

YOU CAN'T GET THERE FROM HERE ... OR CAN YOU? A Discussion of Legal Access in the World of Title Insurance

1 hour CE (Ethics), 1 hour CLE (General), 1 hour Real Estate

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You Can't Get There from Here ... Or Can You?

OVERVIEW

Name of Provider: Alliant National Title Insurance Company

Name of Course: You Can't Get There From Here ... Or Can You? A Discussion of Legal Access in the World of Title Insurance.

Targeted audience: Florida Title Insurance Agents and other Title Insurance Professionals

Course Objectives:

A right of legal access to and from the Land is automatically insured on most Florida title insurance policies, yet the concept of legal access is frequently misunderstood and can become a pitfall for even seasoned title professionals. Improperly insuring legal access can lead to both expensive claims and unhappy Insureds, so a strong understanding of the topic is of key importance to almost anybody who works in this industry.

Course Relevance:

This course will provide an overview of the concept of legal access, how it is established, how it differs from physical access, and what to look for when deciding if legal access can be insured on a policy of title insurance. Agents will learn the process that title examiners go through when making an access determination, how to spot access issues, and how to resolve such issues once they have been identified. Much attention will be given to the topic of access easements, how they are created, how they can be terminated, and when and how they can be insured as a means of legal access to and from the subject property. Access terminology and practical advice for avoiding access claims will also be discussed.

Study Method: Classroom



OUTLINE

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|---|-------------------|
| I. Introduction and Overview | 5 minutes |
| II. Key Elements | 50 minutes |
| A. Access | |
| B. Insuring Legal Access (Physical Access Not Insured) | |
| C. Access By Means of Easement | |
| D. Other Considerations Regarding Insuring Legal Access | |
| III. Questions and Answers | 5 minutes |
| Total Instruction Time | 60 minutes |



I. INTRODUCTION

During this presentation, we will discuss what constitutes legal access and when it is insurable. Attention will be given to how the concept of insurable legal access is approached by title examiners and Alliant National, and how our title agents can identify and resolve legal access challenges they may encounter.

II. ACCESS

- A. For our purposes, access is the legal ability to move between a subject parcel of real property and a public right of way without trespassing on lands of another. In most circumstances, this will mean that the subject parcel either directly abuts a public right of way or a validly-existing easement for ingress and egress goes to a public right of way.
- B. Although an owner may be able to *physically* access the land, this does not necessarily mean that there is a *legal* right to do so. It is important to remember that physical access and legal access are two different concepts, and that a title insurance policy only insures the latter; i.e. that legal access exists. The following checklist should be helpful in determining whether there is legal access to and from the insured land.
 1. **Platted Lands – Newer Plats:** Most plats recorded within the past fifty years or so contain a statement confirming that the roads shown thereon have been dedicated to the public. However, it is also common on some newer plats to see a statement that the platted roads are to remain private, with an easement for ingress and egress being granted to the individual lot owners, their guests and invitees, emergency vehicles, postal workers, etc. Either of these options will give us confidence that our platted lot or tract has good legal access.
 2. **Platted Lands – Older Plats:** With older plats, the question of legal access can get murkier, especially when the plat contains no dedication language or shows roads that have never been physically opened. While plats recorded on or after September 1, 1971 generally (per F.S.177.081(3)) contain an automatic dedication to the public of all roads shown thereon, plats recorded prior to that date can require additional scrutiny. In such cases, feel free to contact the Florida Underwriting Department if you have any concerns about whether a particular platted road constitutes a means of insurable legal access. Additional information on this topic can also be found in Section F below.
 3. **Survey:** Does the survey show the land abutting a public road, or abutting an access easement that connects to a public road? Survey review can be especially important when dealing with unplatted lands.



