11-2004

Taking Title to Servient Tenements

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November 2004

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It is so rare to see two cases on unwritten easements appear in the same time period that I could not refrain from writing a column on them. (See the summaries of *Larsson v Grabach* (2004) 121 CA4th 1147, 18 CR3d 136, and *Felgenhauer v Soni* (2004) 121 CA4th 445, 17, CR3d 135, both reported on p 193.) However, for the most part, neither implied nor prescriptive easements offer much opportunity for real estate attorneys to do much planning for their clients. Most people engaged in acquiring a prescriptive easement do not consult attorneys about how to succeed at it. Generally, either they are unaware that they are trespassing or they expect to be stopped at some point before the 5-year statutory limitations period runs; in any event, it is probably easier to purchase the easement from the servient tenant than to litigate a prescriptive claim against her.

Likewise for people who receive an easement by implication: The doctrine behind it is that, had the parties only thought about the matter at the time of a lot split, they would have said something explicit about the easement, and the court is only making up for their failure to do that thinking. Those assumptions make it inconceivable for anyone to come into your office asking "How do I get (or give) an implied easement?" since the obvious response would be: "Don't. Create an express one instead."

On the servient side, there is the possibility that a client may someday ask you what to do about the neighbor who keeps walking across her property without consent. If the limitations period has not yet elapsed, you can suggest that your client ask the neighbor to agree to accept a license to continue, or else get fenced off or sued if he refuses. But the owner whose property may be subject to an implied easement is not going to see an attorney until it is too late to undo the facts that established the implication in the first place.

However, what I noticed in both *Larsson* and *Felgenhauer*, was that the party whose land was held to be subject to an easement—the servient tenant—was someone who had acquired the property long after the easement had been created. In *Larsson*, a probate lot split was held to have created an easement by implication in 1942, but the servient estate was not sold to the Grabachs until 1998, 56 years later. In *Felgenhauer*, the prescriber adversely used the servient property from 1982 to 1988, but the Sonis did not acquire the property until ten years later, also in 1998.

And, in both cases, things had changed before the defendants had acquired their parcels. A cabin had been built in *Larsson*, and a fence constructed in *Felgenhauer*. Thus, the facts on the ground when the parties purchased might not necessarily have told them about what had happened before.

Although there was some evidence of actual knowledge in both cases, I would rather consider the matters as if that had not been so. And whether there was anything actually happening on the surface to warn those two buyers of the existence of easements would not matter anyway: For there to be an easement by implied creation in *Larsson*, the court had to conclude that there

existed in 1942 an unpaved road that was "so obviously and apparently permanent that the parties should have known of the use" *back then;* and for there to be a prescriptive easement in *Felgenhauer*, an "open and notorious use" had to have existed between 1982 and 1988. In each case, once the easement was created, those essential characteristics were no longer required: At the time the defendants acquired their parcels in 1988, there was no need for the *Larsson* implied easement to be obvious and apparent, or for the *Felgenhauer* prescriptive easement to be open and notorious. Whether or not they knew about the easements or had reason to know about them, the Grabachs and the Sonis took title to properties burdened with preexisting easements.

Which, finally, gets me to the theme of this column: how to protect clients who are acquiring property from taking it subject to easements that may not be recorded and may not be evident from the current physical appearance of the property. The obvious solution is to have them get title insurance, but that advice is no help if the policy excludes those risks. And that means the attorney's job is to make sure that the coverage is appropriate.

To see how effective title coverage is, I turned to Joyce Palomar, whose book Title Insurance Law is the reigning authority in this area (and whose other book, Patton & Palomar on Land Titles, gives her similar stature on easement matters). I asked her to read both cases and give us Californians some advice as to what title policies the Grabachs and Sonis might have wished they'd had, in retrospect, after they lost their cases against their neighbors. My questions and her answers follow.

RB: Joyce, if these defendants have standard CLTA policies, do you think they can recover against their insurers? Would you reach a different conclusion if they had ALTA policies?

JP: In either a standard CLTA (1990) or ALTA (1992) owner's policy, insuring clauses covering encumbrances on the title and unmarketability of the title would cover loss due to unrecorded easements. And, in either of these policies, the preprinted exclusions do not expressly exclude unrecorded easements from coverage.

Traditionally, however, a "general exception" for "unrecorded easements and claims of easements" has been included as one of four or five standard exceptions in Part I of Schedule B of both CLTA and ALTA policies. Palomar, Title Insurance Law §§7:1, 7:2, 7:12 (2004 ed Thomson*West). Assuming this preprinted standard exception to coverage appeared in Schedule B of their standard owner's policies, the Grabachs and Sonis would have had no title insurance claim.

