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MATERIALS

The Importance of Legal Descriptions (Webinar)

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WHO'S WHO SPEAKER BIO



Christina Taylor, Esq.

Speaker and Education Specialist

Christina Taylor is the Speaker and Education Specialist for Fidelity National Financial, Florida Agency based in Maitland, Florida. She currently travels throughout Florida teaching FNF Florida Agency agents by means of engaging and thought provoking continuing education and training presentations. She has extensive public speaking experience, specializing in subjects relating to the title industry and real estate law, as well as topics with professional development and motivational themes. Christina's responsibilities also include research, development, and presentation of these topics. Prior to her training role, she served as Underwriting Counsel with the Company, providing underwriting support to agents and working to resolve issues associated with commercial and residential real estate closings. She has been with FNF Florida Agency since 2000.

Before joining FNF Florida Agency, Christina practiced real estate law with a prominent law firm in Orlando. She earned her law degree from the University of Florida Frederic G. Levin College of Law and her Undergraduate degrees in Business Administration and Music from Palm Beach Atlantic University in West Palm Beach, Florida. Christina is currently a member of The Florida Bar. She is certified as an instructor for numerous accrediting agencies in Florida, including The Florida Bar and The Florida Department of Financial Services. In addition to speaking at FNF Florida Agency events, Christina gives presentations to numerous title industry associations and organizations throughout Florida.

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WHO'S WHO SPEAKER BIO



Daniel R. Osborne, Esq.

Underwriting Counsel

Daniel currently serves FNF Florida Agency as Underwriting Counsel. Prior to joining FNF Florida Agency, Daniel was employed with Fidelity National Financial as Vice President and Senior Claims Counsel. Daniel joined FNF in August 2014 and worked on claim matters throughout the eastern half of the United States, including high-exposure matters, matters in litigation, and in which the Company is a named defendant. Prior to joining FNF, Daniel worked in private practice at the law firm Bradley Arant Boult Cummings (BABC) in Nashville, Tennessee. He was in the Litigation and Financial Services practice groups. Daniel worked at a default servicing firm in Arkansas prior to joining BABC.

Daniel received his undergraduate degree from the University of Tennessee at Knoxville in 2008 and received his Juris Doctorate from the University of Arkansas at Little Rock in 2010. Daniel is licensed to practice law in Tennessee and Arkansas and has an in-house certification with Florida.

THE IMPORTANCE OF LEGAL DESCRIPTIONS (WEBINAR)

I. The Basics: Why a Proper Legal Description is Necessary

A. Indispensable part of the real estate contract to sell, *Kington v. Boone*, 92 Fla. 560, 109 So. 580 (1926), *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 220 So.3d 457 (Fla. 5th DCA 2016)
   1. Must sufficiently describe the property to be sold or provide means for identifying the property with reasonable certainty in order for the real estate contract to be valid and enforceable, *In re Clark*, 289 B.R. 474 (Bankr. M.D. Fla 2003)
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B. Creation and examination of the title search report ("TSR"), title commitment and title policy
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   1. Test of sufficiency of property description, Florida Uniform Title Standard 21.1
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D. How failure to verify the legal description in the contract may result in a lengthy lawsuit after closing, *Diehl v. Hull*, Case No. 22 NO 0489, 7th Appellate District, Noble County, Ohio, December 30, 2022.

II. Hindsight is 20/20

A. Claims example where the title insurance underwriter paid a claim due to the failure to require the release of a mortgage on the insured property
   1. Because the legal description on the mortgage was not properly indexed by the recorder's office, nor properly reviewed by the title agent, there was no requirement in the title commitment to obtain a release of the property from that mortgage
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III. Gaps, Overlaps and Surveyor's Notes

A. Underwriting requirements for a gap (a hiatus or break between 2 adjacent properties where a portion of the property is not included in either property's legal description)
   1. When survey reveals a gap due to reliance on a distance call instead of reliance on bounding to a monument, Surveyor's Rules of Construction

