

THE ALTA 2006 TITLE INSURANCE POLICIES AND THE UNDERWRITING OF SURVEY COVERAGE

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Introduction

The 1992 ALTA owner's title insurance policy contained no survey coverage. That is, the policy was subject to the five general exceptions, at least two of which were clearly related to matters of survey and unrecorded easements. Any desired coverage over these matters had to be deliberately added by an endorsement that deleted one or more of these general exceptions.

This situation has changed dramatically with ALTA's adoption of the 2006 title insurance policies. Both the owner's and loan policies now offer automatic survey coverage. This change in policy format will undoubtedly cause title companies to change their underwriting procedures. The purpose of this article is one, to describe the change in policy coverage and two, to propose a method by which survey coverage can be underwritten pursuant to these new title policies. Although Illinois law is emphasized, the principles noted herein are fairly universal in scope and are applicable in many jurisdictions, as illustrated by the citations to several surveying and boundary law treatises.

Covered Risk 2 (c)

The 1992 owner's policy contained four so-called "insuring provisions." The 2006 owner's policy expands upon and formally names these insurance paragraphs. The new policy now contains ten Covered Risks. Covered Risk 2 (c) reads as follows:

[The Title Company] insures, as of Date of Policy . . . against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from

(c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term “encroachment” includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Unfortunately, this Covered Risk includes terms that are not defined. For example, “violation.” Violation of what? Also, what is a “variation” and “adverse circumstance?”

The Variation

A “variation” might be construed as a reference to those situations in which the record distance in a legal description is different from the measured distance.

Example: the Insured buys the following parcel of land: “Beginning at the intersection of the North line of Adams Street and the East line of First Avenue; thence North along the East line of First Avenue 100 feet to the South line of a public alley; thence East along said South line 100 feet to the West line of Second Avenue; thence South along said West line 100 feet to the North line of Adams Street; thence West along said North line 100 feet to the point of beginning.” The survey shows, though, that although the record dimensions of each side of the tract are 100 feet, the measured dimensions of each side are only 99.8 feet. This results in the following:

Record dimensions: 100 feet x 100 feet = 10,000 square feet

Measured dimensions: 99.8 feet x 99.8 feet = 9,960.04 feet

The difference in area between record and measured dimensions: 39.96 square feet

The title company insures this parcel of land, which is bounded on all sides by public rights-of-way. The company issues the 1992 title policy and waives the general exceptions relating to surveys. A month later, the Insured discovers the difference in area and tenders a claim to the title company.

Illinois case law sets forth a hierarchy whereby some elements are given more weight than others. This hierarchy is (from highest weight to lowest weight) as follows: natural monuments, artificial monuments, courses, distances, and quantity. See *Cottingham v. Parr*, 93 Ill. 233 (1879); *Hadie v. Erlandson*, 41 Ill.App.2d 328, 190 N.E.2d 848 (2nd Dist. 1963); *Forest*

Preserve Dist. of Cook County v. Lehmann Estate, 388 Ill. 416, 58 N.E.2d 538 (1944); *Branstetter v. Dahncke*, 394 Ill. 40, 67 N.E.2d 212 (1946); *Dorsey v. Ryan*, 110 Ill.App.3d 577, 442 N.E.2d 689, 66 Ill.Dec. 263 (4th Dist. 1982); *Texas Co. v. Hawthorne*, 371 Ill. 468, 21 N.E.2d 565 (1939); *Peoria Gas & Electric Co. v. Dunbar*, 234 Ill. 502, 85 N.E. 229 (1908); John S. Grimes, *A Treatise on the Law of Surveying and Boundaries*, 4th ed. (Indianapolis and New York: The Bobbs-Merrill Co., 1976), secs. 308, 366, hereafter Grimes; Curtis M. Brown, Walter G. Robillard, and Donald A. Wilson, *Boundary Control and Legal Principles*, 3rd ed. (New York: John Wiley and Sons, 1986), sec. 5.12 *et seq.*, hereafter Brown, *et al.*; Paul A. Cuomo and Roy Minnick, *Advanced Land Descriptions* (Rancho Cordova, Calif.: Landmark Enterprises, 1993), pp. 26-38; Ray Hamilton Skelton, *The Legal Elements of Boundaries and Adjacent Properties* (Indianapolis: The Bobbs-Merrill Co., 1930), sec. 72 *et seq.*, hereafter Skelton.