The purpose of this standard Schedule B exception is to insulate title insurers from losses resulting from easements that were created as a matter of law by prescription or implication and that cannot be discovered by searching the public records. A title insurer typically does not go onto the land to look for indicia of someone's use.

Nevertheless, in most states, the title insurance applicant can pay an additional premium to receive an "extended coverage policy" which omits all the Schedule B general exceptions, including the exception for "unrecorded easements and claims of easements." Title Insurance Law §§7:1, 7:2, 7:12. If the Grabachs' and Sonis' policies omitted the general Schedule B exceptions, then they will have a claim against their title insurance policies.

RB: Do you think their carriers could defend on the ground that these easements were known or should have been known to them?

JP: You state that there was some evidence of actual knowledge in both cases. The insurers surely would attempt to prove that knowledge and assert the general exclusion from coverage for matters known to the insured and not disclosed to the insurer, which is preprinted in both CLTA and ALTA policies. Title Insurance Law §§6:14–6:16. Nevertheless, insureds are not charged with actual knowledge of a title defect or adverse claim from the mere existence of physical structures or activities on the property, unless the presence of such structures or activities unambiguously indicates an adverse interest. A billboard on the insured land that advertised a neighbor's cave tours was held not to give actual notice that the neighbor claimed an interest in the insured's land. An insured's knowledge of an irrigation ditch on the land did not imply that the insured knew that another party had a right of entry onto the insured land to maintain the ditch. The court ruled that the title insurer may not assume that the insured has specialized knowledge of easements.

In comparison, when, prior to purchasing, the insureds had seen (1) a paved roadway on the western border of the property, (2) a recorded plat which showed the road, and (3) the lender's title policy which contained an exception for the road, the court held that the insureds clearly knew of the presence of the road at closing and had received the bargained-for property. The policy exclusion therefore applied to the insureds' claim. See cases cited in Title Insurance Law §6:15.

RB: Do you think the insureds' carriers could defend on the ground that these were interests that a survey would disclose?

JP: A general exception for what an accurate survey would reveal is another of the standard exceptions that is preprinted in Part I of Schedule B of standard CLTA and ALTA owner's title insurance policies. Like most of the general exceptions set forth in Schedule B, the exception for matters which would be disclosed by an accurate survey or inspection is intended to protect the title insurer from matters that may affect the title but that cannot be discovered via an examination of the public land records. Title insurers have no duty to obtain a survey in connection with the issuance of a title insurance policy. The choice of whether or not to obtain a survey belongs to the insured. Title Insurance Law §7:8.

If the insureds paid for extended coverage and their policies omitted this general exception, as discussed above, that defense would not be available to the title insurer. If the general exception does appear in their policies' Schedule B, then it is a question of fact whether an accurate survey would have disclosed the easements.

RB: Do you think the carriers could defend on the ground that the insureds succeed to the rights of parties in possession?

JP: While the language of exception is a little different in CLTA and ALTA owner's policies, both include in Part I of Schedule B standard language excepting facts or rights that could be ascertained by an inspection of the land or that may be asserted by parties in possession. The analysis would be the same as under the exception for unrecorded easements and claims thereof, discussed above.

RB: Do you think any particular endorsements would have made a difference?

JP: Yes. First, as discussed, the title insurance applicant can pay an additional premium to receive an "extended coverage policy," which omits all the Schedule B general exceptions.

Second, a title insurance applicant may be able to provide the insurer with a survey rendered by an accredited surveyor and receive a "Survey Endorsement." A Survey Endorsement, also called a "Same As Survey Endorsement," assures that the "land" the insured is getting is the same as the survey shows. Encroachments, including easements, not shown in the survey then would be covered.

If the title insurer agrees to delete or endorse over the survey exception, the title insurer cannot thereafter avoid coverage of matters an accurate survey could have revealed by asserting the general exceptions discussed above. Title Insurance Law §7:8.

Neither CLTA Endorsement 100 nor ALTA Endorsement 9—*i.e.*, "Restrictions, Encroachments, Minerals"—would have helped the insureds in these cases, however. These standard endorsement forms provide some coverage against loss as a result of improvements on the insured land encroaching on easements, but they apply only to easements discovered by the insurer and listed in the policy's Schedule B, so these endorsements would not help in the case of easements created by prescription or implication.

Finally, I will note that some express casualty coverage for loss resulting from unrecorded easements is available in both the CLTA and ALTA Homeowner's Policies. These policies would not have been available in the two cases you discuss here, however, because the properties insured were not one-to-four-family residences.