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C. Review of surveyor's notes that reveal potential boundary inconsistencies, Fla. Admin. Code, Section 5J-17.052(2) and Section 5J-17.052(3)

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B. Claims example of conflict between the plat and the survey, the survey was relied upon for the deeds while the tax collector relied on the plat resulting in eviction actions by the tax deed purchaser

C. Use of additional tools to assist in review of the legal description such as the property appraiser's website

V. Things are Not Always as They Seem

A. When an incorrect legal description is still insurable

B. Even when a Personal Representative's Deed uses an incorrect legal description, a corrective deed is likely *not* required because title passes at the death of the decedent, Sections 732.101 and 732.514, Fla. Stat., Florida Uniform Title Standards 5.1 and 5.2

C. Attempts to correct a defective legal description
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D. If there is a conflict between specific description and statement of acreage, then the specific description prevails over the statement of acreage, Florida Uniform Title Standard 21.4

Introduction

This course presumes you possess a basic understanding of the principles of a valid legal description in Florida; for example, the function of the legal description to identify property, the various types of legal descriptions, the relationship between the physical location of the property (as evidenced by a survey and observation) and the public records, and the requirement for a valid legal description in order to issue a title insurance policy.

Building upon that foundation, this training will focus on *why* a proper legal description is necessary, which will most easily be revealed by considering the complications that arise when a legal description is challenged as inaccurate or invalid. We will also recommend several underwriting guidelines and best practices to ensure that any problematic legal descriptions are dealt with prior to closing.

Why a Proper Legal Description is Necessary

An Indispensable Part of the Real Estate Contract

For real estate contracts, a description of the land to be conveyed is an essential part of the agreement to sell the property. If the legal description is ambiguous or omitted, an essential term of the contract is absent.[1]

At a minimum, a conveyance of real property must describe or identify the land.[2] A legal description is sufficient if the reference to the particular property is identifiable to the exclusion of all other property.

As a reminder, Florida's Statute of Frauds requires that a real estate contract for the sale of lands (or for a lease of lands for a period longer than 1 year) must be in writing and signed by the party to be charged in order for any action to be brought upon that contract.[3]

Creation and Examination of the Title Search Report

You should always look for the property description in the real estate contract, which will usually include both a legal description and an address, and sometimes will include a parcel identification number assigned by the Property Appraiser. If your transaction involves a loan secured by a mortgage, the lender may provide a legal description in the Loan Estimate, the Closing Disclosure or other financing documents.

For title insurance purposes, you must utilize and rely upon the correct legal description, not the address or the parcel identification number. To place your title order, you must provide the legal description to a title examiner to perform the title search. The examiner will run a search of the property using that legal description in the public records in the Florida county where the property is located. The examiner will also use the legal description to collect tax information for the property. The examiner will gather the information and will evidence their findings in a title search report ("TSR"), which is the basis for the creation of the title insurance commitment.

Under Florida law, in order to issue a title commitment, and eventually a title policy (and to collect the premium for doing so), you must perform "Primary Title Services." You, as the issuing title agent, must determine insurability using sound underwriting practices based upon evaluation of the title search.[4] This includes your determination that the legal description is valid and reliable to insure the deed and/or mortgage in your transaction, as shown in the final title policy.

Along with the real estate contract, you may be provided a copy of a prior Owner's Policy and/or a prior survey. You should confirm the legal description on those documents matches the contract and the last deed of record as shown in the TSR.

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[1] *Kington v. Boone*, 92 Fla. 560, 109 So. 580 (1926), *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 220 So.3d 457 (Fla. 5th DCA 2016).
[2] *In re Clark*, 289 B.R. 474 (Bankr. M.D. Fla 2003).
[3] Section 725.01, F.S.
[4] Section 627.7711(a)(b), F.S.

To Properly Transfer or Mortgage Property and Insure Title

Every instrument relating to the conveyance or mortgage of property must have a precise and locatable description, which is unique, so that the property can be identified. To properly transfer or mortgage property and to insure title, a correct, definite and precise legal description is required. You should not include an address or parcel identification number in the legal description of your title commitment and the title policy, but solely insure the property in Schedule A by the legal description.

