Things That Cause Escrow Audits

- New, expensive race cars
- Race or show horses
- Investing in oil wells
- Large amounts of money in escrow for many years
- Nigerian e-mail scam schemes
Survey Issues From The Past That Still Come Up

When do improvements require a survey?
- T-47 and drawing on the survey

Internal and External Boundaries
- Easements
- Is a pool a building for building line encroachments?
Are surveys copyrightable?

– No, just a map of what exists.

– First Circuit Court in New York has so held.
What if the surveyor signed in yellow and you can’t read it now?

It’s still evidence of a survey and complies with P-2.
A Survey That A T-47 Should Work With
And As Shown Language (Not Just Shown)

Doubletree Case: Title held liable for surveyor’s error as to where a flood plain was located on theory that the flood plain was “as shown on the survey”…

- Since title company created ambiguous language, it was liable.
- Is just “shown on survey” better?
- What other language can we use? Is the fight worth the safety?
Basic Policy Coverages

Access

• Pre-1991—none

• Until mid-2005s—legal right of access
  – Using the “hop test”
  – Can you get there by boat?

• T-23 actual pedestrian and vehicular
Missed Owners

• Invalid documents because of bad signatures, acknowledgments, delivery or recording
• Forgery, fraud, duress, incompetence or incapacity, impersonation
• Bulletin TX-000065 start search with first warranty deed older than 35 years
  – Still have to search longer for easements and minerals
Restrictions

• Changed use is always a challenge.
  – How long must the use have been changed?
    • 25 years is a good rule.

• How do we know?
  – Google Maps
  – Appraisal
  – Inspection
  – Zoning Changes
Liens

Getting a 2\textsuperscript{nd} Home Loan in Texas

- Homestead Issues

- Can we do?
  - What do folks do with property? Leased out or their 2\textsuperscript{nd} or vacation home?
  - Is the lease written with at least 6 months to run?
  - Do they claim a homestead tax exemption?
  - How often do the owners use the property?
    - How do we know?
      - Question neighbors
      - Look at receipts for plane tickets
      - Where’s their driver’s license from?
      - Letter from employer that job is in Michigan?
      - Bought or inherited?
Mechanic’s Lien Before You Buy

If you get a new roof before you close on the property, can the roofer claim a lien that primes your purchase money lien?

– Generally, yes, even though you intended it to be Homestead…but shouldn’t you have used a Mechanic’s Lien contract? Even if you didn’t own? Probably needed the owners to sign.

What if the then owner contracted for the roof?

– If he had another HS, then no MLC needed
– Need Sellers Affidavit to swear to no unpaid work
– Ask inspector to be on the lookout for new stuff
Contracts For Deed

Recent legislation states that a contract shall be the same as a Vendor’s Lien

– 5.019(a) of the Property Code provides that a recorded contract for deed “shall be the same as a deed with a vendor’s lien” for the unpaid contract price and a general warranty is implied unless limited by the recorded contract.

Does this mean that a lender can treat the payoff of a contract for deed as a sale?

– Maybe, but that is not our issue. We still need a deed from the seller to the buyer

– Underwriting Note: Shall be the same as is an uncertain legal phrase.
Easements

Can we insure an easement that is a benefit to our main insured property?

– Yes. See item 2 of the Commitment: *The interest in the land covered by this Commitment is:*

– There is no prohibition against insuring a fee simple tract and an easement tract.

– The easement should be in writing and it should also be excepted to in Schedule B of the policy.
Good and Indefeasible v. Marketability

Sec. 2502.002. COVERAGE FOR UNMARKETABILITY OF TITLE PROHIBITED.

(a) An insurance company may not insure against loss or damage by reason of unmarketability of title.

(b) The commissioner may not adopt a rule or form providing for coverage prohibited by this section.

What is unmarketable title?
Excluded from coverage in the T-1: *The refusal of any person to purchase, lease or lend money on the estate or interest covered hereby in the land described in Schedule A because of Unmarketable Title.*

In other words, there is an issue with the title that would allow a buyer to terminate the contract since the seller couldn’t provide a deed without the possibility that someone holds an enforceable interests against the property.
Good and Indefeasible v. Marketability

What is good title?
– A title that is free from doubts and is able to be sold with the knowledge that it is clear and valid.
– Defect-free, claim-free and lien free.

What is indefeasible title?
– A title which cannot be defeated, revoked, or made void
Good and Indefeasible v. Marketability

So, what’s the difference?

