# Title Insurance

## A Comprehensive Overview

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Defending Liberty
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**COMMENT**

The Policies insure against loss because of lack of access. The standard ALTA Policies do not insure the physical condition of the right of access, but insure a legal right of access.[119] However the ALTA Homeowner's Policy and the Expanded Coverage Residential Loan Policy insure actual vehicular and pedestrian access to and from the land based upon a legal right. This coverage does not purport to insure that curb cuts exist, but does insure that a vehicle can travel to the perimeter of the land. The ALTA Access Endorsements 17 and 17.1 further expand coverage to insure the right to use existing curb cuts. The CLTA Access Endorsements 103.4 and 103.7 do not provide similarly broad coverage.

Where the title insurer does insure access, the policy insures only some adequate legal right of access, not access along all roads bounding the insured tract.[120] The insurance of access insures against loss if the insured has no existing legal right of access, but does not insure against lack of "an existing means of physical access" or insure that the means is the most convenient. The insured has sufficient legal access if it has a right to cross a flood control channel easement, subject to securing a permit to construct improvements for crossing the easement.[121] The title insurance policy does not insure a specific access, but only insures a right of access.[122]

If the title policy insures multiple tracts and those tracts are contiguous, the insurance of access is satisfied, provided one tract has access and the other tracts have access by traversing that tract.[123]

One case has stated that:

> **When an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is reasonable access under the circumstances.[124]**

This view has not been widely adopted as an articulated legal principle, but it remains a guiding principle in fact. The policy does not by its wording purport to insure vehicular right of access in all cases, nor does it limit the coverage to pedestrian right of access. In many cases, pedestrian right of access may be sufficient, such as direct right of access to a condominium unit or access to a central business district building. However, even that suggested principle is incomplete, for right of access to the common elements of the condominium project will invariably include vehicular right of access, and commercial buildings will abut public streets. Pedestrian right of access to a rural tract would in virtually any circumstance be so inadequate as to be irrelevant, unless the use of the land implied only that type of access. While access to a residence should generally include a street that abuts the land, such access, like access to some commercial buildings, may be sufficient without curb cuts.

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119 *Mafetone v. Forest Manor Homes, Inc.*, 310 N.Y.S.2d 17 (N.Y. App. Div. 1970) (Damage due to a required change in the grade of the street adjoining the insured's land in order to comply with the legal grade limits is not an insured matter. The policy encompasses only title matters and not the physical condition of abutting land, absent specific request by the insured.); *Hocking v. Title Ins. Trust Co.*, 234 P.2d 625 (Cal. 1951) (physical condition of land and access is not insured); *Sperling v. Title Guarantee & Trust Co.*, 236 N.Y.S. 553 (N.Y. App. Div. 1929), *aff'd*, 170 N.E. 163 (N.Y. 1930) (title policy does not insure against loss because of proposed change in grade of adjoining street and effect upon the land); *Krause v. Title & Trust Co.*, 390 So. 2d 805 (Fla. Dist. Ct. App. 1980) (Legal access to land is the only access which is insured under ALTA policy even if the access is not passable by ordinary passenger vehicles without clay or rock fill.); *Title & Trust Co. v. Barrows*, 381 So. 2d 1088 (Fla. Dist. Ct. App. 1979), *pet. denied*, 383 So. 2d 1190 (Fla. 1980) (Where the policy insured legal right of access no damages would lie simply because the road was not improved and was covered by high tide in the spring and fall. The policy did not insure against defects in physical condition of the land, but instead insured only against title defects.); *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo. Ct. App. 1991) (The court states: "if plaintiff had a right of access, even though over a rough and nearly impassable route, he makes no case under his title insurance policy."); *Hulse v. First Am. Title Co.*, 33 P. 3d 122 (Wyo. 2001); *Magna Enters., Inc. v. Fid. Nat'l Title Ins. Co.*, 104 Cal. App. 4th 122, 127 Cal. Rptr. 2d 681 (Cal. Ct. App. 2002) (The policy does not insure against access being impractical or difficult, if a legal right of access does exist. The land had a legal right of access through adjoining shopping center property owned by the insured, although the shopping center parcels were 2½ feet higher than the land in question and a fence and one of the shopping center buildings abutting the land in question were barriers that made access impractical.).

120 *MacBean v. St. Paul Title Ins. Corp.*, 405 A.2d 405 (N.J. Super. Ct. App. Div. 1979).

121 *Green v. First Am. Title Ins. Co.*, No. E036458, 2005 Cal. App. Unpub. LEXIS 9061 (Cal. Ct. App. Sept. 16, 2005).

122 *Coles v. Lawyers Title Ins. Corp.*, No. E-05-063, 2006 Ohio 4802, 2006 Ohio App. LEXIS 4711 (Ohio Ct. App. Sept. 15, 2006).