Not only is an adequate legal description required to insure a deed or mortgage, but it is also necessary to impart constructive notice to third parties.

Test of Sufficiency

In order to be sufficient, the legal description on a deed must be such that a surveyor, by applying the rules of surveying, can locate the property. The deed will be valid if it is possible from the whole description to ascertain and identify the land intended to be conveyed.[5] Generally, this means that the surveyor, using only the description and his equipment, is able to locate the specific boundaries of the property, not just its general location.

You should not assume that a legal description is valid, but instead should evaluate the legal description in every transaction. Evaluating the sufficiency of a legal description is an important skill for you, as the title agent. Deeds that contain vague or indefinite legal descriptions may not be insurable, resulting in title remaining vested in the grantor or subject to a suit for reformation of the improper deed.

Consistency Throughout the Entire Transaction

You must use the same legal description for the duration of the transaction in each of the various transactional documents, including, but not limited to, the real estate contract; the title commitment; the insured deed, mortgage, and other documents; and the title policy. If you find a discrepancy in any of these documents, you should not proceed with your transaction until the discrepancy is resolved. To find a resolution, you may need to contact your examiner, the parties or the parties' agent, the surveyor, or additional experts to assist you. You may also contact the Underwriting Department with any questions.

Problematic Legal Descriptions

Failure to properly identify real property will likely result in an ineffective conveyance; that is, title failing to pass from the grantor to the grantee. A deed that omits the legal description is generally void and uninsurable because title does not pass from the grantor to the grantee.

Description by Street Address

A legal description by street address alone is generally not sufficient for title insurance purposes, although it may be included on an instrument for informational purposes, so long as the instrument also contains a valid legal description. A street address is a method of identification used by the U.S. Postal Service and municipalities and refers to the actual mail receptacle. This type of description does not sufficiently describe the boundaries of the property. Moreover, a street address may describe more than one parcel, tract or lot, or may be assigned to a large tract that does not adequately describe smaller subdivisions within the tract and a street address may also be renamed or renumbered.

Potential for Claim under the Title Policy

If you insure a deed or mortgage with an ambiguous or problematic legal description, it likely will result in a claim under the policy.

An Ounce of Prevention is Worth a Pound of Cure

A recent Ohio case illustrates the importance of a valid legal description at the contract stage of a real estate transaction and how far reaching a problematic legal description can be. The real estate contract, recorded in December 2011, described 16 parcels of land, totaling approximately 383 acres. At some point before closing, it was revealed that the Seller may not have owned 6 of the parcels included in the contract. Due to the issues

[5] Florida Uniform Title Standard 21.1, The Uniform Title Standards of the Florida Bar Real Property, Probate & Trust Law Section.

surrounding those 6 parcels, the warranty deed signed by the grantor in July 2012, contained discrepancies from the contract, including ambiguity as to the number of parcels and acres. The warranty deed listed only 10 parcels and omitted the acreage. A title insurance policy was issued.[6]

In September 2020, the Buyer filed a complaint against the Seller and the title agency, naming both as defendants. The Buyer claimed that he was deeded far less than what was agreed to in the contract, while the Seller claimed that any difference in the acreage was miniscule. Specifically, the Buyer alleged that the title and closing agent breached their duty by failing to perform their part of the contract to transfer 16 parcels. The Buyer also claimed that the deed he received at closing was not the original deed and was fraudulent, amongst other obscure allegations and arguments.

Although the trial court granted both defendants' motions for summary judgment in December 2021, the Buyer continued the case on appeal and sought a new trial based on newly discovered evidence. After numerous statements that the facts were unclear, in December of 2022, the appellate court affirmed the lower court's decision in favor of the Seller and the title agency based on the expiration of the state's statute of limitations for the issues.[7]

Ambiguities: Intention of the Parties

Interpretation of a deed should be consistent with the manifest intention of the parties and is a question of law for a court to resolve.[8] If a legal description in a deed is ambiguous, a party may challenge the deed in court, as seen in this Ohio appellate case.

