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Commentary

Title Insurance Coverage And Easement Disputes: Case Update

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Courts have issued several important decisions recently in cases involving title insurance coverage and easement disputes. Here, the authors discuss a New York court decision resolving whether a title insurance policy excluded coverage of claims for easements implied by law; a case from an appellate court in the state of Washington involving a quiet title action filed against an insured couple by their neighbors; and, back to the East Coast, a case out of New Jersey involving the interpretation of an easement in a lawsuit between neighboring property owners.

Title Insurance Policy Excluded Coverage Of Claims For Easements Implied By Law, New York Court Rules

A trial court in New York has ruled that a title insurance policy excluded coverage of claims against the insured for easements implied by law.

The Case

As the court explained in its decision, in April 2014, 1267 Rogers Avenue LLC entered into a lease with the Roman Catholic Church of St. Ignatius of Brooklyn with respect to property at 1267 Rogers Avenue in Brooklyn, New York (the "Rogers property"). Adjacent to and abutting the Rogers property was a four-story school building owned or occupied by the Dormitory Authority of the State of New York and the City University of New York.

1267 Rogers obtained a title insurance policy for the Rogers property from First American Title Insurance Company.

The Dormitory Authority and City University subsequently sued 1267 Rogers and the church relating to 1267 Rogers' construction and development project at the Rogers property. The lawsuit sought, among other things:

- A declaration that the plaintiffs enjoyed an easement by implication over the Rogers property with respect to a cornice and egress door on the western wall of the school building;
- A declaration that they enjoyed an easement by implication over the Rogers property so as to

> continue to enjoy light and air from the school windows on the west wall of the school building;
>
> - A declaration that they enjoyed an easement by implication over the southeastern portion of the Rogers property so as to permit the continued use of the right of way with respect to the driveway at the southwest portion of the school property to provide pedestrian egress and ingress; and
> - A permanent injunction prohibiting 1267 Rogers and the church "from blocking the [e]gress [d]oor on the western wall of the [s]chool [b]uilding."

1267 Rogers sought a defense from First American, which denied coverage. After the underlying lawsuit was resolved, 1267 Rogers filed suit against First American, alleging breach of the insurance policy and seeking a declaration of First American's contribution obligations with respect to 1267 Rogers' defense and resolution of the underlying action.

First American moved to dismiss.

The Title Insurance Policy

Schedule B of the title insurance policy provided:

> This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:
>
> Rights or claims of parties in possession.
>
> 4. Survey Reading Annexed.

The Survey Reading annexed to Schedule B provided:

> State of facts shown on survey made by Vincent J. Dicce, L.S. and dated 5/23/13. Survey shows premises described on Schedule A. No variations, encroachments and/or projections except as follows:
>
> one story brick (attached to high one story brick) encroaches onto property to the east 3.0' and roof cap projects 0-2";
>
> bumpers located on and outside easterly line;
>
> chain link fence with gate on concrete retaining wall outside portion of easterly line;
>
> hand rail and roof cornice from building on premises to the east project 0-31/2" and 1'91/2" respectively onto premises herein; Door and windows on line;
>
> iron fence on 6" concrete retaining wall outside northerly line up to 6'41/2" on Carroll Street, then continuing with gate outside westerly line up to 3'1" on Rogers Avenue, then continuing inside southerly line up to 21/2", and then continuing inside portion of easterly line up to 6.1' and then continues and encroaches onto premises to the east;
>
> fence with gate at southeast corner from retaining wall and crossing easterly line onto premises to the east.

Item 3 (a) of the Exclusions from Coverage provided that First American:

> will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of: 3. [d]efects, liens, encumbrances, adverse claims, or matters (a) created, assumed or agreed to by the Insured Claimant.

Paragraph 15 (b) of the Conditions provided that:

> [a]ny claim of loss or damage that arises out of the status of the [t]itle or by any action asserting such claim shall be restricted to this policy.

The Parties' Arguments

First American contended that the issues that formed the basis of the underlying action were all excepted from coverage. More specifically, First American argued that the encroachment items at issue in the underlying action all had been disclosed to 1267 Rogers on the survey and were described in the Survey Reading.

According to First American, Item 3 (a) of the Exclusions precluded any coverage of 1267 Rogers' claims because 1267 Rogers had actual knowledge of the encroachment items at the time it signed the lease and obtained the First American policy and, as such, "agreed to accept its leasehold subject to those rights and interests."

