



Adverse Possession Law

Credits: 4 PDH

Course Description

This course is based on the topics of adverse possession and prescriptive easements, both legally established means in which a party may acquire either legal title or the deeded privilege to use land belonging to another party without the expressed consent of that owner. Surveyors who perform boundary retracement surveys must be familiar with this legal doctrine, as these types of boundary surveys are often muddled by the existence of an adverse possession or prescriptive easement situation.

Topics

- What is adverse possession?
- Disseisor and Disseisee
- Types of Encroachment; Encroachment vs Easements
- Overview of "Squatter's Rights"
- Reasons for Adverse Possession and Prescriptive Easement Laws
- The use of "Tacking" in adverse possession
- Examples of, and Exceptions to Adverse Possession
- Adverse Possession of Governmental Lands
- Color of Title and Good Faith
- The Principle Requirements of Adverse Possession
- Preponderance of Evidence and the Claimant's Burden of Proof
- Actual Possession, Open/Notorious, Exclusive Occupation
- What is "Hostile" Claim; Adverse Possession through Acquiescence
- Principal Four - Under "Cover of Claim" or "Claim of Right"
- Principal Five - Under Continuous and Uninterrupted Occupancy
- What is "Prescription" or a Prescription Easement?
- Establishing a Prescriptive Easement; Cases of Prescriptive Easements
- Types of Easements, Termination of an Easement
- Fighting Adverse Possession and Prescriptive Easements
- Filing an Action to Quiet Title; Posting Signage on the Property
- Providing Written Permission to the Squatter or Encroacher
- Filing a report with Law Enforcement; Post a Notice to Evict and Filing
- Blocking Entry to the Land or Property; Statute of Limitations on Ejectment; Statutory Time Periods



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Preface

Intro

This course is based on the topics of adverse possession and prescriptive easements, both legally established means in which a party may acquire either legal title or the deeded privilege to use land belonging to another party without the expressed consent of that owner.

Those performing boundary retracement surveys must be familiar with this legal doctrine, as these types of boundary surveys are often muddled by the existence of an adverse possession or prescriptive easement situation.

What is Adverse Possession?

This is the intentional or accidental occupation of another party's land in order to gain a legal title of ownership.

One example of adverse possession is when a party "squats" in an unused or vacant property of another, in order to gain ownership of that property for use as a residence.

Another example is encroachment, as when a person uses a portion of another's land.

"Structural encroachment" is where a structure is built across a boundary line such as a fence, patio, concrete pad, or even a residence.

Prescriptive Easement

This allows a party to gain the right to use a portion of the other's property for a particular purpose, without deeded or implied consent of the legal owner.

An example may be when one party creates a pathway or road across another's land, or when some type of utility (ex. - pipe lines or power lines) traverses another's property.

In certain cases of adverse possession, a prescriptive easement is often granted in lieu of a title of ownership.

Note: Adverse Possession Requirements Differ based on State or Jurisdiction

In writing this course, we have covered general elements of adverse possession law, which may or may not be valid in all 50 states. The statutes and common law principles governing adverse possession differ from state to state.

In addition, laws based on newly established judicial precedents governing adverse possession are periodically changed; therefore it is advisable to check within a particular state or jurisdiction to see what the qualifications for a particular state may be.

Chapter 1: What is Adverse Possession?

Overview of Adverse Possession

Definition

The legal doctrine, of the common law of “adverse possession” states, that an owner of land may risk forfeiture of title to their land, if they fail to “eject” trespassing parties within the statutory period of time*.

If the trespasser utilizes the land as their own for the length of time specified in the state's statute of limitations, and satisfies all of the principal elements (or statutory requirements**) of the adverse possession doctrine, the owner may stand to lose the right to recover possession of the land from the trespasser.

* The statutory period of time required to occupy a property differs between state jurisdictions, with some states requiring a period of as little as three years of continuous possession (Arizona), while others (Louisiana and New Jersey) require as

** The statutory requirements for adverse possession mandate that the act of possession must be:

- Continuous
- Hostile
- Open and Notorious
- Actual
- Exclusive

(Definitions for these requirements will be covered in depth, later on in this course).

A retracement survey of the original boundary lines alone is not enough to reclaim the right to property lost through adverse possession or prescriptive easement. At least one of the elements of

possession must have been violated, or an “exemptible” situation must have been present.

