TOP THREE TITLE ISSUES ENCOUNTERED BY REAL ESTATE PROFESSIONALS

Nothing is worse in the eyes of a real estate professional than discovering an issue with the title to real estate on the heels of a scheduled closing. Title issues come in a multitude of varieties, forms and fashions, and depending on the severity of the issue, can stop a real estate deal dead in its tracks, as well as render the title essentially worthless. The good news is that a solution for nearly every issue exists. The remedies available depend greatly on the issues and factual circumstances. In any event, identifying the problem as soon as possible is essential to resolving the issue in the most efficient and inexpensive manner. Before committing to purchase an interest in real estate, due diligence in the form of reviewing a title commitment and current survey is imperative to discovering and resolving potential issues with real estate titles. A thorough review of a title commitment and current survey will reveal most title issues, including three of the most common title issues encountered by real estate professionals: (i) blanket easements, (ii) boundary issues and (iii) errors and omissions in the chain of title. Below is a brief overview of these top three title issues, along with some suggested solutions and practice pointers for the real estate professionals who encounter them.

1. Blanket Easements

A blanket easement, also known as a floating easement, is basically an easement that is not limited to a specific portion of the servient tract over which it was granted but, instead, encumbers the entire tract. In some instances, the grantor and grantee intend the easement to be blanket in nature. A conservation easement or flowage easement are both examples of easements generally intended by the parties to be blanket in nature. Other times, blanket easements arise contrary to the parties' intentions and as a result of the instrument granting the easement failing to limit or describe the area over which the easement is located. Regardless of the scenario, a blanket easement generally constitutes a significant title defect, because the easement holder's rights significantly limit or prohibit the right of the landowner to use and enjoy the servient tract.

Often times, an unintended blanket easement will arise from an instrument containing ambiguous language, such as language conveying an easement over "a twenty foot (20') wide portion of the Northwest Quarter (NW1/4) of Section Ten, Range Three West, Township Four North." While, by the terms of the grant, the easement area is limited to a 20-foot wide portion of the subject tract, the instrument essentially grants a blanket easement over the entire tract because it fails to specify which 20-foot wide portion of the tract is encumbered by the easement. Blanket easements on this nature create significant title issues, especially from a development standpoint.

Continuing with this example, consider a scenario where the landowner has entered into an agreement to sell the servient tract to a developer who intends to develop a shopping center on the tract, contingent upon a satisfactory review of the title. Assume also the blanket easement is one for the installation and operation of an underground pipeline, and the instrument prohibits construction of buildings, fixtures and other above-ground improvements within the 20-foot wide easement area.

Since any development within the 20-foot wide easement area is prohibited and the easement area could consist of any 20-foot wide portion of the servient tract, title to the tract is defective because any development is prohibited as a result of the blanket easement.

So what's the solution? The good news is there may be several, all of which depend on the facts and circumstances surrounding the grant and use of the easement. For example, if the pipeline has not been installed, one solution commonly utilized is to obtain and record an amendment or modification to the easement instrument from the holder that terminates the easement as it applies to the entire tract and establishes the specific 20-foot wide easement area. Additionally, the accommodation doctrine recognized in many jurisdictions generally provides that where an easement instrument does not establish a definite location of the easement area, the grantee does not acquire a right to use the servient tract without limitation, and the owner of the servient tract processes the right to establish its location, provided such right must be exercised in a reasonable manner, with due regard to the rights of the easement holder. If the owner of the servient tract can produce evidence establishing the parties intended the easement to apply to a certain 20-foot wide portion of the tract, the owner may also seek to have a court reform the instrument to limit the easement area to a specific portion of the servient tract. If the pipeline has been installed, the common law in many jurisdictions provides the undefined boundaries of an easement granted for a specific purpose can become fixed by use of the land for the prescribed purpose with the consent or acquiescence of the owner.

2. Boundary Issues

Boundary issues are common title issues that generally result from the true boundary being located somewhere other than where the owner believes it to be. The discrepancy in boundary line locations may also be the result of natural forces, such as accretion or avulsion caused by waterways. Other times, boundary lines may change as a result of the owner's action or inaction. Boundary line issues attributable to the owner include changes in the location of boundary lines that result from adverse possession or agreements with adjoining landowners. Additionally, some states recognize the doctrine of boundary by acquiescence, which is similar to adverse possession and arises when adjoining landowners tacitly agree to recognize a boundary other than the true surveyed boundary shared by the parties.

