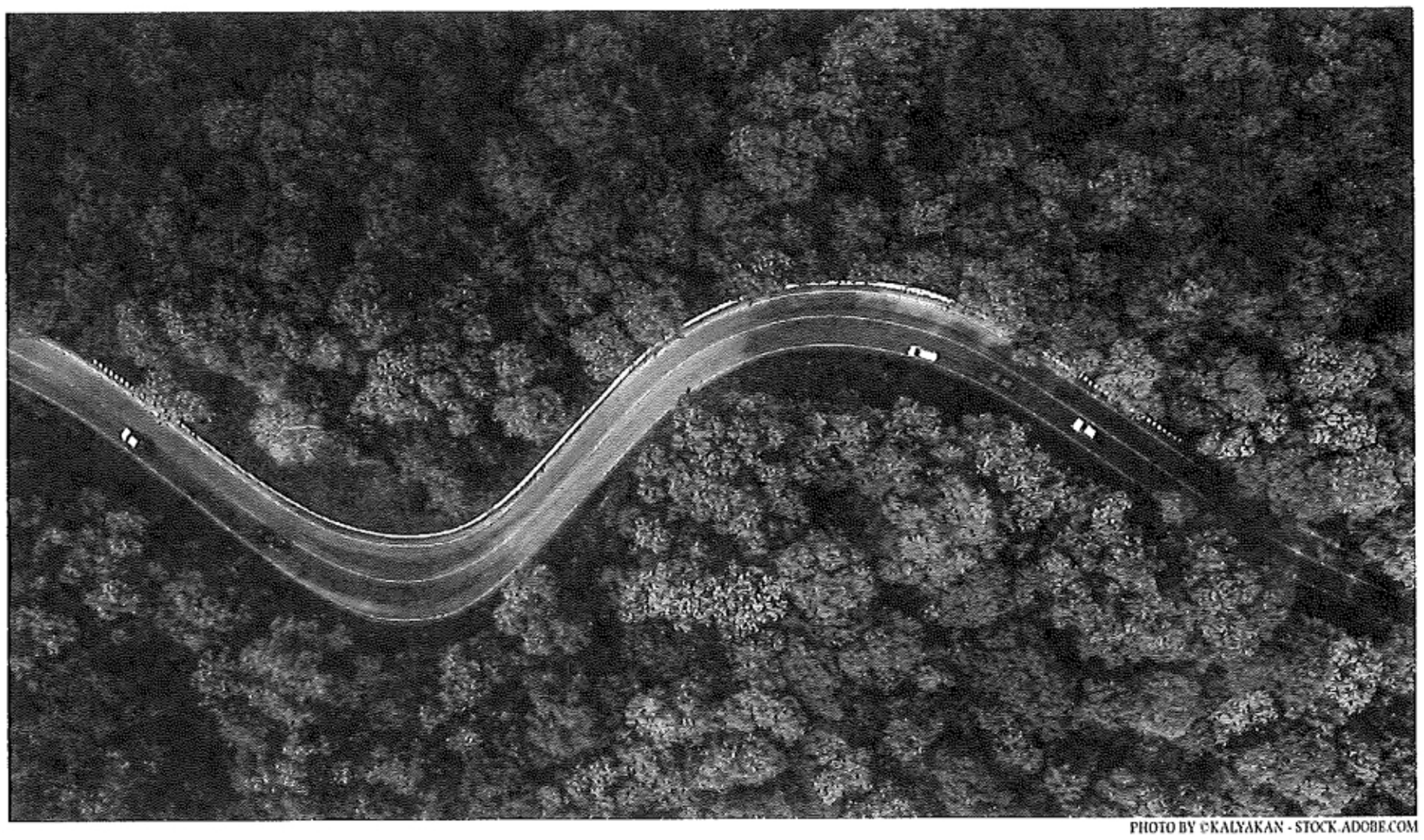
REAL ESTATE

Title Insurance: Coverage for the Right of Vehicular Access

By Stephen Hankin



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There are occasions when we as practitioners may be confronted with a client who has purchased land only to discover—after the fact—there is no means of vehicular access. While potential remedies exist against the seller, the surveyor (if a survey was procured), the real estate broker or even closing counsel, resort should first be had with the title insurance agent or insurer. This article focuses upon the potentially applicable "covered risks" and defenses based upon exceptions, exclusions, and definitions contained in a standard American Land Title Association (ALTA) owner's policy relating to the narrow issue of whether standard policy coverage insuring the right of access applies to vehicular as distinct from only pedestrian access and, if so, under what circumstances.

The Standards Governing Policy Interpretation

An informed analysis requires a close examination of the policy. As with all contracts, including insurance policies, the doctrine of good faith and fair dealing applies, thus triggering a construction based upon an insured's objective, reasonable expectations even when the insured never read the commitment. *DiOrio v. New Jersey Mfrs. Co.*, 79 N.J. 257 (1979). Objective reasonableness is a question of law to be determined by the court. *Bromfeld v. Harleysville Ins. Co.*, 298 N.J. Super. 62, 79 (App. Div. 1997). While any ambiguity is resolved in favor of an insured, in exceptional circumstances even an unambiguous contract has been interpreted contrary to its plain meaning in order to fulfill an insured's reasonable expectations. Werner *Indus. v. First State Ins. Co.*, 112 N.J. 325 (1988).

The Covered Risk Insuring Against 'No Access to or from the Land'

The standard ALTA policy insuring against "No Access to or from the Land" fails to define the words "access" or "right." However, it is fairly well-settled that the word "right" means the *legal* right to access rather than access merely rendered topographically, weather related or otherwise impossible, difficult or unreasonable. *Chicago Title Insurance Co. v. Jen*, 249 Md. App. 246 (Ct. Spec. App. 2021).