The following are additional requirements for qualifying for adverse possession of a property. Some of these are valid in only a select number of states:

- The occupier of the land must have made improvements to the property in question
- Provide proof that the possession of the land was not taken by force
- Legal documentation giving the claimant title to the property must be recorded
- Proof of payment of the property taxes by the occupier
- Color of title
- Good faith

Depending on the situation, if all other requirements are satisfied with the exception of the tax payment, a court may grant the occupier a prescriptive easement to use the property, instead of ownership through adverse possession.

Origins of Adverse Possession

Adverse possession's origins are based both in statutory actions*** (based on statutes) and in common law*** doctrines, so the details concerning adverse possession actions will vary based on the jurisdiction in which the possession occurs.

The required period of uninterrupted possession is governed by the “statute of limitations,” while the other elements of adverse possession are based upon common law judicial rulings.

***Common law is a one of three branches of law in the US, on equal footing with statutes (which are adopted through the legislative process), and regulations which are declared by the executive branch.

In cases where the parties disagree on what the law is, a common law court will use past precedential decisions of relevant courts for the basis of their ruling.

If a similar dispute has been resolved in the past, the court is usually bound to follow the reasoning used in the prior “precedent.” If, however, the court finds that the current dispute fundamentally differs from previous cases, judges have the authority to resolve the issue as they deem prudent.

The Intent of Possession

Intent refers to whether the desseisor knowingly occupies a property (as in hostile intent), or accidentally occupies (such as in the case of a faulty title) or otherwise encroaches upon a property.

As in most of the elements of adverse possession, the intent of possession varies from state to state, however in many states the intent of the desseisor has little bearing on whether the claim is valid or not.

Disseisor and Dissee

There are many labels used to describe a party which acquires land through adverse possession, such as: adverse possessor, occupier, trespasser, squatter, encroacher, etc.

However, from early English common law, the legal term for the party or entity that seizes a property, through adverse possession is referred to as the “disseisor.”

- *Disseisor* - is the party in a case of adverse possession who has taken actual possession of the property, thus "dis-seizing" (or dispossessing) the original true owner of the property. The disseisor is also referred to as a “dominant tenement holder” in the case of a prescriptive easement.
- *Dissee* – is the party dispossessed of their property. The dissee is also referred to as a “servient tenement holder” in the case of a prescriptive easement.

Case of Eminent Domain

Various entities (individual persons, federal and state governments, municipalities, and corporations), can potentially acquire land through

adverse possession. However, if a governmental entity or agency (and in some circumstances, a corporation) seizes land, it is usually a case of eminent domain, which is the condemning and seizing of private land for public use, redevelopment, or benefit.

Eminent domain is an entirely separate legal doctrine from adverse possession or prescriptive easements.

Applicable to the Seized Portion and Not the Whole

Adverse possession applies only to the portion of property that the occupying party has possessed and not the land in its entirety.

For example, if a neighbor builds a structure five feet over the adjoining boundary, only the 5 feet of land encroached by the construction of the fence line would be considered in the claim, and not the entire neighboring parcel of land.

Types of Encroachment

Structural Encroachment

This is the form of adverse possession where a property owner encroaches on the boundaries of his neighbor’s parcel by building a structure over the property line.

Common structures of encroachment are:

- Fences
- concrete pads and patios
- storage buildings
- additions
- residences

The problem of encroachment can usually be resolved with a calm and rational discussion amongst neighbors, but often these problems end up in litigation. Surveyors are frequently brought into the middle of such contentious boundary disputes, and relied upon to testify in court.

It is common for structures to be built without permits, within an existing fenced boundary (see image). In this situation, had the fence been built in

the wrong location, the shed and patio may also have crossed into the neighbor's territory.



Shed and Concrete Pad built right up to fence
Image Source: Movato.com

Landscape Encroachment

This is a type of encroachment which consists of the plant life (mostly trees and shrubs) of one neighbor encroaching on the other. With residential lot sizes becoming increasingly smaller, it's nearly impossible to plant trees or shrubs without their "driplines" eventually flowing over the neighbor's boundaries, when the plants reach mature size.

Generally, people are reasonable and do not become disgruntled when limbs hang over their property line.

However, when limbs (or roots) begin to create serious issues, then landscape encroachment can become a big cause for litigation:

- root systems causing cracks in driveways or foundations
- when they find their way into water/sewer lines
- when large limbs hang over neighboring cars and houses

When landscaping can become a claim for adverse possession

When various forms of landscaping (trees, shrubs, grass, etc.) are actually planted on neighboring land and continuously maintained throughout the statutory period, a case for adverse possession may become valid. Even seeding the lawn and mowing

it might become an argument for claiming adverse possession.

