

The mpass

VOLUME 6, ISSUE 4 APRIL 2008

The Spring 2008 Issue

FOCUS ON UNDERWRITING:

Survey Coverage for Stump Holes? The Limitations of Survey Coverage

By Charity Taylor, NC Underwriting Counsel

Please note: Although the following article pertains to a specific NC case and, in some instances, specific NC underwriting procedure, the concepts discussed herein are applicable to all market areas.

Each day at Investors, I attempt to give proper guidance to our North Carolina underwriters in determining the coverage of a given title insurance policy, and each time we underwrite a new policy we consider whether or not to extend survey coverage to the insured. As a general rule for an owner, this determination is based on an inquiry as to whether or not the legal description presented for coverage is accurately reflected in the current survey at issue. Survey coverage and the extension of its protection is often an area that requires further explanation and clarification. The decision in Shea Homes, LLC v. Old Republic National Title Insurance Company, WL 3334210 (W.D.N.C. 2007), earlier this month, provides a notable review of the potential limitations of affirmative survey coverage in a title insurance policy.

In the case recently at issue, Shea Homes, LLC purchased a 155.9-acre tract of land to develop and build a subdivision in Mecklenburg County. Following the construction, the developer learned that “stump holes” or “waste disposal areas” were located in areas that were not marked on a boundary survey completed in 1999 in preparation for the development. The boundary survey approximated the location of two specific disposal sites with dashed lines, but did not attempt to define their exact location nor give reference to any other undisclosed waste disposal areas on the insured property. As a result, homes were built on lots that included these undisclosed stump holes and extensive remedial action was required of the builder.

After determining the impact of the unmarked waste disposal areas, Shea Homes filed a claim under its Old Republic Title Insurance policy. The claim asserted that survey coverage was given to the insured with an exception for the two waste disposal areas noted on the boundary survey.

With no further exception noted, Shea Homes argued that it was reasonable to file a claim based on the assumption that affirmative coverage was given, by reference to the 1999 survey, for the location of the other waste disposal areas that were not specifically excepted from coverage in the title insurance policy.

In considering the arguments in this case, the Court looked primarily to the general coverage provisions of the subject title insurance policy [not 2006], which provided coverage against loss or damage incurred by reason of:

- (1) Title to the estate or interest being vested other than as stated in the insured;
- (2) Any defect or lien or encumbrance on the title;

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*“When life hands you lemons, don't just make lemonade.
Open up a lemonade stand.”* -Anonymous

(3) Unmarketability of the title; and (4) Lack of a right of access to and from the land. The Court concluded that the existence of a subsurface condition, such as the undisclosed waste disposal areas, was not covered by reason of any of the four coverage provisions listed above.

The title policy at issue in the case also included a survey endorsement whereby the company insured “that the land is the same as that delineated on the plat of survey” delineated as Boundary Survey. The Court looked to the legal description of the property which gave a metes and bounds description as reflected by the survey, and determined that insuring the land was “the same” was, in effect, limited to insuring that the property’s boundaries were located as shown on the survey. Thus, there was no protection offered to the developer through the coverage of the additional survey endorsement.

By means of review, survey coverage is a protection extended to the insured owner when we receive a “satisfactory” and “current” survey of the subject property. A satisfactory survey contains a Registered (or Licensed) Surveyor's signature and seal. The surveyor must locate corners, stakes and improvements located on the property. The “current” requirement references the fact that a survey was dated within the last twelve months, unless the company has knowledge that a significant change has occurred since the survey was completed. In some, limited instances, a survey older than twelve months may allow for survey coverage if the owner certifies that no notable changes have occurred on the property and the survey is properly reviewed. In most cases the survey coverage is limited to the date of the older survey. In either event the survey then allows the certifying attorney to compare this visual record to his findings in the public record, and in accord with his findings, ask the title insurance company to insure that the property defined by the survey is in fact the same property that his client is receiving. Most importantly, the survey allows all contracting parties the opportunity to “see” the property defined in its truest sense and develop expectations for both the ownership interest and the insurance coverage at stake.

Many may seek what they believe to be an extension of survey coverage by requesting a survey endorsement. The survey endorsement currently utilized in North Carolina is a “same-as- survey” endorsement that provides the insured owner or lender with confirmation that the insured property described in the policy through the legal description is the same as that reflected on the survey. Use of the endorsement is often unnecessary or repetitive. In cases where survey coverage was already affirmatively given in Schedule B of the policy, the survey endorsement has no additional effect as to the coverage that was already extended to the insured. Further, the same coverage results when an attorney incorporates the survey when drafting the legal description. The title insurance company is then insuring the description of the property directly reflected by the survey. The most appropriate time to request a survey endorsement may be in the situation where a legal description is coming from a prior conveyance or older survey and there is a new survey of the property. With this scenario, a borrower or lender may want assurance that the description of the property in the policy is consistent with the most recent survey obtained.