Because the monuments (the rights-of-way) take precedent over the record dimensions, it is possible that the Insured would have no claim against the title company for “losing” almost forty square feet, even though the title company issued its policy with survey coverage. In this regard, see *Lynburn Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 191 Ga.App.710, 382 S.E.2d 599 (1989); J. Bushnell Nielsen, *Title & Escrow Claims Guide* (Brookfield, Wis.: Foundation Press Wisconsin, 1996), sec. 12.3.8, hereafter Nielsen, but see *Sunset Holding Corp. v. Home Title Ins. Co.*, 172 Misc. 759, 16 N.Y.S.2d 273 (Sup. Ct. 1939); Nielsen, sec. 12.3.16.

Example: The Insured buys lot 1 in Blackacre. Its platted dimensions are one hundred feet square. However, the surveyor locates the original lot corners set in the ground, and these monuments indicate that the lot is actually only 99.8 feet square. The surveyor shows both the record and measured dimensions on his survey.

The title company insures this parcel, it issues extended coverage over the survey-related general exceptions, and again it issues the 1992 title policy. Again, after the policy is issued the Insured discovers that the lot is only 99.8 feet square and tenders a claim.

Illinois law indicates that the true boundary lines of subdivided property are those lines established by the original surveyor. The lines so marked by these original monuments must prevail, even if the surveyor makes a mistake in some of the measurements. Thus, it is again possible that the Insured would not have a claim against the title company for its “loss” of almost forty square feet. See *City of Joliet v. Werner*, 166 Ill. 34, 46 N.E. 780 (1897); *Tinnea v. Piel*, 122 Ill.App. 304 (4th Dist. 1905); *City of Decatur v. Niedermeyer*, 168 Ill. 68 (1897); Grimes, sec. 298, sec. 366; Brown, *et al.*, sec. 5.18; Skelton, sec. 76, *et seq.*

But what if the two title companies issued the 2006 owner's title policy and not the 1992 version? Because the 2006 policy gives automatic coverage over survey "variations," both Insureds might have a claim for the difference in value between 10,000 square feet and 9,960.04 square feet. (See paragraph 8 of the Conditions of the 2006 owner's policy.) Can title companies reasonably underwrite this potential problem of survey variations?

Underwriting Considerations

Possibly, yes. Generally speaking, Illinois surveyors prepare 1-4 residential surveys in accordance with boundary survey standards found at 68 Ill. Administrative Code, Sec. 1270.56. More complex surveys are performed pursuant to the 2005 ALTA/ACSM land title survey standards, which are found at either www.acsm.net or www.alta.org. Illinois title companies might consider raising the following exception on all of its 1-4 residential title commitments:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete boundary survey of the land.

In order to delete this exception, we should be furnished a current boundary survey appropriately certified to Illinois boundary survey standards. Encroachments, encumbrances, violations, variations, or adverse circumstances disclosed by said survey may be shown as additional exceptions to the policy, when issued.

For commercial, industrial, or large vacant or multi-family parcels of land, the title company could raise this exception:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete land title survey of the land.

In order to delete this exception, we should be furnished a current land title survey appropriately certified to ALTA/ACSM land title survey standards. Encroachments, encumbrances, violations, variations, or adverse circumstances disclosed by said survey may be shown as additional exceptions to the policy, when issued.

Both the Illinois boundary survey standards and the ALTA/ACSM land title survey standards require the surveyor to disclose differences between record bearings, angles, and distances and measured bearings, angles, and distances. Thus, if either survey discloses variations between record

and measured bearings, angles, or distances, the title company would raise the following exception on both the owner's and loan title policies:

Variation between record and measured bearings, angles, or distances, as disclosed by a survey.

The insured owner would take "subject to" this exception; the title company could endorse over this exception on the loan policy, probably with a "diminution" endorsement similar to the following:

The Company hereby insures the Insured against loss or damage that the Insured shall sustain by reason of the diminution of the value of the security shown in Schedule A as a result of the variation between record and measured bearings, angles, or distances, as shown as exception _____ in Schedule B.

Conversely, if the survey did not disclose any difference between record and measured bearings, angles, or distances, the title company would not raise this exception. (Of course, the survey would still have to be reviewed for any other survey-related matters that might have to be shown on the policy.)

Note that both of these commitment exceptions indicate that the surveys should be certified to the appropriate survey standard. The model survey certifications for both these survey standards are set forth below:

Boundary survey: "This professional service conforms to the current Illinois minimum standards for a boundary survey." See "Minimum Standards of Practice," 68 Ill. Administrative Code, Sec. 1270.56(b)(6)(P).