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4. **Unpaved Road:** Be careful when your insured parcel abuts an unpaved road since unpaved roads are often privately owned and maintained and may or may not be subject to an ingress/egress easement that benefits our parcel. While unpaved roads can certainly be publicly dedicated, they constitute a "red flag" that requires additional scrutiny.
5. **Governmental Maps:** If there is a public road, it should show on county or state right-of-way maps. However, reviewing governmental road maps is not generally part of a standard title search, and such maps can sometimes be difficult to access.
6. **Documents:** Do any of the conveyances in the chain of title provide for a "together with" access easement, or is there a separately-recorded easement document?
7. **Limitations:** Does a recorded easement contain terms and conditions including limitations on what the easement can be used for and the number of people who can use it? If so, an exception should be placed in Schedule B for the limitations on the easement use. Such an exception will typically read: "Terms and conditions of that certain easement recorded in...."
8. **Inquiry of the Parties:** If the parties indicate that access to the property is over a private lane or street that has not been searched, then a search must be done if such lane or street is to be the sole means of legal access.
9. **Unadjudicated Access:** For insuring purposes, unadjudicated access such as prescriptive easements, common law ways of necessity or statutory ways of necessity, do not provide legal access until there is a court adjudication to confirm their validity.
10. **Railroad Crossings:** If a railroad crossing is being relied on for access to and from the insured land, Schedule B should specifically limit the access being insured to that provided in the crossing agreement.
11. **Property Appraiser's GIS Map:** As a general rule, if a roadway is public, when you click on the roadway in the Property Appraiser's GIS map, either nothing will happen, or it will return an error message such as "Parcel Not Found." By contrast, if you click on a private road, information for the privately-owned parcel that the road traverses will usually be displayed. This is a general rule only and while it may be helpful, it should not be relied upon as a sole means of determining legal access.



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- C. **Public Roads:** By statute in Florida, public roads are defined as: "all roads which are open and available for use by the public and dedicated to the public use, according to law or by prescription, are hereby declared to be, and are established as, public roads." Florida public roads are divided by Sec. 335.01 into these four systems:
1. The state highway system,
 2. The state park road system,
 3. The county road system,
 4. The city street system.
- D. **Curb cuts:** We don't usually find recorded notices of curb cuts. Permits have to be obtained for curb cuts, and the denial of a permit could create a lack of physical access. There is no policy coverage for the denial of a curb cut, since such an action would be excluded from coverage by the governmental regulation exclusion (Exclusion No. 1). In sum, the lack of a curb cut will not eliminate an otherwise good and insurable means of legal access.
- E. **Limited Access Highways:** There is no legal right of access to limited access highways such as interstate highways, local expressways, and the Florida Turnpike. Therefore, access may not be insured based on abutment to these roads or their access ramps. Our agents should be aware that in addition to the Florida Turnpike and the Interstate Highway System, there are local limited access highways that do not provide access to abutting property owners.
- F. **Platted Roads:** As discussed above, most recent plats contain language either expressly dedicating the roads shown thereon to public use or keeping the roads private while granting access easements over them for the benefit of the owners of lots in the plat. Even in the absence of such language, F. S. 177.081(3) provides that, for plats recorded on or after September 1, 1971, "all streets, alleys, easements, rights-of-way, and public areas shown on such plat, unless otherwise stated, shall be deemed to have been dedicated to the public for the uses and purposes thereon stated."
- a. For plats recorded prior to September 1, 1971, an *offer* to dedicate the streets may be implied from the filing of a plat showing the streets unless the plat recites a contrary intention. However, *acceptance* of the dedication must be established by either formal acceptance by the proper authorities or by an implied acceptance by public use.



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- b. When property is platted and sold, two kinds of rights are created in the streets. Public rights are created by the offer and acceptance of a dedication of the streets, and private rights are acquired by the purchasers of lots that are described by reference to the plat. Therefore, owing to the concept of private rights, it may be possible to insure legal access for a parcel that abuts a platted road even if that platted road was never dedicated to the public and was never physically opened.
 - c. Vacated streets generally become part of the land of the adjacent owners, unless otherwise provided for in the vacation ordinance or per the plat.
- G. Public Roads that Have Not Been Dedicated. There are multiple ways in which such roads can come into existence.
1. **Map Filing.** Filing of a map in the circuit court for that county showing the land and reciting that the road is vested in the state, county or municipality, which map has been certified by the appropriate representative of the governmental agency, is evidence that a public road exists. Florida Statute 95.361(3).
 2. **Roads That Are Both Constructed and Maintained by Governmental Authority.** Here is an example of how a non-dedicated road becomes public after construction and maintenance by a governmental authority.