In an action which arose in Queens County, New York, the plaintiffs (desseisors) brought suit against a neighboring landowner, Apple Bancorp, Inc., claiming that they were entitled to the title of ownership for a portion of the neighboring land by reason of adverse possession. They argued that, for a period of 10 plus years they had planted, cultivated, and watered the vacant land.

The courts ultimately ruled that Apple Bank was able to show adequate proof that their contracted landscaper had also cultivated the land for over 16 years and that the plaintiffs were allowed onto the bank's property "as a neighborly accommodation."

The courts, in this case, eventually denied the plaintiffs claim of adverse possession for the portion of the land.

Although, had the bank been unable to prove that they maintained the landscaping as well, the plaintiffs may very well have won their case for adverse possession of the vacant property. The fact that this case went to court, proves this likelihood is a possibility.

Agricultural and Grazing Encroachment

Using a neighbor's land for agricultural purposes might also provide the disseisor an argument for adverse possession of a plot of land, whether the occupancy is accidental or intentional.

Such a case is when one land owner cultivates and plants on the land of another or has their livestock graze neighboring fields.

If the disseisee negligently allows this to occur over the statutory period of time, they may stand to lose their acreage, should the disseisor choose to file a claim.

Squatting and “Squatter’s Rights”

Squatting

“Squatting,” has more or less become the standard label when referring to the occupying of a property that legally belongs to someone else when that owner has not given permission for them to be there.

Squatting is a form of adverse possession, and is typically considered as pseudo-criminal activity by the courts.

Squatter’s Rights

The term "squatter's rights," refers to the temporary rights of squatters that exclude them, from being removed from a property without going through the due process of law.

A “squatter's right” allows one party to use the property of another, in the absence of an attempt by the owner to “eject” the trespasser from the land.

There is a lot of gray area when it comes to the issue of squatting, with many seeing at it as the outright theft of property, while some may see it to be a claim of right to use something which has been abandoned by another.

Ejecting a Squatter

Depending upon the jurisdiction, the first step in the ejection of a squatter may be written notice to vacate. When this step fails to dissuade the trespasser, going through the full eviction process is usually the next step.

This can take a property owner several months to regain access to their property, but simply removing a trespasser by force might wind the property owner up in jail; and removal by law enforcement is not always an option, as many times this may be considered a civil infraction, not a criminal one.

Use of “Tacking”, or Shared Continuous Possession

In some jurisdictions, one squatter may pass along continuous possession to another squatter, known as "tacking," until the adverse possession period is complete.

The general rule applicable to the use of tacking is that adverse possessors can “tack” their periods of possession onto one another's possession if, and only if, the transfer from one possessor to the next possessor is voluntary.

Changes to Adverse Possession Law

In the years following the bursting of the US housing bubble and the “Great Recession,” many houses around the nation sat vacant due to the fact that many homeowners’ were underwater on their mortgages.

This became a nightmare for banks and other mortgage holders. With so many homes lying vacant, being more or less abandoned by the mortgagees, many unscrupulous parties sought to acquire these homes through adverse possession.

As word spread of the opportunity available to go after “free houses,” many of these vacated homes became occupied by squatters hoping to occupy the homes long enough to obtain ownership. Door locks were changed; utilities were illegally turned on, furniture moved in, and so on.



Vacant and Abandoned House

Image Source: propertycasualty360.com

Because of these widespread abuses of the adverse possession laws, some changes to adverse

possession law were made in many states where squatting abuse was rampant.

Justification for the Adverse Possession Law

Justifications for Adverse Possession

The fundamental reasoning behind the adverse possession doctrine, is similar to the reasoning behind all statutes of limitations; (old claims are simply hard to prove, documents are lost or destroyed, witnesses pass away and the memory of who did what, and where becomes faded).

If a claim never expired, then a legitimate buyer of property may find themselves having to defend against a claim based on an action or event occurring years prior, thus potentially depriving them of their property.

Since it is unreasonable to expect that evidence be forever preserved and for land owners to foresee every possible action from the past which may give rise to a claim, the law must create such statutes of limitations.

Also, the principal requirements of adverse possession are designed such that should the owner of the property allow an overt possession of their land for such a long period of time, before taking action to protect their property, then they obviously have neglected or abandoned it.

Thus, in the eyes of the law, the elements of possession and statutes of limitations of adverse possession are not considered to be unjust to the original owner.