First American also contended that the Survey Reading, along with Schedule B Exceptions from Coverage, provided unambiguous notice to 1267 Rogers that all claims arising from physical "encroachments, variations

and/or projections" were subject to the exceptions noted in the policy. First America asserted that the Survey Reading specifically referred to a "hand rail and roof *cornice* from building on premises to the east project 0-3 1/2" and 1'9 1/2" respectively onto the [Rogers property]; *Door* and *windows* on line" (emphasis added). First America also claimed that although the language used in the Survey Reading and survey was not specifically the same as that used by the Dormitory Authority and City University in their claim to a pedestrian right of way, that claim fell within the Schedule B Exceptions to the subject policy.

First American further argued that 1267 Rogers' complaint failed to state a cause of action for contribution because a claim for contribution existed only where "the underlying liability" for which contribution was sought sounded in tort and 1267 Rogers' claim for contribution was based solely on an alleged breach of contract.

For its part, 1267 Rogers maintained that First American failed to conclusively establish that the claims were expressly excluded from coverage. In response to First American's reliance on the exceptions delineated in paragraph 1 of Schedule B of Exceptions from Coverage and the referenced Survey Reading to disclaim coverage, 1267 Rogers countered that the language did not clearly and unambiguously exclude easements by implication from coverage.

1267 Rogers also argued that it had a cause of action for breach of contract because First American had breached its duty to defend the underlying action.

Lastly, with respect to its claim for contribution, 1267 Rogers said that it pled the claim merely as an alternative form of relief.

The Court's Decision

The court granted First American's motion to dismiss.

In its decision, the court acknowledged that the language "easement by implication" did not appear in the First American policy. The court then observed that the provisions of paragraph 1 of Schedule B of the Exceptions from Coverage provided that the "[r]ights or claims of parties in possession" were excepted from coverage. It stated that a policy exception of this type "has been held to exclude claims for easements implied by law."

The court found that the claims brought by the Dormitory Authority and City University against 1267 Rogers "were based upon easements by implications related to certain encroachments which were disclosed in the Survey Reading annexed to Schedule B of the Exceptions from Coverage (referenced in paragraph 4)" under the First American policy.

In addition, the court said, the claims related to the cornice, the windows, and door referenced in the underlying action all were listed in the Survey Reading.

Accordingly, the court ruled, First American had no duty to cover the claims against 1267 Rogers. It also rejected 1267 Rogers' claim for contribution, reasoning that 1267 Rogers sought damages related to First American's alleged breach of the policy and duty to defend 1267 Rogers; as such, the court concluded, the damages sought by 1267 did "not sound in tort."

The case is *1267 Rogers Ave., LLC v. First American Title Ins. Co.*, 67 Misc. 3d 1241(A) (N.Y. Sup. Ct. Kings Co. July 2020).

Title Insurer Did Not Have To Defend Insureds Against Neighbors' Complaint, Washington Appellate Court Decides

An appellate court in Washington, affirming a trial court's decision, has ruled that a title insurer did not have a duty to defend a couple in a quiet title action filed by their neighbors.

The Case

In 1987, Neil and Elizabeth Rabinowitz purchased a home on Bainbridge Island, Washington. The adjacent property was owned by William and Sara McGonagle. Both properties once were owned by a common grantor.

Decades earlier, the common grantor had deeded the property purchased by the Rabinowitzes to one of the Rabinowitzes' predecessors in interest. The legal description in that deed stated:

> BEG AT A PT 495 FEET W AND 247.5 FT N OF THE SE CORNER OF THE SW OF NE OF SEC 11, TWP 24-2 E, AND RUNNING THE W 880 FEET; TH N 247.5 FEET; THE 880 FEET; TH S 247.5 FEET TO P O B, CONTAINING

> 5 ACRES *LESS A STRIP OF LAND 10 FEET WIDE ALONG THE E LINE OF SAID TRACT RESERVED FOR A ROAD FOR THE USE OF THE GRANTOR OF THE TRACT IMMEDIATELY ADJOINING ON THE SOUTH.*

(Emphasis added.)

The legal description in the Rabinowitzes' deed similarly stated:

> Beginning at a point 495 feet West and 247.5 feet North of the Southeast Corner of the said Southwest quarter of the Northeast quarter, which is the True Point of Beginning; thence West 825 feet, more or less, to the West line of the said Southwest quarter of the Northeast quarter; thence North 247.5 feet, more or less, to the South line of the North 825 feet of the said Southwest quarter of the Northeast quarter; thence East 825 feet, more or less, to a point North of the True Point of Beginning; thence South to the True point of Beginning *LESS the East 10 Feet reserved for road for use of the Granter of the tract immediately adjoining on the South*; . . . .

(Emphasis added.)