Access to Greenacres is by way of a dirt road that leads to a public highway. There is no dedication of record or filed map. Sec. 95.361(1), F. S., provides that a road constructed and maintained continuously for **four years** by the county or municipality or by the Department of Transportation is deemed to be dedicated to the public, and title is then vested in the county, municipality, or State, as applicable. How do we determine whether this road provides access?

 - a. Obtain and record an affidavit from the county engineer stating that the road was constructed by the county, and has been maintained continuously by the county, for **four (4) years**; and
 - b. Review a survey showing that the insured property abuts the road.
 - c. The road does not need to be paved with concrete or asphalt to qualify as a public road under the statute. It can be a dirt road.



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3. **Roads that are Maintained, but not necessarily Constructed by Governmental Authority.** Same facts as above, but there is no evidence of who constructed the road as required by Sec. 95.361(1), F. S. Another section of the statute - Sec. 95.361(2), F. S. - provides a presumed dedication upon the passage of **seven (7) years** of regular maintenance and repair by a governmental entity, regardless of who (private or public entity) constructed the road. Access can be insured if we:
 - a. Obtain and record an affidavit from the county engineer stating that the road has been maintained continuously by the county for **7 years**; and
 - b. Review a survey showing that the insured property abuts the road.
 - c. The road does not need to be paved with concrete or asphalt to qualify as a public road under the statute. It can be a dirt road.

III. INSURING LEGAL ACCESS (PHYSICAL ACCESS NOT INSURED)

- A. Title insurance policies insure that a property has a right of legal access to and from the Land. On the ALTA 2021 form Owner's Policy and Loan Policy, this is Covered Risk No. 4, which reads as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, ALLIANT NATIONAL TITLE INSURANCE COMPANY, a Colorado corporation (the "Company") insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

...

4. No right of access to and from the Land.

This Covered Risk can be removed from coverage by a Schedule B exception that explicitly excepts legal access. Such an exception should be included in all title commitments and policies where no means of legal access to the property can be identified.



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- B. The title policy does not contain any provisions insuring the particular *physical condition* of the legal access. Stated differently, the roadway that provides legal access does not have to be in good condition, or even physically passable.
- C. Therefore, a title insurer has no contractual liability to an Insured if the access road is physically impassable or impaired. For example, in *Title & Trust Company of Florida, Inc. v. Barrows*, 381 So. 2d 1088 (Fla. 1st DCA 1979), the court held that the fact that the platted road providing access was covered by high tide water during the spring and fall of each year was not a matter covered by the title insurance policy. Additionally, *Krause v. Title & Trust Company of Florida*, 390 So. 2d 805 (Fla. 5th DCA 1980) held that a title company was not liable to an Insured for breach of fiduciary duties for failing to disclose a matter which would have been readily apparent upon a visual inspection of the property. In this case, the legal access was not passable by ordinary passenger vehicles without a substantial amount of clay or rock fill.
- D. As stated above, Florida policy jackets automatically insure legal access to and from the property unless a specific exception for lack of access is shown on Schedule B. Unless the legal description contained in Schedule A specifically describes an ingress-egress easement, the policy does not insure any *specific* or *particular* means of access.
- a. **If access by a particular easement is requested by the parties, this request should be made at the time the title order is placed with Alliant National. Upon seeing this request, the Alliant National title searcher will search this easement, and then add it to the Schedule A legal description if the easement is deemed insurable. If the search reveals any encumbrances (such as a mortgage) on the easement, an exception for said encumbrances will be included on Schedule B-2 of the search, followed by the words, "as to access easement only."**
- E. In the event that access is available only by way of a private easement, this should be noted in the policy as an informational note on Schedule B as follows:
- "NOTE: Access to the insured land is solely by virtue of that certain Easement recorded in O.R. Book, Page _____, Public Records of _____ County, Florida."**
- F. A public road based solely on easement by prescription (i.e., established by prolonged use) or easement by way of necessity cannot be relied on as insurable legal access unless its status as a legal means of access has been judicially determined.



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G. If there is no right of access, the commitment and Schedule B of the policy being issued must contain an exception as to the lack of a right of access. The exception should state:

"Notwithstanding Covered Risk Number 4 on the jacket of this policy, this policy does not insure any right of access to and from the land."