The Use of Tacking to obtain Title

The use of tacking in adverse possession

As briefly mentioned in the previous page, “tacking” is when one squatter voluntarily passes along continuous possession of a property to another squatter, until the adverse possession statutory period of time has been satisfied.

Tacking still applies, even if the land is legally conveyed to another owner during the time of possession

The rule regarding adverse possession against successive owners is, that once an adverse possession begins to run against the original deeded land owner, it continues to run against any other subsequent deeded land owners as well.

This is a good reason for any purchaser of land to have it promptly inspected, and any tenants or occupants be thoroughly vetted prior to completion of the sale, as it’s possible that a case of valid adverse possession may be nearing the end of a statutory period of occupation on that property (also known as ripening).

The burden of proof is for all desseisors, not just the one filing claim

Based on the standard of “preponderance of the evidence,” all parties participating in the squatting sequence must provide proof that their occupancies met the elemental requirements of possession during their occupying time period, when claim of adverse possession is filed in court.

If the last desseisor did not obtain the land voluntarily and openly from the previous desseisor, then the burden of proof may be problematic for that desseisor seeking the final claim on the land.

In addition, if the previous desseisor refuses to appear in court and offer testimony as to their statutory period of possession, then the claim of adverse possession is likely to be dismissed.

Examples of Adverse Possession

Examples

Fences installed at wrong property line location
A common example of adverse possession is the case of residential neighbors who share a common property line which has been fenced in the wrong location.

When corner monuments are not located in order to accurately define a boundary, property owners

tend to install fencing where they assume the property line to be located.

Also fencing may be erected out of convenience to circumvent stationary objects such as trees and shrubbery. As the years go by, this can become the new boundary under the rules of adverse possession.

(When a desseisor seeks to prove their case of possession for the entire statutory period, the condition of the fence provides a good indication of the age).

These situations tend to become apparent when land changes ownership, and boundary retracement surveys are performed for the new buyer.

If the new buyer hopes to reclaim the land, they may need to do so in court, as the neighbor might decline to relinquish a section of yard that they've assumed was theirs for so many years. This is especially likely when the section of land is being utilized for purposes such as above ground pools, swing sets, sheds, etc.



Small Yards and Privacy Fences

This situation occurs frequently following property transfers. Sometimes both parties are rational and agree on returning to the original boundary, but when the situation isn't handled diplomatically, immovable structures are built on the land, or folks simply become defiant, the matter may wind up in court in an adverse possession lawsuit.

Agricultural and Grazing Encroachment

This type of encroachment may occur when a farmer intentionally or accidentally cultivates and plants crops on neighboring acreage. If this is allowed to go unchecked for the statutory period of time, the desseisee may potentially lose their rights to ownership of these lands.

The same can occur when livestock grazes across the property lines unchecked. As with all adverse possession cases, the principal elements of possession must exist for the full time period.

Timbering of Another's Land

In cases when a person decides to timber another's property, whether it is accidental or intentional, they will likely be charged with felonious theft. By timbering a property, they are exacting irreparable damage to that land, which can take a generation or more to restore its original condition.

Other Structural Encroachments

In addition to fences, other structures may tend to cross over boundary lines, especially when these projects are built without being properly vetted through the permitting process.

Homes, additions, storage sheds, open or enclosed patios, decks, treehouses, jungle gyms, swimming pools, and concrete pads are some of the most common examples of structural encroachment.

Mineral encroachment

Though mineral encroachment does not exactly fit into the scheme of this course, it is still worth mentioning this subject, as it has some bearing on the overall limitations of certain land ownership rights.

Land is typically divided into a surface estate (with surface rights), and a mineral estate (mineral rights).

Depending on the state and the specific title of ownership, sometimes the ownership of land automatically includes the ownership of the mineral estate, such as with a "fee simple absolute" title.

Fee simple absolute owners have the option to sever mineral interests from their surface estate through private deed or lease transactions by grant, reservation, or exception.

Not all titles of ownership are fee simple absolute, such as various residents in Pennsylvania who own the land's surface and their house, but the coal companies may own the right to extract minerals. Occasionally this will cause "subsidence," or sinking of the land, which has become a serious issue for many home and land owners in this area.

As for encroachment, usually a reputable mining enterprise will attempt to acquire a lease in order to extract minerals from a property. However, some mining or oil companies will forego the lease and simply take the mineral interests from a land owner.

In the oil business this can be accomplished through the use of slant or horizontal drilling rigs. In the coal industry, coal companies may tunnel onto an adjacent property, sometimes building miles of shafts beneath land for which they do not own the surface estate, or the mineral estate.

