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The Docket: Potential Claims Hiding in Plain Sight

February 28, 2023

The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry.

Lance Pomerantz reviews a recent Montana case that illustrates how a seemingly obsolete document in the land records can expose a title insurer to an unanticipated defense obligation. Pomerantz is a New York-based sole practitioner who provides expert testimony, litigation consulting and strategic advice in land title disputes. He can be reached at **lance@landtitlelaw.com**.

Citation: *Towsley v. Stanzak,* 2022 MT 217, 519 P.3d 817 (2022).

Facts: Prior to April 1975, Margaret Rose owned a large tract of land. At that time, she recorded Certificate of Survey 569 (COS 569), which created a new 23.24-acre parcel (Parcel 1) from Rose's original tract. COS 569 also depicted a "private road easement" about a quarter-mile long, over Rose's remaining lands, for the benefit of Parcel 1 (the "COS 569 Easement"). In July 1975, Rose recorded COS 648, which divided her remaining lands and depicted an access easement for Parcel 1, along with the notation it was a "REPLACEMENT EASEMENT FOR C.S. #569 PARCEL." In 1977, Rose entered into a contract of sale with Benjamin for Parcel 1 and they recorded a Notice of Purchaser's Interest (NPI) as part of their transaction. The NPI described Parcel 1, along with an access easement "according to the [COS] 569, thereof on file and of record." The NPI also provided for installment payments toward the purchase price and "upon payment in full of the purchase price, … the escrow agent is instructed to deliver the said Warranty Deed to the Buyers." The escrow never closed.

Over time, Rose subdivided Parcel 1, creating separate access easements for each new parcel in locations other than that depicted on COS 569. In 1980 and 1984, Rose conveyed the subdivided parcels, along with the newer access easements, to Kenneth and Teri Benjamin by separate deeds, without mentioning the COS 569 Easement. Stanzak—and the other appellants in the dispute—are the present-day owners of these subdivided parcels. In January 2020, they contended they had rights to use the original COS 569 Easement to access their properties based on the recorded NPI.

Holding: The court held the NPI, because it lacked "language of conveyance," merely provided notice of a potential grant of the property, to be effectuated by deed upon future performance of the contract, and was not effectuated by the NPI itself. Likewise, the NPI failed to meet the criteria for a statutorily permitted "abstract of conveyance," because such a recorded abstract must be an abstract of an instrument of conveyance, *i.e.* one creating, granting, assigning, surrendering or declaring an interest in real property, which did not exist in this case.

Relevance to the Title Industry: Although the reported decision makes no mention of title insurance, the facts of the case illustrate the dangers of failing to include a title policy exception for "obsolete," "replaced, "expired" or "lapsed" documents found in the public records. Although they might seem irrelevant, and very well may not give rise to concern in many subsequent transactions, there is always a risk that creative lawyering might impose a defense obligation on an insurer far in the future. It's always prudent to raise an exception in the first instance, and, if pressed, tailor coverage to precisely account for that risk.

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