IV. ACCESS BY MEANS OF EASEMENT

A. WHAT IS AN EASEMENT?

An easement is a non-possessory right to cross or otherwise use someone else's land for a specified purpose. Unlike a license, an easement runs with the land and cannot be unilaterally terminated or revoked by the grantor. Once an easement has been granted, the grantor cannot interfere with the grantee's use of the easement – unless exceptions are expressly set forth in the easement agreement. Access easements are said to be "appurtenant easements," which means that they have a benefitted (or "dominant") parcel and a burdened (or "servient") parcel. Appurtenant easements run with land for both the dominant and servient parcels, regardless of whether or not they are mentioned in the fee simple deeds that comprise the respective chains of title.

B. WHY ARE EASEMENTS IMPORTANT WHEN DISCUSSING LEGAL ACCESS?

If your subject property does not directly abut a public road, the most common way to insure legal access is to locate an easement that will provide access to a public road across the lands of one or more intervening property owners. If no such easement is revealed by the title search, it may be necessary to include a B-1 requirement for creation of a new access easement. Depending on the most logical way to get from the subject parcel to the nearest public road, this may require contacting more than one intervening property owner to execute the document creating the easement.

C. HOW IS AN EASEMENT CREATED?

1. An easement must be in writing, signed in the presence of two witnesses, and acknowledged in the presence of a notary public. Section 695.01(1) of the Florida Statutes reads as follows:

"No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law...."



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2. Insurable access easements are often created by including "together with" language in a fee simple deed conveying the property benefitted by the easement. For example, a deed in the chain of title for the subject property might contain a legal description that reads in part:

"the SE 1/4 of the SE 1/4 of Section 30, Township 17 South, Range 22 East, together with a perpetual, non-exclusive easement for ingress, egress, and utilities over and across the West 30 feet of the SE 1/4 of the SE 1/4 of Section 30, Township 17 South, Range 22 East, which easement shall be appurtenant to the fee conveyed by this instrument."

Such language could be the basis for insuring legal access to our property. However, before the "together with" language could be included in our Schedule A legal description, the land burdened by the easement would have to be searched by a title searcher. A determination would need to be made that the easement was validly created, is still in existence, and actually provides a means of legal access for the benefitted parcel. In addition, exception(s) would need to be taken for any items that encumber the easement property.

3. Insurable access easements can also be created by the recording of a separate document that is something other than a fee simple deed of conveyance. Such a document might bear a title like "Grant of Easement," "Deed of Easement," "Roadway Maintenance and Easement Agreement", "Declaration of Covenants, Conditions, Restrictions, and Easements", etc. Easements created in this manner must still be searched before they can be included as part of the Schedule A legal description.
4. Access easements can also be created by prescriptive use ("I have used this roadway for so long that the law deems it to be an easement for the benefit of my property") and by necessity ("I must have an easement over this roadway because there is no other way I can access my property"). Easements created in this matter cannot be considered insurable, however, unless they have first been confirmed by a recorded judicial decree.

V. OTHER CONSIDERATIONS REGARDING INSURING LEGAL ACCESS

1. When legal access is not being insured, an exception will appear on the search/commitment and policy that substantively reads: "A right of legal access to and from the Land is not insured hereunder." In addition, a corresponding requirement to establish legal access will usually also be included in the search or commitment as a reminder to the agent that this property lacks legal access.



