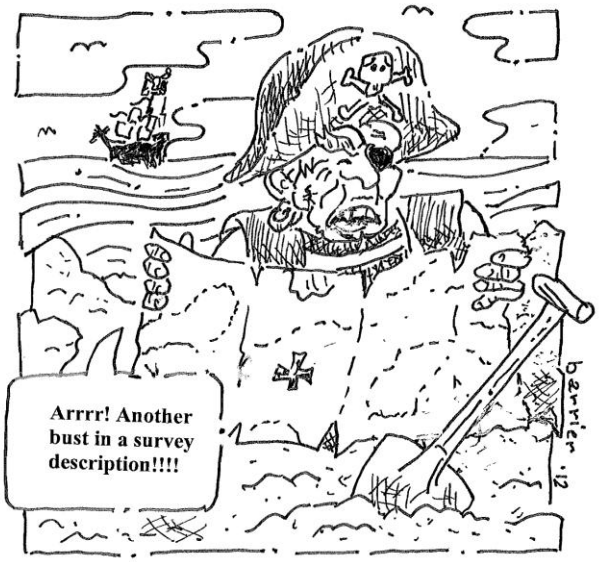
Dirt Law at Ground Level…



JUST WHOSE SURVEY IS IT ANYWAY?

By W. Christopher Barrier
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Some years ago, the Welch Foods case (as I remember it) reminded us (a) to be careful who you rely on in a real estate transaction and (b) the meaning of subrogation, since your common sense assumptions in either instance just may turn out to be wrong. In the Welch Foods case, the seller of a large tract of unimproved land provided the buyer with a title commitment with a metes and bounds description, which took in a road.

The sale closed on that description, but a later survey demonstrated the road was only an easement---the seller did not own it in fee and, hence, could not sell it. The title insurer paid the buyer for the difference in value and, much to the seller's surprise, sued him to recover the sum paid.

Not even a handshake…

The seller insisted that he was entitled to rely on the title commitment and policy, especially since the title insurance agent had clearly missed the easement, which was the mistake that ultimately injured the seller (in his view). The ultimate judicial decision pointed out that the contract was between the buyer and insurer, the seller not being a party to it; that the seller had warranted in the deed the title to what he sold; and the insurer stepped into the buyer's shoes (i.e., was subrogated to his claim).

The same principles apply to surveys, especially if the seller adds his own assurances and representations to the mix, and they become misrepresentations due to negligence. In a recent

Florida case, the seller did tell a prospective buyer that he had been wrangling with his neighbor over a boundary line. When the buyer heard about it from a third party, the seller brushed it off and minimized the extent of the disputed strip. He did not mention an earlier survey that matched the neighbor's claim.

All surveys aren't equal…

The buyer purchased a survey which corresponded to the seller's claim. That description was used in the closing. The earlier survey put the boundary line eight inches from the building the buyer intended to use. The buyer sued and recovered, because the seller's behavior amounted to negligent misrepresentation---that is, the seller carelessly persuaded the buyer to close on a questionable description.

Buyer was entitled to rely on what appeared to be a recent, accurate survey, which the seller endorsed, and in fact it did so rely. It ended up buying property it could not use. Despite the surveyor's mistake, the survey was not certified to the seller's benefit.

So, what to do?

It is not uncommon at all for real estate contracts to require a seller to not only provide a current survey, but also any and all earlier surveys, examination of which could alert the buyer that unresolved boundary line issues exist. And, if either the buyer or the seller obtains a current survey, it ought to be certified to the use and benefit of both as well as to any lender, the title insurer and its local agent. Anyone getting a survey without certification is in the position of a payor accepting a check with no signature---it tells you some things, but not what you need to know.

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