

A close-up photograph of a person's hands writing on a document with a pen. The document is a lease agreement, with visible text such as "Lease Agreement", "Landlord agrees to lease to Tenant", and "Tenant agrees to lease from Landlord". The background is a wooden desk. The title "Resolving Common Real Estate Title Problems" is overlaid in large, bold, black font.

Resolving Common Real Estate Title Problems

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CURRENT ISSUES IN REAL ESTATE TITLE AND TITLE INSURANCE

I. RESOLVING COMMON TITLE PROBLEMS

A. Litigation

Litigation involving certain causes of action has the potential to affect the title of a party to the action, including foreclosure, divorce, partition, quiet title, rescission, specific performance and declaratory judgment actions. When litigation contesting or asserting ownership is pending, a transfer of the title by the owner or contestants is unlikely to occur unless the action is dismissed and the lis pendens discharged by the court. When an action has been dismissed or a judgment entered, an appeal or the possibility of an appeal is similarly a deterrent to the transaction's closing. Title insurers will strive to assure that an order for dismissal is entered and the right of appeal has passed, before providing title insurance to a prospective purchaser. Generally, title insurers do not insure titles that are the subject of litigation, for to do so would be to handicap the likelihood of a party prevailing by projecting the type of title insurance premium appropriate to the risk of a favorable outcome.

B. Intractable Title Problems

Defects or encumbrances that result in unmarketability of the title to real estate defy generalization, and involve any number of situations. The following is a brief discussion of several examples for which resolution without curative litigation is unlikely.

1. Lack of any record title to the real estate

When the longtime owner of real estate requisitions a search of the title in anticipation of sale, and it is discovered that there is no deed or evidence of its title, a question arises whether there is any alternative to the quieting of the title by appropriate civil action. The owner may have evidence that a conveyance was prepared but the original lost and not recorded. Similarly, the owner may be of the opinion that it has been in open, notorious, exclusive and adverse possession as against the record title holder for the period of time necessary under state law to establish a title by adverse possession. The land to which the owner lacks any record title may comprise the entirety of the land occupied by the owner, or only a portion of the owner's land, the balance of which the owner holds a marketable record title. The usual answer is that there is no alternative to commencement of an action and entry of judgment, though a default judgment may be anticipated.

2. Lack of requisite authority to convey

When the title is held by a corporation, LLC, general partnership or other entity, and a principal of the entity is uncooperative in authorizing the conveyance of the entity's

real estate by another principal, a question arises whether there is any alternative to the commencement of a declaratory judgment action for the transfer of the real estate. The answer may depend upon the extent of the voting shares or LLC membership or partnership interest, and the existence of evidence that the uncooperative party retains no enforceable rights in the entity.

3. Theft of identity

When an individual has acquired real property in the name of another, obtains a mortgage loan and is convicted of having stolen the nominal owner's identity, a question arises whether there is any alternative to the commencement of a declaratory judgment action that determines the identity of the owner, or a mortgage foreclosure divesting the potential ownership claimants. The usual answer is that there is no alternative to commencement of an action and entry of judgment, though a default judgment may be anticipated.

4. Uncooperative co-owners holding undivided fractional interests

Occasionally, the title to real estate is held by two or more individuals who do not agree upon the land's disposition. When two or more individuals own real estate and fewer than all have agreed to join in a conveyance of the real estate, a question arises whether there is any alternative to the commencement of a partition action or appointment of a receiver having the authority to convey. The usual answer is that there is no alternative to commencement of an action and entry of judgment, though the matter may depend upon the quantum of the undivided fractional interest, and the remoteness in time of the holder's vestiture.

5. Defective tax titles

Tax titles may prove unmarketable for lack of a definitive statute of limitation barring actions enforcing the rights of the former owner, who may retain a right of redemption unless extinguished by subsequent action of entry of judgment. When a successor of the taxing authority purchases such lands, a question arises whether there is any alternative to the commencement of a declaratory judgment action or action to bar the rights of the former owner. The answer is state-specific, and will depend upon the laws of the jurisdiction.

C. Title Insurance as a Solution or Enhancement: Problem Profiles

Although litigation culminating in a declaratory judgment may be necessary to clear the title to real estate when the defect is severe or the title unmarketable, yet in other instances, title insurance may be available to insure against the outstanding encumbrance. Title insurance format will vary. In the event that the potential lien, defect or encumbrance is one that can be characterized with reference to a recorded instrument, the title insurer may agree to simply omit or remove the item, or alternatively, to display the item and provide affirmative coverage against it by

appropriate expository language. For example, in the event that a mechanics' lien of questionable enforceability was filed, the title insurer may, depending upon its underwriting and indemnification criteria, agree to provide affirmative coverage as follows: "The Company hereby insures the named insured against loss or damage not exceeding the Policy Amount occasioned by the enforcement of the aforementioned mechanics' and materialmen's lien." The following are several examples of situations in which title insurance may prove to be available and a cost effective solution.

1. Encroachments of building

Buildings and appurtenant structures that encroach upon adjoining land or upon easements, or that violate building setback lines place at risk the building's occupant. In the event that the building has been occupied openly, exclusively, and adversely for a period sufficient under applicable state law to ripen the occupant's title by adverse possession, title insurance that provides coverage against loss occasioned by the encroachment's enforced removal may be available to protect both mortgagee and owner. In the event that the encroachments are of a minor nature, title insurance that provides coverage against loss occasioned by the encroachment's enforced removal may also be available. (See Exhibit B.)

2. Break in the chain of title

In the event that a former owner of the real estate, a corporation, failed to convey the title to a successor, and the former owner was subsequently dissolved and its board of directors not locatable, is it possible to obtain title insurance that insures against the possible ownership claims of the dissolved corporation and its shareholders? Depending upon the circumstances of the case, it may be possible for the purchaser to obtain an Owner's Policy without any exception for claims of the former owner. (See Exhibit C.)

3. Lack of authority to convey

Title held by co-owners who cannot agree upon a transfer of ownership and do not therefore execute a deed is an unlikely prospect for title insurance insuring the purchaser of what amounts to an undivided fractional interest. But title that is held by co-partners or by members of a limited liability company who are inactive or not available or responsive to sign or consent to the transfer may prove a possible setting for title insurance.

4. Lack of access

Access to real property via easement rather than abutting public road is occasionally the only option available to the prospective purchaser. There is no legal litmus test as such that will determine the willingness of the purchaser to consummate the closing, but purchasers will occasionally find that the title insurer will agree to provide coverage that insures against lack of a right of access.

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