Land title survey: " This is to certify that this map or plat and the survey on which it is based were made in accordance with the 'Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys,' jointly established and adopted by ALTA and NSPS in 2005, and includes Items _____ of Table A thereof. Pursuant to the Accuracy Standards as adopted by ALTA and NSPS and in effect on the date of this certification, undersigned further certifies that in my professional opinion, as a land surveyor registered in the State of _____, the Relative Positional Accuracy of this survey does not exceed that which is specified therein." See paragraph 8 of the 2005 ALTA/ACSM land title survey standards.

The reason for requiring these certifications is as follows: As noted above, both the land title standards and the Illinois boundary survey standards provide that the surveyor should show differences between record and measured bearings, angles, and distances. If the surveyor certifies his or her survey to one of these standards, does not disclose such a difference,

and this non-disclosure results in a title claim, the title company would be able to recoup any loss against the surveyor by virtue of the subrogation provisions of the owner's title policy. (See paragraph 13 of the Conditions of the 2006 owner's policy.) But if the surveyor merely used a generic certification that did not reference a specific standard, the title company might not be able to recover its loss.

Here is an example of such a generic certification: *"I John Doe, hereby certify that I have surveyed the above-described land and said plat is a correct representation of said survey."*

What if the title company raises the appropriate commitment exception, but the survey furnished the company nonetheless contains the above or similar generic certification? In this event, the title company would probably be able to give extended coverage over the survey-related general exceptions, but it might not be able to insure against loss due to variations between record and measured distances, bearings, and angles. It might have to raise an exception similar to the following:

Possible variation between record and measured bearings, angles, or distances, as would be disclosed by an accurate and complete survey of the land.

The Adverse Circumstance

Covered Risk 2 (c) reads in part as follows: "Any . . . adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land." This portion of the Covered Risk will probably be especially troublesome to both the title company and the attorney.

What is an adverse circumstance? When does an adverse circumstance affect the title to the land and when does it not? It is quite possible that when issuing the 2006 title policy, the title company, fearing a claim, will want to show anything and everything disclosed on the survey. On the other hand, the attorney for the insured will argue that the survey exception in question does not affect the title to the land, and thus it should not be shown. (In this regard, see Nielsen, sec. 9.11.1.)

Two examples that help define the fine line that separates the "affects title" and "does not affect title" philosophies are as follows:

An unrecorded utility line that runs across the rear of the residential lot and other property should be shown on the policy as a survey exception, as it is an unrecorded easement that affects the title to the land. On the other

hand, the utility “drop line” that runs from the street to the house should not be shown, as it does not affect title.

Assume that the title examiner has a survey of a commercial lot that shows storm sewer openings in the parking lot. If this is a storm sewer that does not run through adjoining property, but instead is a sewer that is connected solely to the main sewer in the street, it does not have to be shown on the title policy, as it does not affect title. On the other hand, if the storm sewer on this lot is part of an overall storm sewer system that affects the entire shopping center, then it should be shown on the policy, as the storm sewer system is in the nature of an unrecorded easement. (The problem, of course, is how will the examiner know if the storm sewer system affects other land or not?)

But what about a survey that shows that a portion of the land falls within a flood zone or flood plain? What if the survey indicates that some of the land falls in “wetlands?” There is no corresponding recording document. This survey matter does not appear to affect the title to the land. Nonetheless, when the Insured is told that he can’t build his dream home on the land because a portion of the land is in a flood zone, flood plain, or wetlands, does the title company have to defend the subsequent claim? After all, the Insured argues, the flood zone (or flood plain or wet lands) is in the nature of an unrecorded drainage easement. With potential problems like this, it seems clear that the task of underwriting the “adverse circumstance” will be an issue with both the title insurer and the Insured in the years to come.

Conclusion

The 2006 owner’s policy contains the five general exceptions. It is possible that in order to ensure that the Insured gets complete survey coverage, attorneys will have to be concerned about providing the title company with a survey that meets two threshold tests:

One, the survey must be sufficient to waive the survey-related general exceptions;

Two, the survey must be sufficient to not cause the title company to raise an exception that will modify, qualify, or otherwise dilute the automatic survey coverage of Covered Risk 2(c).

Note: The opinions expressed in this article are those of the author only and do not necessarily reflect the views of Chicago Title Insurance Company.