Surprisingly, despite the fact that the standard ALTA policy fails to define "access," there is a paucity of relevant caselaw, no doubt due to the average insured's inability to fund litigation against litigious, well-heeled carriers. Although not precedential, one New Jersey Law Division judge has wrestled with the issue.

In *Goedtel v. Jacobs*, 2010 WL 2220600 at *4-5 (N.J. Sup. Ct. Law. Div. May 14, 2010), where there was no alternate means of vehicular access, the court found the standard policy "language ambiguous and appl[ied] the doctrine of reasonable expectations," reasoning that "a reasonable person could expect coverage for any 'lack of a right of access to and from the land' includes the right to vehicular access [in that a homeowner's] ... reasonable expectations include[] access to their driveway, an essential feature for drivers and homeowners."

In *Marriott Financial Serv. v. Capitol Funds*, 217 S.E.2d 551, 565 (N.C. 1975) the North Carolina Supreme Court similarly held "mere pedestrian access cannot be deemed reasonable access." The only other decision dealing with the issue is *Riordan v. Lawyers Title Ins. Corp.*, 393 F.2d 1100 (D.N.M. 2005). There, the access coverage provision was determined as not applying to vehicular access, but only because the property was located far from any paved cartway, and the insured knew there was no vehicular access. See Joyce Palomar, Title Insurance Law, §5.8 (3d ed. 2020) (noting *Riordan* "should not be taken as the general rule ... because the insureds knew before buying ....").

The Covered Risk Insuring Against 'Any Defect'

The standard policy-covered risk insuring against "any defect" in title is another provision potentially insuring the right to vehicular access. This policy language has been declared as a generic, "catch-all" provision that "can have substantive and relevant meaning only if it is construed to refer to claims, other than those expressly articulated in the list of [other] covered risks, that assert an interest by others in, or a limitation of an owner's rights to, the subject property." *Forio v. Lawyers Title Ins. Corp.*, 2006 WL 1520175, at *1, 6 (N.J. Sup. Ct. App. Div. June 5, 2006). For example, the restricted use of an insured's side entrance has been held as constituting a policy-covered defect. *McMinn v. Damurijan*, 105 N.J. Super. 132, 139 (Ch. Div. 1969).

The Covered Risk Insuring Against 'Unmarketable Title'

Still another standard policy-covered risk insuring against "unmarketable title" embraces "Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend ...." Even if a title policy does not expressly cover a lack of the right of access, the absence of the right of at least pedestrian access renders title unmarketable as a matter of law. *Melcer v. Zuck*, 101 N.J. Super. 577, 583 (App. Div. 1968) (adopting the majority view and holding "there are few title problems that are more palpable than complete lack of access to a public road" and that the lack of access to a property renders it unmarketable as a matter of law).

The Importance of the Policy Definition of 'Land'

In one of a number of efforts to evade coverage, title carriers will contend vehicular access is not insured because it is not part of the actual insured property, as described by a metes and bounds description in the policy's Schedule A. However, this position ignores the standard policy definition of "*Land*" which provides even though "Land" is not included in Schedule A, "this does not modify or limit the extent that a right of access to and from the Land is insured by this policy." *See MacBean v. St. Paul Title Ins. Corp.*, 169 N.J. Super. 502 (App. Div. 1976) (explaining under the reasonable expectation doctrine, a title policy insuring a public street address would lead a purchaser to believe it to be located on a public street, without restriction).

The Survey Exception

If the insured has not secured a survey, and the absence of vehicular access is not due to a recorded instrument that the title agent has failed to list in the commitment, coverage will not exist. However, if the lack of access is due to a recorded instrument that was somehow missed in either the title examination or in the commitment itself, the Survey Exception will not excuse coverage. *Walker Rogge v. Chelsea Title & Guar. Co.*,116 N.J. 517, 533- 534 (1989) ("[T]he very purpose of a survey exception is to exclude from coverage errors that would be revealed not by a search of public records but by an accurate survey").

Thus, for example, if a title examination or commitment fails to disclose a recorded street vacation ordinance that renders legally impossible the only means of vehicular access, regardless of any survey exception, coverage remains. Were that not the case, an insured's failure to obtain a survey would discharge a title insurer from its essential statutory obligation, under the Title Insurance Act of 1974, of assuring a "reasonable title examination" and "guaranteeing ... the correctness of searches." N.J.S.A. 17:46B-1(1)(a), -9. So deeply entrenched is a title insurer's duty to except matters of public record that a standard ALTA Policy Exclusion 3(b) precludes coverage only when an unrecorded matter is known to the insured. Thus, only where an insured has actual, as distinct from constructive, knowledge of an adverse matter not of public record, and has failed to disclose it, has coverage been denied. *Pioneer Nat. Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 338, 341 (App. Div. 1978) (rescinding title policy where insured deliberately concealed adverse defect not of public record and unknown to insurer).

Given the strictures of the Title Insurance Act, any contractual attempt—such as a *survey* waiver—to limit or excuse liability from the statutorily imposed duty to assure a reasonable search seemingly violates public policy and is ineffective as a matter of law. *See McCarthy v. NASCAR*, 148 N.J. 539 (1967).

Comparative/Contributory Negligence

Finally, neither contributory nor comparative negligence is available as an affirmative defense to a breach of contract claim even when an insured has failed to read the policy or failed to order a survey that would have disclosed the pertinent recorded instrument. *Aden v. Fortsh*, 169 N.J. 64 (2001).

Conclusion

To eliminate the Herculean task an insured must undertake in facing off with a title carrier, it would be a rather simple undertaking for the Commissioner to exercise his broad administrative powers under the Title Insurance Act by requiring that "access" be defined as either explicitly including or excluding vehicular means, thereby calling to the attention of an insured any need for a special endorsement. ■

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