As always, we can stop and consider the lessons to learn from the decision in the Shea Homes case. Perhaps most importantly, it serves as yet another reminder that an individual involved in a real estate transaction needs an opportunity to review his title commitment, as well as an opportunity to have counsel explain the extensions and limitations of coverage with regard to the subject property. In order to rely on survey coverage in particular, an insured should review the survey and the extent to which it defines the property and factors limiting the use of said property. In the policy for Shea Homes, LLC, survey coverage was extended to insure the work of a surveyor who was asked to determine the boundary lines of the property. It reasonably followed that the Court viewed the “same as” coverage offered by both the affirmative survey coverage and the survey endorsement to be limited to the property lines defined by the boundary survey. The Court determined that coverage could not reasonably extend to stump holes or other subsurface conditions that had not been properly defined and did not fall within the coverage provisions of the title insurance policy. With regard to seeking the protection of affirmative survey coverage for damage caused by undisclosed stump holes, Shea Homes was seeking “more than they contracted for.”

It is good practice, especially with infrequently requested endorsements such as a “same-as-survey” endorsement, to provide the insured a sample at the commitment stage so that they may have an opportunity to review and assess the coverage. This may not eliminate the possibility for misinterpretation altogether, but it does provide the insured with all the pertinent information up front.

Reverse Mortgages

By Rich Erdosy

Reverse Mortgages are becoming a common transaction. As the population of the United States ages, some of our older citizens find it necessary to tap into another cash stream in order to pay their expenses. For many, Social Security, pensions and other vehicles on which they may rely are becoming increasingly inadequate. A reverse mortgage can allow homeowners to not only meet financial obligations, but also to remain in their homes. In a Reverse Mortgage, homeowners borrow against the equity in their homes. Interest is added to the principal balance, as are any periodic payments that are made to the homeowner. In addition, an existing loan can be refinanced and, instead of making payments, the funds used to pay off the loan are added to the principal, ending the need for loan payments. The Reverse Mortgage will be paid off upon sale of the home or upon death of the homeowner. No payments are made to the lender during the life of the loan.

Reverse Mortgages present some underwriting challenges, not the least of which can be identifying a transaction as a reverse mortgage transaction so that it can be underwritten as such. Lenders and Attorneys will often fail to report to the Agent that the transaction is a Reverse Mortgage. As this identification is integral to correctly underwriting the transaction, we should be aware that there are some items that may be provided that would indicate a Reverse Mortgage transaction.

Here are some of the factors that can be used to identify a Reverse Mortgage:

If you see the term Home Equity Conversion Mortgage (HECM). This is another name for a Reverse Mortgage.

If you receive a request for an ALTA 14.3(-06) Endorsement.

If you receive a request for coverage greater than what will be the amount on the Deed of Trust or Mortgage itself.

If a second Deed of Trust or Mortgage, to be executed to the Secretary of Housing and Urban Development for the same amount as the Deed of Trust or Mortgage to be insured, is referenced.

Once you have identified the transaction as a Reverse Mortgage transaction, you will want to underwrite the commitment as shown in the General Underwriting Principles Manual under the Deeds of Trust and Mortgages section. It is especially helpful to print out the sample Commitment. Please note that the parenthetical directions regarding which dollar amount goes in which blank are not to be included in the printed product, but are merely instructional. The ALTA 14.3(-06) Endorsement requirement as provided in the Endorsements Manual should be included whether or not the Endorsement had been requested. Feel free to submit your finished commitment to Underwriting Support for guidance.

From the Auditor's Desk...

By Stacy Klancher

2008: Changes in the Audit Department!

The New Year was the kick-off for some new practices in the Audit Department. These changes affect the audit rankings, the ranking category names, and the method of ranking calculation. The purpose of this discussion is to introduce these changes while future articles in The Compass will more clearly outline how they affect your audit results.

For now, let's take a look at the ranking category changes. The "ranking" assigned to your audit result communicates the overall quality of an agency's underwriting/settlement practices as represented by the sample of files the auditor reviews. In order to provide clear distinction between audit rankings, the following adjustments were made to the ranking category names:

2007 RANKING CATEGORY	EQUALS	2008 RANKING CATEGORY
Satisfactory	=	Excellent
Generally Satisfactory	=	Satisfactory
Needs Improvement	=	Needs Improvement
Unsatisfactory	=	Unsatisfactory

Additionally, the method of calculating the discrepancies noted in an audit to arrive at the audit's ranking has changed. The biggest effect is that underwriting discrepancies that carry a larger claim potential have a greater influence as to the audit's ranking. Items with no claim potential are housed in the new "General Underwriting Compliance" section of the audit and do not affect an audit ranking unless numerous. We will discuss these changes in depth in next month's Compass Newsletter.