About the same time, the common grantor also deeded the McGonagle property to one of their predecessors in interest, but this deed made no mention of the 10-foot strip. The McGonagles' deed likewise did not mention the 10-foot strip, although the strip was essential to accessing the McGonagle property from the public road.

When the Rabinowitzes purchased their home, they purchased a title insurance policy from Chicago Title Insurance Company. The policy provided coverage for loss or damage if the "[t]itle to the estate or interest described in Schedule A . . . vested otherwise than as stated therein." The description of the land covered by the policy in Schedule A was a verbatim copy of the legal description of their property in the deed.

The Rabinowitzes' policy listed exceptions from coverage. Below the list of standard exceptions, the policy also listed two easements as exceptions from coverage, neither of which appeared to refer to the 10-foot strip.

In 2011, the McGonagles filed a quiet title action alleging that they owned the 10-foot strip in fee simple. Under this claim, the Rabinowitzes would have no interest in the disputed property. Alternatively, the McGonagles claimed that they had an easement by "title, prescription or implication" that ran with their property. Under this claim, the Rabinowitzes had a fee simple interest in the disputed property, subject to the McGonagles' easement.

The Rabinowitzes notified Chicago Title of the lawsuit and requested that Chicago Title tender a defense and indemnity coverage. Chicago Title responded by denying the Rabinowitzes' claim, explaining that the disputed 10-foot strip was expressly exempted from coverage due to the word "LESS" in the legal description of the property.

After the trial court decided the dispute regarding the 10-foot strip in the McGonagles' favor, the Rabinowitzes sued Chicago Title. They alleged that the title insurer had breached the policy by failing to defend them and that its failure constituted bad faith, entitling them to reimbursement of the costs they had sustained in defending the underlying lawsuit. The Rabinowitzes also claimed that Chicago Title had violated the Washington Consumer Protection Act and the Insurance Fair Conduct Act, had breached its quasi-fiduciary duty, had caused negligent infliction of emotional distress, and owed them coverage by estoppel.

The Rabinowitzes moved for partial summary judgment on their duty to defend claim and Chicago Title moved for summary judgment.

The trial court denied the Rabinowitzes' motion for partial summary judgment, granted Chicago Title's motion for summary judgment, and dismissed the Rabinowitzes' lawsuit.

The Rabinowitzes appealed.

The Appellate Court's Decision

The appellate court affirmed, finding that neither the McGonagles' fee simple claim nor the McGonagles' express easement claim was covered by the Chicago Title policy.

In its decision, the appellate court explained that the McGonagles' fee simple claim was "not conceivably

covered" under the Rabinowitzes' title policy because, if the McGonagles' allegations were considered as proven, the title policy accurately described the disputed land as belonging to the McGonagles and not to the Rabinowitzes. That was so, the appellate court reasoned, because if the McGonagles' fee simple claim was proven, then the Rabinowitz deed expressly excluded the 10-foot strip from the Rabinowitzes' property. According to the appellate court, because the legal description in Schedule A contained identical language to the Rabinowitzes' deed, "then Schedule A must also be interpreted as excluding the strip." Therefore, title would not vest "otherwise than as stated," because the title policy accurately described the Rabinowitz property, and this claim was not covered.

The appellate court then turned to the McGonagles' express easement claim and ruled that, if proven, the McGonagles' express easement allegation also did not trigger Chicago Title's duty to defend "because the Rabinowitzes would not suffer a loss or liability."

The appellate court noted that the purpose of title insurance was "to protect the insured from a loss arising from a defect in the title." Therefore, it continued, the duty to defend was "not triggered" merely when the complaint contained allegations that might "conceivably be *proven*."

Instead, the appellate court said, these allegations, if proven, also must result "in a loss or liability" conceivably covered under the insured's policy.

According to the appellate court, even if the Rabinowitzes had an encumbered fee simple interest subject to the McGonagles' easement, they failed to show that they would "suffer loss or liability resulting from this claim." This was so, the appellate court said, because the only way they could suffer a loss was if the interest they had to begin with was greater than the interest they would retain if the McGonagles' express easement claim was proven. The appellate court found, however, that the Rabinowitzes did not have a greater interest because either they never owned the land or, alternatively, they would retain the same fee simple interest subject to the McGonagles' easement that they had before the McGonagles had filed their lawsuit.

The appellate court said that an average person would interpret the capitalized word "LESS" in the legal description of the Rabinowitzes' property to indicate that the land described thereafter was "not included within the boundaries of the property owned in fee simple without any encumbrances." Accordingly, it concluded, because the Rabinowitzes would not face any loss or liability if the McGonagles' express easement claim was proven as alleged, this claim was not conceivably covered by the Chicago Title policy, and Chicago Title did not owe the Rabinowitzes a duty to defend.