Determining whether boundary issues exist before purchasing real estate is an absolute necessity because unresolved issues can eventually result in the record owner being divested of title to all or a portion of its property, as well as the improvements located thereon. The only means for confirming whether a boundary line issue exists is a current survey. A survey, however, is only as good as the surveyor who prepared it. When selecting a surveyor, keep in mind that, like real estate attorneys, not all surveyors were created equal. Thus, it is equally important the surveyor selected has sufficient experience, is licensed in the state where the property is located and is of good repute. Along those lines, consider retaining a surveyor who is a member of the National Society of Professional Surveyors and familiar with the area where the property is located.

If the current survey reveals a boundary issue, several methods for resolving the issue are available. An obvious solution to the issue is for the landowner to either convey or purchase the

encroachment area. Another common solution is a boundary line agreement between the adjoining owners, whereby the owners agree to the true location of the boundary, regardless of the parties' past or future actions, or the existing location of boundary markers (such as drainage ditches or fences). An easement agreement may also be utilized if the encroaching fixture or improvement will remain in its current location. Alternatively, a quitclaim deed from the adjoining owner may also be used to extinguish any interest the adjoining owner may have acquired through adverse use or acquiescence. If a quitclaim deed is utilized, however, encroaching fixtures or improvements should also be removed in conjunction with the conveyance or the issue will likely resurface at a later point. If these remedies are unavailable, boundary issues may be resolved by a quiet title action or an action for a declaratory judgment.

3. Chain of Title Errors and Omissions

Title issues commonly arise from errors and omissions in the chain of title and are often the result of sloppy drafting and undocumented conveyances. Incorrect and invalid legal descriptions; mistaken, misnamed and omitted parties; and ineffective acknowledgements are common examples of chain title issues arising from careless drafting. Chain of title issues caused by undocumented conveyances are commonly the result of undocumented intestate transfers between family members, as well as failures to open a probate estate for a decedent/landowner. Some chain of title issues are not substantive issues or constitute title defects—other times, the result may be a complete failure of title.

In many instances these issues can be corrected through a correction instrument, modification agreement, or scrivener's error affidavit. Because these corrective measures generally require one or more of the parties or their attorneys to execute the remedial instrument, time is very much of the essence. If the issues are not discovered until many years after their creation, the remedies available are significantly limited. Below is a list of some practice pointers for real estate professionals to avoid or remedy chain of title issues:

1. Use a Valid Legal Description. An instrument purporting to affect the title to real property must contain a valid legal description, which are usually in the form of a platted, lot and block description or a metes and bounds description. Tax parcel numbers and property addresses are generally invalid legal descriptions. Most importantly, if the legal description is referenced as an exhibit, don't forget to attach the exhibit.

2. Attach the Legal Description. It is easy to make a typographical error when retyping a legal description. An instrument affecting title to real property must contain a valid legal description, and in order to be valid, a metes and bounds legal description must "close." Often times, errors or omissions in retyped descriptions can result in the legal description failing to close, rending the instrument ineffective. If possible, copy and paste the legal description from another instrument in the chain of title, a title policy or a survey. If you must retype the description, have someone read aloud the original legal description used by you while you follow along reading the retyped description you prepared.

3. Correctly List the Parties. Always review the chain of title to ensure the current grantor is the same party listed as the grantee in the immediately preceding conveyance

instrument. For individuals, driver's licenses and birth records should also be reviewed to confirm correct spelling is used and ensure the parties' names are listed correctly. Also, be sure to include suffixes such as "Jr." and "Sr." and confirm whether the individuals are married. With respect to corporations, limited liability companies and limited partnerships, review the entity's filings with the appropriate secretary of state's office to ensure correct spelling. As for trusts, the trust documents should be reviewed to confirm proper names and spellings. If the applicable state law provides for trust certificates, also consider having the trustees execute and record a certificate of trust verifying the names of the trust and the trustees.

4. Use a Proper Acknowledgement. In some cases, a defective acknowledgement can render the instrument ineffective. Arkansas for example has a form acknowledgment set by statute. Be sure to review applicable state law to ensure the instrument's acknowledgment conforms to any state-specific requirements.

5. Correct the Record. As noted above, many issues can be resolved by correcting the errors and omissions in the chain of title via a corrective instrument. However, before preparing a corrective instrument and tracking down the requisite person or persons to sign the instrument, check with a title insurance underwriter to confirm the corrective instrument will have its intended effect. At the end of the day, the question is whether title to the property will be insured in connection with a conveyance. Accordingly, consult with an underwriter to confirm your plan and form of corrective instrument will result in an insurable title.