Underwriting/Examining Problem of the Month

Last month's problem:

An owner's policy may be issued any time as long as a search/opinion has been obtained and the appropriate premium has been paid. There is no requirement for there to be a corresponding closing or loan transaction. For example, if an owner realizes they would like owner's coverage years after they had purchased the property, they may obtain one.

This month's problem:

An intrepid Agent of Investors Title receives a request to issue a commitment for a lenders' policy on a reverse mortgage. Everything appears to be in order except for one item on the loan application, which the mortgage broker thoughtfully provided. The loan application calls for a fixed interest rate. The agent has underwritten several reverse mortgage transactions in the past, and all have been variable rate. The requirements of the Lender call for the ALTA 14.3(-06) endorsement to be issued. The agent looks over the endorsement, and takes note of Section 3 which includes provisions regarding "changes in the rate of interest." As red flags are raised, the intrepid agent picks up the phone to make a call to Underwriting Support. Have the lender and mortgage broker mixed up the terms of the loan? Can this conflict be resolved without major stress to said lender and mortgage broker?

Spotlight on Settlement

HUD-1/SoftPro Timesaver Series

USING THE SEARCH FEATURE IN PROFORM

By: Gina Webster

As your database of files continues to grow, it may seem that searching for one particular file is like trying to find a needle in a haystack. Below are some tips on searching for files that can make the task easier.

Searching for Files

1. Choose File/Search or click on the magnifying glass on your icon toolbar.
2. Enter your search criteria into the Search (Open) window. Use as many or as few of the fields as you like.
3. Select Search to begin the search. A Search Results (Open) window will appear containing all of the files meeting your criteria.
4. Select the file you want to open, and choose Open.

Hint: You can click on any column heading (such as Settlement Date or Date File Received) to resort the list in the order you prefer.

Searching with Wildcards

There are three wildcards that can be used when searching for files, the question mark (?), the asterisk (*), and the carat (^). These wildcards are used to represent unknown characters in a search. For example:

- The question mark (?) represents a single unknown character in a search (M?ndy = Mindy, Mandy, etc.).
- The asterisk (*) represents a group of unknown characters in a search (Jo*ns*on = Johnson, Johnston, Jonson, Jonston, Johanson, etc.; and Smith* = Smithfield, Smithville, Smithtown, Smith, etc.).

The carat (^) can be entered before or after a word or combination of letters to search for any records which have the same string of letters (^Wood = Woodcroft, Briarwood, etc.).

DID YOU KNOW?

- Did you know that the ALTA 14.3-06 endorsement (or its equivalent in your market area) is to be used in reverse mortgage transactions? The coverage provided in the previously used ALTA 6.2 and the Reverse Annuity Mortgage endorsement have been combined in the ALTA 14.3-06.
- Did you know that any licensing inquiries are now handled by Eric Hines in Underwriting Support? Please contact Eric in the event you have any licensing related questions.
- Did you know there are now two links related to Title Talks? The first is to access the talk and the second, provided in the email, is for a survey to be completed in order to get “credit” for participating. Please note that this credit is a confirmation of participation and not related to any licensing requirements.

NEWS FROM THE HILL

- The next underwriting/examining training will be held May 5th—9th, 2008. Contact Chris McIlravey at cmcilrav@invtitle.com to register.
- Underwriting Support would like to introduce the newest member of our team—Robert Crabill, Title & Regulatory Attorney. Mr. Crabill will be involved in a variety of underwriting support functions including licensing, regulatory compliance, and agency underwriting/examining support.



2006 Policies Status

States Approved to Use 2006 Policies As of April 1st, 2008
Alabama
Arkansas (must attach AR-141)
District of Columbia
Georgia (must attach the GA-141)
Illinois
Indiana
Kentucky (must attach KY-141)
Louisiana
Maryland
Michigan
Minnesota
Mississippi
Missouri (must attach MO-141)
Nebraska
New York (must include TIRSA Standard New York Endorsement)
North Carolina
Ohio
Pennsylvania
South Carolina
Tennessee
Virginia (must attach VA-141 and the VA-123)
West Virginia (must attach WV-141)

Please Note:

The Policy and Forms Manual Volume I housed under the online Internal Library is updated on a regular basis to reflect changes in approval status for all the states in which ITIC/NEITIC underwrites. Please check this manual periodically to obtain the most current information.

THERE WERE NO UPDATES TO THE INTERNAL LIBRARY IN THE PRECEDING MONTH.

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