A person who loses a sale because of a technical defect (say a defective acknowledgment less than 2 years old) could require the title company to pay damages for the lost sale (marketability).

In the Texas system, there is a duty to defend an attack on the title and pay if someone’s rights are superior but only after the rights are adjudicated to be superior.

In the above example, since no one is challenging the validity of the deed, there is no duty to defend or take action to correct, especially with only months until the defect cures.
What is a title defect?

• Something imperfect in the execution or recording of a document
• A property that has an unsatisfied lien against it.

_A cloud on the title:_ An outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question. A conveyance, mortgage, judgment, tax-levy, etc., may all, in proper cases, constitute a cloud on title.

(Black’s Law Dictionary)
Statutes of limitations can cure clouds and defects.

- 4 years after a debt becomes due
- 10 years for AJ to people and entities
- 20 years for AJ to a government
- 3, 5, 10 or 25 years of adverse possession depending on facts
- 5 years for UCC-1 filings
- 6 years for fraud
- 2 years for defect acknowledgments
Covered Matters

• Defects caused by defective electronic recordings especially if the problem caused by the filer
  – Example: sent to wrong clerk’s office

• Powers of Attorney
  – Used after death
  – Used before declared incompetent if that is called for
  – Conveyance by agent to agent unless specifically allowed
  – No power to sell, encumber, convey real estate
  – Bad acknowledgment
  – No proof of signed in lender, attorney or title company for Home Equity Loans
As one technology commentator put it,

“A computer lets you make more mistakes faster than any invention in human history—with the possible exception of handguns and tequila.”

-Herb Brody-


From an online article by W. Kelly Stewart and Jeffrey L. Mills of Jones Day (http://www.jonesday.com/files/Publication)
Court Cases

A lis pendens is a notice that a case has been filed challenging the title to real estate. A searcher is obligated to review the pleadings to see if the case does so.

For example, a car wreck case doesn’t normally involve title to real estate, but beware of a case involving land like a dispute over earnest money that could be changed into a title case with new pleadings.

Underwriter approval is required when there is a lis pendens.
Police Powers of the Government
The coverages and exclusions for police powers are in the T-1 in a give and take manner.

Covered Risk 5 & 6
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:

a) the occupancy, use or enjoyment of the Land;

b) the character, dimensions or location of any improvement erected on the Land;

c) subdivision of land; or

d) environmental protection

– if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only the extent of the violation or enforcement referred to in that notice.
Police Powers

Covered Risk 6

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
Exceptions

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:
   i. the occupancy, use, or enjoyment of the Land;
   ii. the character, dimensions or location of any improvement erected on the Land;
   iii. subdivision of land; or
   iv. environmental protection;

   or the effect of any violation of these laws, ordinances or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5

(b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
So, what’s really happening here?

Essentially, the policy excludes from title insurance coverage the rights of the government to regulate land use, the types of buildings built on the land, subdivision ordinances and environmental protection matters unless the government has filed a notice in the public records asserting a violation or intent to enforce (limited to what’s in the notice).
Example

A house built on the property that violates the setback lines

– The violation is not covered.
– Unless the government has put a notice of record that the house is violating the setback line requirements of the city’s zoning ordinances.
– If the city later records the notice, it would be a post policy event and not covered.
Lack of Loan Priority

Loan priority is one of the major coverages of the loan policy (T-2 and T-2R). See covered risks 10 and 11:

10. The lack of priority of the lien of the Insured Mortgage over any other lien or encumbrance.

11. The lack of priority of the lien of the Insured Mortgage

   a. as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory or constitutional mechanic’s, contractor’s, or materialman’s lien for services, labor or material having its inception on or before Date of Policy; and

   b. over the lien of any assessments for street improvements under construction or completed at Date of Policy.
Lack of Loan Priority

Issues:

– Prior Deeds of Trust of record
– Mechanic’s Lien contracts of record
– Prior easements across the property of record
– Outstanding mineral interests of record
– Street assessment and other governmental liens like mowing liens of record.
Lack of Loan Priority

How do we know what to except to or obtain releases of?

– The classic search and examination of the title

If such matters are found in the search, then we need to take exception or obtain a release of those matters.

Failure to do so may lead to loss of priority and loss (or at least the expense of defending the priority of the insured loan).
Lack of Priority Over Loan Advances

While this coverage does have value, Texas case law unlike some other states allows a lender with priority to continue to make loans even if there have been Mechanic’s Liens filed.