Therefore, you should not attempt to interpret an ambiguous legal description. Sometimes it may be necessary that the parties clarify a legal description by modifying it to accurately reflect their intent. Other times a survey may be required to determine an accurate legal description. Any ambiguity must be resolved prior to closing, so that all documents in your transaction, from contract to final title policy, include an unambiguous legal description to which all parties agree. Similarly, if the quantity of land is in question (such as the number of parcels or the amount of acreage to be conveyed), you should not proceed to closing until the matter is resolved and reflected in your transactional documents (which may need to be amended to reflect the proper legal description).

Acreage – Generally

If a deed contains a specific description of the property, such as metes and bounds or reference to a plat, together with a statement of the acreage, the specific description prevails over the statement of acreage, unless an intent to convey a certain quantity is clearly stated.[9] In other words, the specific description in an instrument will prevail over a reference to acreage, *unless* the intent to describe a quantity certain is indicated in the description; for example, *"14.5 acres described as follows…"*. In this example, the general standard would not apply (where the more specific description controls over the acreage) and you should resolve any discrepancies between the specific description and the statement of acreage prior to closing.

However, if you determine that there is no intent to convey a certain quantity of land by reading the entire deed, the described land is insurable as described, even if acreage is inconsistent with the description; for example, a metes and bounds description followed by the words *"the same being 25 acres, more or less."* If the acreage amounted only 24.5 acres, the more specific metes and bounds description controls and is reliable.

[6] The facts of the case fail to include the legal description set forth in the title policy.
[7] *Diehl v. Hull*, Case No. 22 NO 0489, 7th Appellate District, Noble County, Ohio, December 30, 2022.
[8] If there is no ambiguity in the language of the legal description in a deed, then the deed will be taken at face value, ascertaining the grantor's intent from that language leaving no room for court to construe or interpret the language. *City of Clearwater v. BayEsplanade.com, LLC*, 251 So.3d 249 (Fla. 2d DCA 2018). However, if there are ambiguities, Florida courts will consider the language of the entire instrument and extrinsic evidence to determine the intent of the parties, with an eye for effectuating the grantor's intent. *Nourachi v. U.S.*, 632 F. Supp. 2d 1101 (M.D. Fla 2009).
[9] Florida Uniform Title Standard 21.4.

Acreage – Title Policy Exclusion from Coverage

When preparing a commitment or policy, you should not include references to acreage, square footage, or other measurement of volume or quantity of land in the legal description because the policy only insures the land described in Schedule A by legal description (and improvements thereon).

Moreover, the ALTA 2021 Owner's Policy and the ALTA 2021 Loan Policy (with Florida modifications) contain Exclusions from Coverage, specifically Exclusion 7 (Owner's Policy) and Exclusion 9 (Loan Policy), where the company will not pay loss or damage that arises by reason of:

7. *Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.*

Including the acreage in the commitment or policy may suggest to the insured that a certain quantity of land is guaranteed or insured, which is not the case.

Hindsight is 20/20

A Real Life Claims Example

The Facts

- In 2003, Ryan purchased condominium Unit 1 taking out a $254,000 mortgage - Mortgage #1.
- Loving the condominium, in 2005, Ryan purchased another unit, Unit 2, taking out a $550,000 mortgage - Mortgage #2.
- Mortgage #2 only listed the street address for Unit 2, but the legal description included both Unit 1 and Unit 2.
- The clerk recorded Mortgage #2, but indexed it with reference only to Unit 2.
- In 2007, Ryan paid off Mortgage #1, receiving over $87,000 in proceeds.
- Ryan then conveyed Unit 1 to Regis.
- The examiner missed that Mortgage #2 included Unit 1 in the legal description, and the Company issued a $475,000 Owner's Policy to Regis without exception for Mortgage #2.
- Regis and his wife Joy moved into Unit 1.
- Eight years later, Regis received service of a foreclosure complaint from Mortgage #2 Lender seeking to foreclose on Unit 1. Regis tendered a claim to the Company.
- Ryan then filed a Chapter 7 bankruptcy proceeding in a different state.[10]
- Due to passage of time and difficulty to prove that Ryan knew that he actually intended to encumber both units, the Company was left with nominal settlement opportunity as to Ryan and forced to continue providing a defense to Regis, its insured, in the foreclosure.
- Ultimately, in addition to legal fees incurred in both the bankruptcy and foreclosure proceedings, a settlement was reached that included a payment from the Company in excess of $300,000 to obtain a release of Unit 1 and avoid the risk of loss to Regis of his condo unit.

