Adverse Possession & Its Impact on Title

Description

Having spent over half of my lifetime working to cure or resolve thousands of imperfect real estate title issues, I regularly address how allegations of adverse possession impact the title insurance underwriting process.

Most title underwriters are highly unlikely to insure a title based solely on facts that might establish adverse possession, no matter how strong the case may seem. Facts that may establish adverse possession really amount to nothing more than evidence that may be presented to the local Circuit Court with the hope of obtaining an order declaring the title to be vested in the claimant. As such, a court order is required to establish title by adverse possession.

However, in some cases where the title is somewhat marginal or imperfect, facts that might establish adverse possession may be taken into account by the underwriters in making their decision to insure a particular property. In these cases, the insurer has some level of comfort in knowing that, if all else fails in the event a claim is made against the title, it may be able to establish the title through adverse possession as a last resort.

Any discussion on the issue of insuring a title based in whole or in part on adverse possession necessarily must start the premise that the goal of the title insurer and the parties to a real estate transaction is to reach the mutual conclusion that the title is marketable based on consideration of all of the relevant facts. Justice Carrico stated what most consider to be the standard for marketable title in Virginia in the case of *Madbeth, Inc. v. Weade,* 204 Va. 199, 129 S.E.2d 667 (1963). His opinion stated as follows:

A marketable title is one which is free from liens or encumbrances; one which discloses no serious defects and is dependent for its validity upon no doubtful questions of law or fact; one which will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land; one which a reasonably well-informed and prudent person, acting upon business principles and with full knowledge of the facts and their legal significance, would be willing to accept, with the assurance that he, in turn, could sell or mortgage the property at its fair value. *Cogito v. Dart*, 183 Va. 882, 887, 33 S.E.2d 759; *McAllister v. Harman*, 101 Va. 17, 25, 34 S.E. 474; *Clark v. Hutzler*, 96 Va. 73, 76, 77, 30 S.E. 469; Anno. 57 A.L.R. 1284.

While there is no bright line test as to what constitutes a marketable title, it is clear that an allegation of title by adverse possession does not alone make a title marketable since it is necessarily dependent on litigation and a court order to be conclusively established.

The more difficult issue is where the seller is clearly in the record chain of title, but perhaps the legal description is old and somewhat difficult to follow, or where there appear to be scrivenersâ?? or other errors in old deeds which create clouds on the title to varying degrees. In some of those cases, despite their imperfections, strong evidence of facts which appear likely to establish title by adverse possession may convince the underwriter to insure with the added comfort that if the title otherwise fails, title by

adverse possession could successfully be asserted in order to establish or defend the title in the insured. Since no two titles are exactly alike, all of the relevant facts will always need to be considered on a case by case basis.

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Category

1. Underwriting

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