examples are not isolated cases. TUTE regularly hears about similar property matters that leave owners frustrated—which often results in a negative perception of the value of title insurance. Owners in such circumstances tend to look to other sources for a remedy or monetary satisfaction, often leading back to the title agent.

Courts have held that title insurance is not a guarantee of the title and the search is performed for the purpose of determining insurability, resulting in the contract of indemnity that is title insurance. Without delving into the intricacies of contract law, it's easy to make the leap from "If I had known" to "Why didn't you tell me?"—directed to the title agent. And although the title agent cannot give legal advice or opinions, there is one simple action the agent can take to insulate the agency from at worst legal liability and at best reputation damage. What is it?

DELIVER A COPY OF THE COMMITMENT TO THE BUYER PRIOR TO CLOSING. Ideally, it should be delivered with a statement that the agent cannot give legal advice but the recipient may have any questions answered by an attorney of his/her choice. If the proposed insured decides not to avail himself/herself of legal guidance, any potential risk of loss lies solely with the person who failed to protect himself/herself.

Land Title Associations have been spotlighting fraud in real estate transactions frequently over the last few years. A recent Michigan case published in the ALTA newsletter reported that a title agent responded to a fraudulent payoff statement by wiring funds to a different bank than the one first identified in a legitimate payoff. In doing so, the agent sent the wire to the receiving bank with the name of the beneficiary (correct) and the account number (fraudulent). The UCC requires the transmitter of funds to include in the wire the account number of the transferee and the name associated with that account number. Of course, in this case the name of the account owner did not match the account number, so when the bank allowed the funds to be withdrawn by the fraudster (whose name was on the account), the agent sued the bank, alleging that when the account name didn't match the account name provided for that account number, the bank had an obligation to take action accordingly. The court, however, held that when the account number provided matches an actual account in the bank, the bank has a right to rely on it solely and is not required to look further into the transaction—including matching the referenced account owner to the bank's named account holder.

Courts are consistently ruling that the transmitter of the funds has the last best chance to ensure the validity of the transaction. Be warned.

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