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2. If neither an access exception nor an access requirement appears in the search, then the title searcher has determined that the property possesses good legal access to a public road. This is true even though you may not see any specific access easement referenced in the Schedule A legal description.
3. As stated previously, if a specific means of access is requested to be insured, this request should be communicated to the title searcher, preferably at the time of placement of the original title order. The requested easement will then be searched, and added to the Schedule A legal description if it is deemed to be insurable. In addition, if any items (such as mortgages) are discovered that the easement is subject to, such items will be added to Schedule B-2 as exceptions "as to access easement only". This is important because if an access easement is determined to be subject to a mortgage, foreclosure of said mortgage could potentially result in extinguishment of the easement.
4. If a specific access easement is being insured, the document creating the easement should be examined for specific terms and conditions that may impair or qualify the easement's use. If such terms and conditions are found, then an exception should be taken for them on Schedule B- 2 (or policy Schedule B).
5. It is possible to *overburden* a private access easement, thus making it invalid for uses beyond its original intent. If you discover an access easement that states it is for the benefit of Parcel A, be wary of relying on that easement as a means of access for a different parcel that may be contiguous to Parcel A, even if said parcel is owned by the same individual or entity. Read the easement's terms, but you will most likely need a new easement.
6. Say you are insuring a conveyance of two contiguous parcels (PARCEL 1 and PARCEL 2), each being purchased by the same individual or entity. PARCEL 2 abuts a public road, but the contiguous PARCEL 1 does not. Check with underwriting first, but it may be possible to insure both parcels without an access exception if you add the following informational note to Schedule B: "NOTE: A right of access to and from PARCEL 1 is available only by traversing PARCEL 2. In the event that PARCEL 1 and PARCEL 2 ever cease to be in common ownership, no coverage will be afforded for a right of access to and from PARCEL 1."
7. A cash buyer may sometimes be willing to live with an access exception if they are comfortable that their right of access will never be challenged. An institutional lender will never be willing to live with an access exception.
8. A warranty covenant appearing in a warranty deed will typically not cover a lack of legal access. Such covenants are only against the claims of third parties against the property.



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9. **Practice Tip:** When reviewing surveys and aerial maps, watch out for adjoining parcels whose owners may need to traverse your subject parcel in order to obtain access to a public road. Even if no recorded easement burdening your property is found to be recorded, an easement may be imposed by virtue of prescription or necessity. An exception for such a potential right of access should therefore be raised in your commitment and policies.
10. **"Subject To".** When the words "subject to an easement..." are used in a legal description, this indicates that the property being conveyed is burdened by an easement that was previously created. "Subject to" easements should be shown as exceptions on title commitments and policies, but it is not necessary to include them as part of Schedule A legal descriptions. To help clarify what "subject to" means when included in a legal description, let's look at an example.
- Lincoln conveys the north half of Blackacre to Kennedy, and adds "subject to an easement over the east 20 feet thereof". Lincoln **later** conveys the south half of Blackacre to Truman, and adds "together with an easement over the east 20 feet of the north half of Blackacre."
 - **Can the south half sold to Truman be insured with an access easement?** The answer is "NO". The words "subject to" have been a source of confusion for decades. *Those words are not sufficient to either reserve an easement in favor of the grantor or anyone else, or to create an easement.* This is established law in Florida, and there are multiple cases that support this.
 - In our example, if Lincoln had still owned the north half of Blackacre at the time he conveyed the south half to Truman, then the words "together with" could have created an easement over the north half for the benefit of the south half. However, since Kennedy did not acquire the north half subject to any easement (because "subject to" was not sufficient to create one), Truman does not have an easement over the north half owned by Kennedy, and Lincoln had no right to convey the south half "together with" any easement. Lincoln no longer owned the north half at the time he conveyed the south half to Truman, and Lincoln never validly created an easement while he owned all of Blackacre.
 - **Can we ignore the "subject to" easement on the north half when insuring a future sale of the north half?** The answer is still "NO". The fact that it was mentioned implies that there are parties that believe they have an easement right, so an exception should be made for possible easement rights created by the "subject to" language in the deed, despite the fact that no easement was validly created.
11. **Termination of Access Easements** – Since there is a general public policy against landlocking parcels, access easements are rarely terminated once they are established.
- i. However, easements can be and often are *moved*, which essentially means the termination of one easement and the creation of a new easement to take its place.



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- ii. Some easements terminate or expire by their own terms; for example, at the end of somebody's life, or upon the failure of a property to be used for a specific purpose. Read your easement documents carefully before deciding to rely on them as a basis for insuring legal access!
- iii. Easements can be extinguished by merger if the dominant and servient parcels ever come into common ownership. Remember, you cannot have an easement over your own land.
- iv. Also, it is important to remember that the Florida Marketable Record Title Act *does allow* for extinguishment of easements that only appear prior to the root of title *if they are no longer being used*. See F. S. 712.03(5).