123 *Haystad v. Fid. Nat'l Title Ins. Co.*, 68 Cal. Rptr. 2d 487 (Cal. Ct. App. 1997); *Coles v. Lawyers Title Ins. Corp.*, No. E-05-063, 2006 Ohio 4802, 2006 Ohio App. LEXIS 4711 (Ohio Ct. App. Sept. 15, 2006).

124 *Marriott Fin. Serv., Inc. v. Capitol Funds, Inc.*, 217 S.E.2d 551, 565 (N.C. 1975) (in this case, the land was located along a heavily traveled street in Raleigh in a commercial area and the court stated that pedestrian access would not be reasonable access under the circumstances).

However, the Policies do not insure either access to all adjoining roads or the best and most convenient access. Consequently, the insured should request insurance of specific easements in Schedule A and issuance of an Access Endorsement, unless the insured secures a Homeowner's Policy or Expanded Coverage Residential Loan Policy that includes coverage of pedestrian and vehicular access based on a legal right.

The Policies also do not insure that access complies with Fannie Mae requirements for fronting on a publicly dedicated and maintained street that meets community standards, or that any private access be based on a privately or community-owned and -maintained street subject to a legally enforceable and adequate agreement.

Although right of access as insured by the policy might include not only "deeded access" (by appurtenant perpetual easement), but also a way of necessity or year-to-year license, the sufficiency of access is a triable issue if based on a seaplane or by boat over a lake. This determination is an issue of fact as to whether access is adequate or effective if it is not a right of land access.[125] In a similar case, the insureds suffered no loss since they took into consideration the lack of right of access when negotiating the purchase price and admitted that the land retained value because it could be reached by boat via the Arkansas River and that the land was bought for recreational and not commercial purposes.[126]

Access to rural property by a trail maintained by the U.S. Forest Service is sufficient access. The policy does not insure that the land has vehicular or any other particular type of access, and the definition will not be established by the "reasonable expectations" of the insured, because the language of the policy is clear and unambiguous. Unambiguous contracts must be construed in their ordinary and usual sense. Right of access includes access that is difficult, as long as the right does exist. Even if there is a requirement of reasonableness of access under the circumstances, the access available is sufficient for land in the middle of a wilderness. Any defect in the physical condition of the property did not cause unmarketability of the title, because the insurance as to unmarketability relates only to title. The fact that the insureds were able to sell the land at a profit indicates that title was marketable and that the insureds had not suffered a loss because of the access.[127]

The Policies generally will insure against loss because of limitations on access due to the express provisions of a recorded condemnation proceeding.[128]

The Policies also insure against loss because of a recorded deed that, in conveying adjoining land to the state, expressly limits access to a feeder road.[129]

An exclusion may limit the insurance of access. For example, if governmental regulations (not in the county clerk's real property records) limit access, the Policies afford no coverage on this issue.[130]

The reference to the description in Schedule A also should be carefully considered. In a number of cases, the express issue was whether the policy insured an easement, but in reality, the easement may have been the only means of access.

In one case, an Owner's Policy did not expressly insure an access easement described in the deed but referred to the insured tract as being 1.395 acres "and being the same property conveyed by deed...." The policy under Schedule B failed to exclude the easement specifically described in the deed. The policy was construed as insuring the easement and a defect existed where title to the easement failed.[131]

Likewise, a description in Schedule A of an Owner's Policy of the land insured as "Tract(s) 3 of Short Plat No. 702...," which plat described Tract 3 as being "The east 250 feet ... together with an easement for road and utilities purposes ..." was construed as insuring such easement.[132]

However, a title policy that refers to a deed and then contains a metes and bounds description that does not include an easement described in the deed will not be construed (based on those facts alone) to insure the easement.[133]

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125 *United Bank v. Chicago Title Ins. Co.*, 168 F.3d 37 (1st Cir. 1999).
126 *Riffle v. United Gen. Title Ins. Co.*, 984 S.W.2d 47 (Ark. Ct. App. 1998).
127 *Riordan v. Lawyers Title Ins. Corp.*, 393 F. Supp. 2d 1100 (D. N.M. 2005).
128 *Livingston v. Title Ins. Co.*, 373 F. Supp. 1185 (E. D. Mo.), *aff'd*, 504 F.2d 1110 (8th Cir. 1974).
129 *Hawkins v. Oakland Title Ins. & Guar. Co.*, 331 P.2d 742 ( Cal. Ct. App. 1958).
130 *Marriott Fin. Serv., Inc. v. Capitol Funds, Inc.*, 217 S.E.2d 551 (N.C. 1975).
131 *Clements v. Stewart Title Guar. Co.*, 537 S.W.2d 126 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).
132 *Santos v. Sinclair*, 884 P.2d 941 (Wash. Ct. App. 1994).
133 *Kuper v. Stewart Title Guar. Co.*, No. 01-00-00777-CV, 2002 Tex. App. LEXIS 7855 (Tex.App.—Houston [1st Dist.] Oct. 31, 2002, no pet.).