Bankruptcy Cases – short summary of each. 1-2 paragraphs. Used as part of CLE materials for Mid-South Conference.

***In Re Pierce,* 581 B.R. 912 (Bankr. S.D. Ga. 2018).**

Farm Bureau Bank loaned $18,000.00 to Kenneth R. Pierce to finance the purchase of a fertilizer spreader. The parties entered into a security agreement, granting the Bank a security interest in the equipment, and the Bank filed a UCC-1 financing statement with the appropriate filing agency. Mr. Pierce later filed for Chapter 12 bankruptcy, and the Bank filed a proof of claim for the amount of the loan. Mr. Pierce objected to the Bank's claim, arguing the Bank's financing statement was insufficient to perfect its security interest because it failed to correctly identify the debtor in its financing statement as he was identified on his Georgia driver's license, and therefore, the Bank's security interest was unperfected and its claim unsecured. The court noted in its ruling that the Bank's financing statement listed the debtor's name as "Kenneth Pierce." It also noted that Mr. Pierce's name of his driver's license is "Kenneth Ray Pierce"—but, he signed his driver's license as "Kenneth Pierce." The court's ruling ultimately held the Bank failed to provide in its financing statement the name indicated on the debtor's driver's license, Kenneth Ray Pierce, as required by Georgia law, and uncontradicted exhibits showed that a search under his correct name, Kenneth Ray Pierce, did not disclose the Bank's financing statement. The court, therefore, found the Bank's financing statement was seriously misleading and failed to perfect its security interest, rendering the Bank an unsecured creditor.

***In re Nay,* 563 B.R. 535 (Bankr. S.D. Ind. 2017).**

Ronald and Sherry Nay borrowed $1.2 million from MainSource Bank to finance their 2015 crop and executed an Agricultural Security Agreement granting the Bank a security interest in **all present or future** inventory, **equipment**, crops, farm products, **farm equipment** and instruments and all proceeds, profits, replacements and substitutions related thereto. The Bank filed a sufficient financing statement and perfected its security interest. Later in 2015, LEAF Capital Funding, LLC financed the Nays' purchase of two Terex Dump Wagons, and the Nays executed a Financing Agreement granting LEAF a first priority lien and security interest in the Dump Wagons. LEAF subsequently filed a financing statement with the Indiana Secretary of State listing the debtors as "Ronald Mark Nay" and "Sherry L. Nay." However, the name on Mr. Nay's driver's license was listed as "Ronald Markt Nay." After the Nays filed for Chapter 11 bankruptcy, the Bank and LEAF both claimed to have a priority security interest in the Dump Wagons. The Bank alleged that LEAF's security interest was not perfected because its financing statement did not correctly list the name of the debtor and was seriously misleading. The court determined that LEAF's inadvertent omission of the letter "t" from the debtor's middle name invalidated its financing statement, resulting in MainSource's interest having priority over the unsecured interest of LEAF.

***In re Harvey Goldman & Company,* 455 B.R. 621 (Bank. E.D. Mich. 2011).**

The court in this case determined that a financing statement which identified the debtor by an assumed name, instead of its legal corporate name, was ineffective and the creditor was unsecured. The debtor's Articles of Incorporation identified it as "Harvey Goldman & Company," formed in 1947. The debtor filed a certificate of assumed name with the Michigan Secretary of State in 1991

stating the true name of the corporation was "Harvey Goldman and Company" and the assumed name under which the debtor transacted business was "Worldwide Equipment Company." The creditor, Abraham and Geraldine Paternak Irrevocable Living Trust, filed a UCC-1 financing statement that identified the debtor's as "World Wide Equipment Co." After the company filed for bankruptcy, the bankruptcy trustee sought to avoid the creditor's security interest, arguing the financing statement was insufficient to perfect the creditor's security interest because its financing statement did not list the legal corporate name of the debtor, but instead identified the debtor by a name that was similar, but not identical, to the debtor's assumed name, and the financing statement was not disclosed by a search using the correct legal name of the debtor. The court sided with the bankruptcy trustee and held the financing statement was seriously misleading under Michigan law, and therefore, ineffective.