Lesson Learned

It is imperative that you examine the recorded instruments as a whole to confirm whether there is potential for them to affect title. If the examiner would have reviewed the entire legal description in the document (Mortgage #2), instead of only considering the clerk's indexing and the street address contained in the document, then the commitment for the sale of Unit 1 to Regis would have included a requirement for a partial release of Unit 1 from

[10] Note, Ryan's filing of Chapter 7 bankruptcy also triggered an automatic stay of the state court foreclosure proceeding, further delaying any resolution in the foreclosure case.

Mortgage #2. This requirement would have avoided years of litigation for the insured, as well as significant loss and fees incurred by the Company.

Gaps, Overlaps and Surveyor's Notes: Oh My!

A gap, sometimes referred to as a hiatus or gore, is an area between two surveys which is not described in either adjacent owner's deed. An overlap is where two adjacent owner's deeds describe the same property (both deeds cover part of the same lands). In an overlap, the lands surveyed are in conflict, where part of an area of one survey extends over and covers a part of a different survey.

You may discover a gap or overlap in your review of the survey. The Florida Standards of Practice for Boundary Surveys require the surveyor to describe all monuments on the survey and require the surveyor to address, clearly indicate, and explain potential boundary inconsistencies, including overlapping descriptions or hiatuses.[11] When the results of the survey differ significantly from the record, The Florida Standards also require the surveyor to explain with notes on the face of the survey.[12]

An ALTA/NSPS survey must include the relationship of the boundaries of the surveyed property to the adjoiners for contiguity, gaps and overlaps. Any gaps or overlaps between multiple parcels must be identified and disclosed to the title insurer and the client.[13]

You may also encounter a gap or overlap by other means, such as a notation on the property appraiser's website, the plat or from disclosure by the parties or the parties' agents.

It is possible that very small gaps (a few tenths of a foot or less) could be ignored; however, larger gaps may be problematic. Although the gap parcel is not insured (since it is not included in the legal description in our policy), a claim may still result where the owner of the gap parcel asserts a claim for access through the subject parcel under a common law claim for entitlement to an access easement.[14] In an overlap, it will be necessary to first establish which owner has superior title to the overlap area; but even so, an overlap represents an adverse claim to title and should not be ignored.

If you have knowledge of a potential gap or overlap, you should not proceed with your transaction until the issue is resolved. To find a resolution, you may need to contact your examiner, the surveyor, or additional experts to assist you before proceeding. Your FNF Florida Agency Underwriting Team is also available to assist you with any questions.

Barking Up the Wrong Tree

Live from Chicago – A Home Built on the WRONG Lot

After residing in a home for more than a decade, a Chicago couple learned that the property upon which their home was built was sold for delinquent property taxes. For years, the couple had been paying property taxes on the vacant lot next door.

How did this happen? The deed, mortgage, survey, title insurance policy and assessments named the correct lot, Lot 39. However, the builder erroneously built the couple's house on the adjacent lot, Lot 38. For years, the County also assessed the unimproved Lot 39 as one with improvements, which the couple paid. All the while the taxes for Lot 38 went unpaid and defaulted. The County unilaterally realized the error, adjusted their records for the unimproved Lot 39, and subsequently proceeded to sell Lot 38, the property that the couple had been residing in, for delinquent taxes.

The couple was required to settle with the Company who bought Lot 38 at the tax sale, presumably obtaining a deed from the Company to the couple; however, this required the couple to pay $43,000 plus attorney fees, not to mention the overpayment of taxes for the unimproved Lot 39 which the County took the position were nonrefundable.

