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The Docket: How Does a Public Record Become a 'Public Record?'

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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.

Today's review of a recent Montana case concerning an insurer's obligation to search the public records was provided by Lance Pomerantz, a sole practitioner in New York who focuses solely on land title issues. He can be reached at lance@landtitlelaw.com.

Citation: Harpole v. Powell County Title Company, et al., 2013 MT 257 (2013)

Facts: Harpole, the seller, sued the title agent and underwriter claiming they negligently misrepresented the status of the access road into his property and thus foiled a potential sale of the property.

In connection with a proposed sale, the agent searched the records located in the county treasurer's office, clerk and recorder's office, the clerk of court's office and the commissioner's office. These searches revealed nothing to indicate that the sole access road to the property had been designated as a county road and that there was no recorded easement granting access. Hence, the commitment contained an exception for "lack of right of access to and from the subject property."

Harpole then undertook his own investigation, which lasted three months and led him on an odyssey through four different Montana cities. He eventually found a 1903 road record document located in a vault in the clerk and recorder's office at the local county courthouse. The county attorney eventually opined that the document established that the access road was, in fact, a lawfully dedicated county road. As a result of these efforts, the agent deleted the exception pertaining to lack of legal access in an amended commitment. Alas, while this intricate scenario was playing out, the sale fell through.

Harpole's suit claimed the agent and underwriter failed to conduct "a reasonable search and examination of the title" as required by state law, and, consequently, were negligent *per se*. He also asserted the companies had negligently misrepresented the status of the road in the original commitment. He claimed damages caused by the loss of the sale and ensuing "severe emotional distress."

Holding: The title companies prevailed. Montana law states that a title insurer has a duty to base its title commitment upon a reasonably diligent title search of the "public records." "Public records" means "title records that give constructive notice of matters affecting [the] title according to the state statutes." Even though the 1903 document was a "record" in the custody of a "public" official, it was not a "public record" because it wasn't recorded or filed.

Relevance to the Title Industry: This decision delineates the parameters of an insurer's research obligation. It would be wholly unrealistic to require the expenditure of hundreds of hours and travel throughout the state in order to conduct a "reasonably diligent search."

Read the full opinion here.

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