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# 'Legal Access' and 'Physical Access'

**By Lance R. Pomerantz**

Many landowners believe their title insurance policy will protect them if they are physically unable to access their property. Such lack of access may be attributable to natural features such as dense vegetation, rock formations or swamps. Or, it may be attributable to human interference such as a neighbor's parked vehicles or accumulated debris. A recent case contains the clearest explanation yet that New York courts will not extend title insurance protection to cover merely physical barriers to access.

**The latest word**

In *43 Park Owners Group, LLC, et al. v. Commonwealth Land Title Insurance Company, et al.,* 2014 NY Slip Op 07120 (Second Dept., Oct. 22, 2014) the insured parcel adjoined a public street. For many years, the City of New York had maintained a 1½-foot-thick stone retaining wall along the length of the street boundary. Due to the steep slope of the parcel, the wall was eight feet above grade at its shortest point and 34 feet above grade at its tallest. Vehicular access was impossible and pedestrian access would require a ladder.

Despite obtaining construction permits that allowed partial demolition of the wall, the insured owner commenced litigation against the title insurer. The insured alleged a policy breach for failing to disclose that the wall blocked access from the public street.


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The Appellate Division upheld a grant of summary judgment in favor of the insurer. The panel expressly held the policy provision insuring against a 'lack of a right of access to and from the land'[1] only protects against the absence of a legal *right* of access and "does not cover claims concerning lack of an existing means of physical access."

This is the first New York appellate case to clearly enunciate the law.

The existing New York law, *Mafetone v. Forest Manor Homes, Inc.,* 34 A.D.2d 566 (Second Dept., 1970) involved a change to the abutting street grade. The court found "the provisions of the standard title insurance policy here in question are concerned with matters affecting *title* to property and do not concern themselves with physical conditions of the abutting property" [emphasis in original], did not recite the policy provisions at issue.

**Welcome to the Club**

This holding puts New York in line with the majority rule on this issue. As summarized by the New Mexico federal court construing the identical provision, "courts in other jurisdictions have found that coverage for a 'lack of right of access' to the insured property is not triggered where access is merely impractical or difficult as long as the right to access exists." *Riordan v. Lawyers Title Insurance Corporation,* 393 F.Supp.2d 1100, 1104 (U.S.D.C., D. New Mexico, 2005).[1] Courts in Florida, California and Missouri have considered the issue and agree with the Second Department's holding.

The only outlier is a case out of North Carolina, *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 SE 2d 551 (1975), which, in *dicta,* construed the provision to insure against a lack of physical access. *Marriott* was cited in the brief for appellants in *43 Park Owners Group,* but was not even mentioned in the Second Department appeal.

**Homeowners can obtain protection**

The form of owner's title insurance policy presently authorized in New York State insures against damage caused "by reason of … [n]o right of access to and from the land." A purchaser of a one-to-four family residence may purchase a "TIRSA Owner's Extended Protection Policy," which protects against a lack of "both actual vehicular and pedestrian access to and from the Land," as long as the access is based upon a legal right.

*Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He also publishes the widely read land title law newsletter "Constructive Notice." For more information, visit www.LandTitleLaw.com.*

[1] From this language, as well as the date the policy was purchased (2005) it appears the policy being construed is the 1992 ALTA Owner's Policy. This policy cannot be issued in New York after May 1, 2007. The current owner's policy contains a slightly different coverage provision.