[11] Rule 5J-17.052(2) and (3), F.A.C., governing Professional Surveyors and Mappers.
[12] Rule 5J-17.052(1), F.A.C.
[13] ALTA/NSPS Minimum Standard Detail Requirement 6(b)(vii).
[14] Such as an easement by necessity or a prescriptive easement.

Was this Covered Under the Owner's Policy?

Although this is an unfortunate tale, the couple's problem is not a title defect that falls within coverage of a typical owner's title insurance policy. If this had occurred in Florida, the Commitment and Owner's Policy insure that the couple was vested in and held title to the unimproved Lot 39. The couple's ownership of Lot 39 is not in question and there is not a title defect for Lot 39. The delinquent taxes are related to Lot 38, which was not insured in Schedule A under their policy.

A Local Example – A Recipe for Disaster

Similar to the Chicago example, the Company was involved in undertaking a massive replat effort relating to a development in North Florida.

- After recording of the initial plat and prior to starting development, in 2001, the developer hired a surveyor to craft a survey for an entire government lot within the plat. This survey essentially included all lots within 6 blocks of the platted subdivision.
- The surveyor who prepared the 2001 survey made some miscalculations resulting in the survey having measurements several hundred feet off from the lines as drawn on the plat. A few houses existed based on the initial plat, but from the early-2000s until 2011, various lots were developed on which houses were constructed based solely on the erroneous survey.
- To complicate matters, the County approved building permits based on the erroneous survey, but taxed and assessed the lots based on the plat.
- As development slowed and vacant lots went to tax sale, tax deed purchasers realized that the advertised unimproved lots included improvements and many of those houses were occupied by the Company's insureds.
- The tax deed purchasers began initiating ejectment actions in an effort to evict various owners from their occupied properties.
- In an effort to rectify the issue, the County sent out letters to all affected owners suggesting that they contact their title insurance carrier.
- This resulted in around 18 owner's claims, and their various lenders who were also insured, with ultimate policy exposure estimated at $1,600,000. Additionally, other underwriters were involved on behalf of their insureds.
- The Company ultimately undertook a massive replat effort, working with the County to obtain requisite approvals, variances, and vacations and redrew all boundary lines that reflected the existing owners' intent (the boundaries of the homes in which they were residing, as constructed on the ground). This required eight years of effort, incurring losses to address various tax deed purchasers and attorney fees incurred not only to defend various insureds in the ejectment proceedings, but also to undertake the replat itself.
- Once the County was on board with the replat, the Company was then required to undertake a declaratory judgment action requesting that the Court provide an Order approving the replat and then subsequently reformed the legal descriptions of all owners and lenders to also reflect the intent and spirit of the replat.

Why was this covered? There are several differences in the local example versus the Chicago example. In the Chicago example, it was apparent that the owner obtained title to the vacant lot, not the land on which the home was actually built. The builder who built the house on the wrong lot left the owner residing in a house on land not insured under the policy. Ultimately, proper recompense should have been sought through the builder, not the title insurer.

In this local example, however, the improvements constructed on various lots in reliance on the erroneous survey caused numerous encroachment issues throughout the entire area of the subdivision, implicating coverage for various insureds. Several individuals resided in a house (or a portion of a house) built on property other than what they technically owned "on the ground." The platted legal descriptions contained in the various owners' deeds,

mortgages, and policies, differed from the improvements on the ground in which they were residing, resulting in various encroachment issues which would fall under Covered Risks in many of their title policies. In addition, the difference in the legals created potential adverse possession challenges to title, due to the length of time in which some owners were in possession of the property that was technically insured to have been owned by another. In many of those policies, the exception for rights of parties in possession had been removed, which also would have implicated coverage for various owners. Additionally, because participation was necessary for a successful replat and to obtain the requisite local government approvals, it was prudent to involve any and all relevant parties to the extent possible. Otherwise, without the replat or the avenue of litigation to cure the deficiencies, there would have been no fix in sight for the issues that existed throughout this area of the subdivision. The claim has been on going for over a decade.