The case is *Rabinowitz v. Chicago Title Ins. Co.*, No. 52898-3-II (Wash. Ct. App. Aug. 18, 2020).

New Jersey Appellate Court Affirms Trial Court's Ruling On Easement

An appellate court in New Jersey has affirmed a trial court's interpretation of an easement in a lawsuit between neighboring property owners.

The Case

In 1983, Barbara H. Abrom and her husband conveyed an easement to her neighbors at the time. The deed stated:

> Subject to an easement covering the premises described below, giving the grantees herein, their assigns and successors in interest, the exclusive right of ingress and egress over an existing driveway located on the adjoining premises, being 17 Ridge Road. This easement is given so the grantees and their successors will be able to use their rear yard for parking. This easement will expire by its own terms if the grantees or their successors alter the grade of the purchased premises, allowing them access to the rear yard.

At some time after the conveyance, a combination concrete/wood fence was erected around the yard next to Abrom's home.

Philip and Donna Picinich purchased the home next to Abrom's home and, between 1995 and 2000, parked their vehicles in the street. From 2000 to 2009, they rented a space in the garage behind Abrom's home. They obtained a permit to construct a parking space alongside their home from the municipality sometime before or in 2009. The parking space only was accessible over Abrom's driveway – in other words, over the easement. From 2009 to 2017, the Picinichs parked one vehicle in their parking space, and one on the street.

When the Picinichs' children reached driving age, they applied to the municipality for permits to build three extra spaces alongside their home, which would also be accessible only along the easement – that is, Abrom's driveway. Abrom threatened legal action upon being informed of the issuance of the permit. The Picinichs nonetheless proceeded with construction.

Abrom sued.

In competing certifications supporting and opposing summary judgment, the Picinichs' seller (the grantee on the original conveyance) certified that the parties did not intend to limit the easement access to reach parking only in the rear yard. The Picinichs' seller believed the phrase "use their rear yard for parking" referred to building a garage in the back yard. The Picinichs certified that because it was practically impossible to access the rear yard of their house from the street without using Abrom's driveway, and because their rear yard was fenced, parking only could occur on the side and, therefore, the easement was intended to allow for side yard parking.

Abrom certified that at the time the easement had been created, no concrete/wood fence blocked the Picinichs' rear yard. Abrom testified that, at the time of the original sale, she understood parking for the Picinichs' home would be in their rear yard, but accessible over her driveway.

The trial court concluded that "the explicit language of the easement" stated its intent: the easement was "given so that grantees and their successors will be able to use *their rear yard* for parking." The trial court interpreted the express language to "unambiguously" provide "for access to parking in the rear yard of the property." Because the language was so clear, the trial court considered the certification by the Picinichs' predecessor in title to be irrelevant.

The trial court further found that the easement had been "voluntarily abandoned" because of the Picinichs' "intent to never make use of said easement going forward." The fence around the rear yard made it clear that the driveway would never be used to access the yard. The trial court viewed the construction of the fence (which the Picinichs indicated they did not intend to remove) to express an intent to terminate the easement because its original purpose was no longer feasible.

The trial court said it was "irrelevant" that the Picinichs did not know who had created that structure or when it had been created. The trial court enjoined the Picinichs' further use of Abrom's driveway, and they appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the primary rule of construction of easements was that the intent of the conveyor normally was determined "by the language of the conveyance read as an entirety and in the light of the surrounding circumstances." The appellate court added that when the language of the easement was unambiguous and the intent of the parties was evident, the language governed.

However, the appellate court said, when there was "any ambiguity or uncertainty about an easement grant," the surrounding circumstances, including the physical conditions and character of the servient tenement and the requirements of the grantee, played "a significant role in the determination of the controlling intent."

In this case, the appellate court found, the language of the easement was "clear and unambiguous, making the intent of the parties evident." It found that "rear yard" did not mean "side yard" – it meant that "the driveway was available for travel so that the grantee could access parking in back of [the grantee's] structure." In the appellate court's view, any effort to cast a different light on the language was "simply unconvincing."

The appellate court pointed out that the trial court had terminated the easement as "abandoned" because of the concrete/wood structure that for years had made parking in the rear yard a practical impossibility. The appellate court concluded that the use of the driveway to access side yard parking "was never contemplated" by the grantors; language reflecting that simply was not in the deed.

The case is *Abrom v. Picinich*, No. A-3610-18T1 (N.J. Ct. App. July 10, 2020). ■

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