***In re Alvo Grain and Feed, Inc.*, 2009 WL 5538645 (Bankr. D. Neb. 2009).**

The issue presented in this case was whether UCC financing statements listing the name of the debtor as "Alvo Grain & Feed, Inc." were sufficient to perfect a lender's security interest, when the debtor's name under the public records was listed as "Alvo Grain and Feed, Inc." Specifically, the use of an ampersand instead of the word "and" was at controversy in this case. The evidence presented to the court established that a search of UCC filings for "Alvo Grain and Feed, Inc."—the correct legal name of the debtor—did not reveal the lender's financing statements. The court ultimately held that because a search of the debtor's correct name did not reveal the lender's financing statements, the financing statements were seriously misleading, and therefore, insufficient to perfect the lender's security interest. The court noted, however, that this was not an easy decision to make, given that the debtor seemed to have been using the "and" and "&" interchangeably for many years, and found it difficult to understand why the Secretary of State's search logic failed to equate the "&" symbol and the word "and."

***In re EDM Corporation*, 431 B.R. 459 (8th Cir. BAP 2010).**

EDM Corporation was a Nebraska corporation that sold and leased emergency vehicles. The company routinely did business as "EDM Equipment," and was commonly known by that name, although it had no registered trade name on file with the Nebraska Secretary of State. Hastings State Bank loaned the company in excess of $4.5 million in 2003 and filed a financing statement with the Nebraska Secretary of State listing the debtor as "EDM Corporation D/B/A EDM Equipment." In 2005, TierOne Bank extended a $3 million line of credit to the company and filed a financing statement with Secretary of State listing the debtor as "EDM Corporation." In 2007, Huntington National Bank loaned the company $250,000.00 and filed a financing statement with Secretary of State listing the debtor as "EDM Corporation." The collateral in all three financing statements included certain ambulances owned by the company. The company filed for Chapter 7 bankruptcy in 2008, resulting in a priority dispute among the three banks with respect to the company's ambulances. Hastings State Bank argued that it had priority because it was the first to perfect its security interest via the filed financing statement. The other two banks argued that Hastings' financing statement failed to correctly list the debtor, rending its financing statement ineffective and its security interest unperfected. The bankruptcy court agreed and entered an order holding Hastings State Bank's financing statement failed to correctly list the name of the debtor as required by Nebraska law, resulting in its security interest being unperfected, and the interest of

Hastings in the collateral was subordinate to the other two lenders. The bankruptcy court stated in its order that the addition of the trade name made the financing statement seriously misleading because a search using the debtor's correct name would not reveal the financing statement filed by Hastings State Bank. On appeal, the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals affirmed the lower court's ruling and held that Hastings' addition of the debtor's trade name to its financing statement resulted in the document being seriously misleading, rendering the financing statement ineffective to perfect Hastings' security interest. According to the Panel, under Nebraska law, "if the debtor is a registered organization, then a financing statement 'provides the name of the debtor' only if it 'provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization' – nothing more and nothing less." The Court went on to state that trade names may be added to a financing statement, but not as a part of the organizational name itself.

***In re C. W. Mining Company,* 488 B.R. 715 (Utah 2013).**

C. W. Mining Company was a corporation formed in Utah that was engaged in the business of mining coal. In connection with its coal-mining operations, it obtained financing from five separate lenders and granted each lender a security interest in its accounts receivables. Each lender filed a UCC financing statement with the appropriate state agency—the Utah Division of Corporations and Commercial Code ("UDCC"). The lenders' financing statements listed the debtor as either "CW Mining Company" or "C W Mining Company," rather than by its name in the public records maintained by UDCC—C. W. Mining Company—with a period after the letters "C" and "W" and a space after each period. The Company was later forced into involuntary bankruptcy, and the bankruptcy trustee moved to set aside the lenders' claims made under their respective financing statements. The bankruptcy trustee argued the lenders' financing statements were insufficient to perfect their security interests and the lenders' claims were unsecured, because the financing statements failed to correctly list the name of the debtor, as required by Utah's version of Article 9. In response, the lenders contended the financing statements were not seriously misleading because a "reasonably diligent searcher" could have discovered the financing statements by following an obvious link to all filings under the Company's organization number. The bankruptcy court declined to adopt this minority approach and stressed the revised version of Article 9 adopted in Utah is unforgiving of even minimal errors. The bankruptcy court's ruling, which was affirmed on appeal by the district court, held the lenders' financing statements failed to list the correct name of the debtor as required by Utah law, which is the name of the debtor indicated in the public records of the debtor's jurisdiction of organization, and a search of UDCC's records using the correct name of the debtor would not reveal the lenders' financing statements, rending the financing statements seriously misleading and insufficient to perfect the lenders' security interests.