Helpful Tools to Consider

There are many resources available to you, at little to no cost, when reviewing various issues that concern legal descriptions. All of these tools used together can serve to confirm the reliability of the legal description in your transaction.

- An obvious tool is your survey. Does the legal description in the survey match that set out in your closing documents (the contract, the deed, the mortgage)? Does the legal description in the survey accurately reflect the property the parties are intending to purchase and that the Company is agreeing to insure? Are there conflicts between the legal description in the last deed of record and that measured in the field? Are there discrepancies or issues notated by the surveyor? You should also consider the surveyor an additional resource, who you should contact if you have any questions or require revisions to your survey.
- A free tool available to you is tractplotter.com, which allows you to plot out any typical metes and bounds legal description and determine whether the legal description sufficiently closes. Note: if the legal description does not close, it is invalid and must be revised in order to rely on it for title insurance purposes. An invalid legal description in the chain of title will likely require a corrective deed from the prior grantor.
- Another resource to consider is the County Property Appraiser's website. Most County property appraisers include access to a GIS map that will allow you to see the property as it appears on the ground. Tractplotter can also be used to compare the GIS map with the County Property Appraiser, to see if any discrepancies stand out in a visual review. This will typically allow you to see whether there are any glaring issues, such as additional tracts that the parties may potentially intend as part of the transaction and ultimately want to also be insured under their policy.

If Only…

One example involved a boat slip in South Florida. An out-of-state nurse had retired to Naples and made an offer on a house after seeing that a boat slip was included with the lot as part of the purchase. The boat slip was also included in the legal description of the commitment and policy and ultimately insured. The agent, however, missed that the boat slip was separately assessed and failed to redeem outstanding tax certificates on it. A tax deed was issued following a tax sale soon after the purchase. The owner tendered the claim soon after her purchase when she realized that the boat slip was purchased by a local real estate agent at the tax sale.

The Company ultimately accepted coverage for the claim and purchased the boat slip from the tax deed purchaser at roughly 10 times what he paid for it at the tax sale. Had the agent reviewed the property appraiser's website, the agent would have seen the boat slip was being separately assessed and would have realized that when paying the outstanding taxes, such payment should include addressing outstanding tax certificates that had accrued to date.

Things Are Not Always As They Seem

An Incorrect Legal Description May Be Insurable?

For title insurance purposes, so long as a deed adequately describes a parcel owned by the grantor *along with* additional property *not* owned by the grantor, that deed is effective to convey the portion of the parcel that is owned by the grantor.

For example, Kelly Ripa holds title to the South ½ of Lot 1, All My Children Plat. Kelly owns no other portion of Lot 1. She conveys to Kathy Lee Gifford, but the deed uses a legal description of Lot 1, All My Children Plat. For title insurance purposes, that deed is reliable to convey title to the South ½ of Lot 1 of said plat because the deed clearly described a parcel that included the South ½ of that Lot, assuming no challenge to the deed was recorded within a reasonable time.

Deed of Distribution with Incorrect Legal Description is Insurable?

In probate, title passes to the rightful intestate successor (intestate succession) or to the devisee named in a last will and testament (testate succession) at the date of death of the decedent.[15] We sometimes overlook this legal doctrine, tending to erroneously think that title passes when it is distributed by deed in the probate estate. However, that instrument of distribution in the probate is not really a conveyance, but a release of the estate's/Personal Representative's right to sell non-homestead property for valid estate purposes (generally to pay expenses of administration and estate taxes). Therefore, an error in a legal description on a distributive deed in probate which renders the conveyance defective, does not render the title unmarketable and would not require a corrective deed, because title already passed to the grantee at the date of death under the statute.

For example, Regis Philbin owned ABC Acres at the time he died testate. His will was admitted to probate in Florida, the estate was administered, and the PR was discharged. Regis's will contained a devise of ABC Acres (non-homestead property) to his widow Joy, but the legal description in the petition for discharge and distribution was incorrect. Joy then conveyed by proper legal description to Michael Gelman. Gelman's title is marketable because title passed to Joy under the will as of the date of Regis's death.