If a lien claim has been made asserting that the claimant has priority over the insured loan, underwriter approval of continued advances would be required, particularly when issuing T-3 Down Date endorsements.
TDI Enforcement Actions

For a detailed look at enforcement actions:


Unfortunately, you have to scroll through the list since title is not well represented, but we will show a few here in this presentation:
TID Enforcement Actions

Telly Smith; Telly Smith d.b.a. Exodus Title Company of Houston

- Order Number: 4273
- Date of Order: 1/22/2016
- Action Taken: (SOAH Docket No. 454-16-1220.C) Cease and desist from engaging in unauthorized insurance
- Violation: Unauthorized insurance; engaged in false, misleading or deceptive practices
TDI Enforcement Actions

Lawrence, Angela Victoria of San Antonio

– Order Number: 4081
– Date of Order: 8/12/2015
– Action Taken: (SOAH Docket No. 454-15-4730.C) Escrow officer license revoked
– Violation: Failed to provide complete information on closing and settlement statements; Misappropriated, converted to own use or illegally withheld money belonging to a title insurance agent, direct operation, or another person
TDI Enforcement Actions

LenderLive Title Agency, LLC of Dallas

- Order Number: 4094
- Date of Order: 8/21/2015
- Action Taken: Fined $1,000
- Violation: Failed to timely submit annual trust fund account audit
TDI Enforcement Actions

Metropolitan Escrow and Title, L.L.C. of Houston

– Order Number: 4019
– Date of Order: 6/25/2015
– Action Taken: Fined $1,400
– Violation: Failed to timely submit annual trust fund account audit
TDI Enforcement Actions

Ector County Abstract & Title Co., Inc. of Odessa

- Order Number: 3953
- Date of Order: 5/11/2015
- Action Taken: Fined $3,000
- Violation: Misrepresented completion of continuing education requirements by escrow officer
TDI Enforcement Actions

Contact Escrow, Inc. of Camarillo, CA

- Order Number: 3864
- Date of Order: 3/16/2015
- Action Taken: Cease and desist
- Violation: Engaged in unauthorized business of insurance
TDI Enforcement Actions

Global American Title Agency, Inc. of Allen

– Order Number: 2096
– Date of Order: 12/5/2012
– Action Taken: Fined $15,000
– Violation: Failed to comply with provisions of the title insurance basic manual
TDI Enforcement Actions

Alamo Title Company of Tarrant County, Inc. D/B/A Alamo Title Company of Colleyville

– Order Number: 120864
– Date of Order: 11/5/2012
– Action Taken: Fined $10,000
– Violation: Permitted unlicensed individuals to act as escrow officers; Failed to comply with provisions of the title insurance basic manual
TDI Enforcement Actions

Waypoint Title of Austin, L.L.C. of Austin

– Order Number: 120850
– Date of Order: 10/26/2012
– Action Taken: Fined $1,500
– Violation: Failed to timely remit title insurance policy guaranty fees
TDI Enforcement Actions

Benchmark Insurance Company of Eden Prairie, MN

- Order Number: 12-0159
- Date of Order: 9/26/2012
- Action Taken: Fined $5,000
- Violation: Failed to provide on-site visit or other appropriate services to policyholders with $25,000 or more in premium
TDI Enforcement Actions

Stewart Title Guaranty Company, Stewart Title San Antonio Division A/K/A Stewart Title of San Antonio

- Order Number: 120741
- Date of Order: 9/11/2012
- Action Taken: Fined $12,500
- Violation: Failed to collect promulgated premium for second mortgagee policy; Failed to timely report directly-issued policies; Failed to comply with provisions of the title insurance basic manual
TDI Enforcement Actions

Vantage Point Title, Inc. of Irving

– Order Number: 120697
– Date of Order: 8/16/2012
– Action Taken: Fined $48,500
– Violation: Failed to comply with provisions of the title insurance basic manual; Charged and collected premium different than rate fixed and promulgated by Commissioner
TDI Enforcement Actions

And many more in 2012 and before.

Including:

Tarrant Title, LLC D/B/A Attorneys Title Company of Dallas

- Order Number: 120141
- Date of Order: 2/16/2012
- Action Taken: Fined $50,000; Title Insurance Agent License revoked
- Violation: Failed to comply with provisions of the title insurance basic manual
Contact Info

John Rothermel
SW Regional Underwriter
Senior Vice President
Senior Underwriter

Stewart Title Guaranty Company
San Antonio, Texas
210.590.1981
john.rothermel@stewart.com
stewart®

Real partners. Real possibilities.™