Attempts to Correct a Defective Legal Description

Minor Errors in the Legal Description

A minor error in the legal description may be considered insignificant and thus may be corrected with a Scrivener's Affidavit. For example, if an error in the name of the subdivision/plat or condo project is slight enough that it can be shown that no other recorded subdivision/plat or condo project is so similarly worded to be confused with the description in error, then the clerk of court, a surveyor or a title professional familiar with the records of plats or condo declarations in that county can execute an affidavit to correct the error.

Also, a Scrivener's Affidavit can be used to clarify *one* minor error in a deed; however, the statute has specific requirements that must be met.[16] Only *certain* minor errors qualify; for example, a *single* error or omission in the lot or block of a platted subdivision, or a *single* error or omission in the unit, building or phase of a condo. Plus, you must confirm that the owner did not own other property within the same subdivision or plat. If more than one error exists, then the curative notice cannot be used.

[15] Florida Uniform Title Standard 5.1 and Section 732.01, Fla. Stat. relating to an intestate decedent (providing that the decedent's death is the event that vests the heirs' right to the decedent's intestate property). Florida Uniform Title Standard 5.2 and Section 732.514, Fla. Stat. providing that the death of the testator is the event that vests the right to devises, unless the will states that some other event must happen first.

[16] Section 689.041, Fla. Stat. entitled Curative Procedure for Scrivener's Errors in Deeds.

Erroneous or Defective Legal Descriptions

However, a severe defect in the legal description may cause a complete failure of title (title fails to transfer to the grantee); for example, an omitted legal description may render the instrument void and uninsurable. An erroneous or defective legal description will likely require you to obtain a corrective instrument to remedy the defect to properly transfer title to the grantee. A Scrivener's Affidavit is not appropriate in this situation because an affidavit may be used to prove title, but it can never be used to create or vest title that does not already exist or to change how title is vested.

Likewise, where an instrument contains a fatally flawed description, you cannot correct it by unilaterally changing the description on the original instrument and re-recording it. This is ineffective because some of the essential elements for a valid instrument are lacking; i.e., the correction is not executed by the grantor, the witnesses did not sign as witnesses to the correct instrument, and the correction was not acknowledged. Once an instrument leaves the hands of the grantor and the party who took the acknowledgment, any substantive error, including a fatally flawed description, cannot later be corrected by unilaterally changing the instrument to correct the mistake and then re-recording the instrument. In order to correct the instrument, a new corrective instrument should be obtained and recorded with fresh execution, subscribing witnesses and a new acknowledgment. The corrective instrument should include the recording data for the erroneous instrument and state that its purpose is to correct the legal description. It should also be noted that the corrective instrument does not retroactively correct the defect in the legal description. If you have questions or concerns about whether a legal description is reliable for title insurance purposes, please contact the Underwriting Department for assistance.

Deed Purporting to Correct Previous Effective Deed

A grantor who has conveyed land by an effective and unambiguous deed cannot avoid the effect of that conveyance by executing a new deed making a change in the conveyance, even if the later deed purports to correct or modify the earlier deed.[17]

For example, Ryan Seacrest owns Lots 1 and 2, American Idol Acres. Ryan conveyed Lot 1 to Mark Consuelos. Ryan then realized he meant to convey Lot 2, so he executed a new deed to Mark conveying Lot 2, with a statement that this later corrective deed was to correct the erroneous legal description of Lot 1, referencing the recording information for that prior deed. Because Ryan also owned Lot 1 at the time of the original deed, it was effectual to transfer Lot 1 to Mark. Ryan cannot unilaterally execute a corrective deed to "take away" that interest once it vested in Mark. If a subsequent purchaser wants to purchase Lot 1 from Mark, we would require a corrective deed from Mark to Ryan (because of the record notice that Ryan's intent was to convey Lot 2, not Lot 1), and a deed from Ryan to the subsequent purchaser.

[17] Florida Uniform Title Standard 3.2.

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