Encroaching upon Air Rights

In addition to encroachment on the surface, and sub-surface, there is also encroachment above the surface of a neighboring property, meaning within a private airspace. The airspace above a property is private to an elevation or altitude mandated by the Federal Aviation Administration, which is typically in the range of 500 ft. to 1500 ft above the mean surface elevation.

Some possible examples of airspace encroachment may be:

- Low-flying aircraft which fly below the FAA's mandated minimum safe altitude (MSA)
- Tree limbs and structures which protrude above ground level
- Repeated drone flights
- Fired projectiles (military or private)

- Construction crane towers
- Aircraft flying over restricted airspace of other sovereign entities

Exceptions to Adverse Possession

Governmental Lands are exempt

Private individuals are typically banned from seizing the property of the government through adverse possession claims. If this were not the case, the hundreds of thousands of acres of state and national parks would be in jeopardy from illegal squatters.



Theodore Roosevelt National Park
Image Source: nationalpark.org

Property held by a federal or state government, or a municipal corporation is exempt by statute, and cannot be taken by adverse possession. As long as the property has a public use, such as with a park, environmental buffer, highway or school property, its ownership is safe from adverse possession claims.

When the government takes land from private parties

The government has on occasion, taken the lands of private individuals through the adverse possession rule, but this tends to be a legal gray area which may violate the Fifth Amendment's "Taking Clause" concerning the topic of eminent domain, and just compensation.

There are other arguments against adverse possession claims. Some of these legal arguments against claim of adverse possession might include: Exemption by Permissive Use - If the original land owner has granted the claimant permission to use

the property, the claim of "adverse possession" cannot be considered as "hostile" and thus fails to meet the qualifications.

Insufficient Engagement of Property

Although it may be acknowledged that a claimant has engaged in some use of a property, a land owner may allege in court that these acts were not sufficient enough to suggest a claim of ownership. The burden of proof will be placed on the possessor to provide evidence to the contrary.

Not Continuous or Uninterrupted

All elements of adverse possession must be met at all times through the statutory period in order for a claim to be successful. It may be possible to claim adverse possession even if there is a transfer of ownership through the principle of "tacking."

For example, in a situation where a former owner had twelve years of adverse possession, this can be "tacked" onto the present owner's eight years of adverse possession, for a cumulative twenty years of adverse possession.

Not an Open and Notorious Occupancy

The means in which the property is being utilized by the occupier is not sufficient to claim an "open and notorious" act of ownership.

Not Under Cover of Claim or Right

Either when the person claiming the property makes the claim based upon constructive possession under "color of title" (see next page for an explanation of this topic), or makes the claim based upon actual use and possession of the area of land at issue for the statutory period.

Non-Exclusive Use

Although the claimant may have engaged in some use of the property, it can be alleged that others (usually the property owner) also used the property in a manner consistent with that of a landowner. Here again, the possessor must prove otherwise.

Insufficient Time - Even if various elements of adverse possession were met, it can be alleged that

the adverse possession did not last for the full statutory period, or that the adverse possession was interrupted by a period of non-use. It is usually the processor's responsibility to prove that the statutory period of time was met with no periods of abandonment. This can often be difficult to prove.

Even though the possessor may have paid property taxes for the statutory period, they must usually prove that they actually used the property for the entire uninterrupted period.

Color of Title and Good Faith

What is meant by "Color of Title"

In US common law, the term "color of law" denotes the "mere semblance of legal right," or the pretense or appearance of being right; hence, an action done under the color of law means that the intent was to be legal even if it fails to meet all of the legal criteria.

"Color of title" In property law, this refers to a claim to title that appears valid but may be legally faulty; a document or other instrument of conveyance that appears to be a legitimate claim to title of a piece of land but due to a title defect cannot transfer or convey ownership.

For example, if a grantor of a property was suffering from a legal disability at the time they executed a deed, the recipient of the deed (the grantee) might not receive a valid title. However, they would have color of title because it would appear to anyone reading the deed that a valid title had been conveyed.

Situations where a color-of-title dispute may occur:

- The most recent buyer of a parcel of land believes their title to be clear, however a previous owner's title had contained a defect; therefore, passing the defect on to the new title
- More than one party has received a title to the same parcel of land

- A deed was executed that turns out to be defective, or possibly forged
- A party in the transaction is disabled in a means which affects their full comprehension of the transaction

Adverse possession claims often include the addition of a color-of-title claim. By claiming adverse title, a person may receive only what they already possess.

Additionally, if a grantee (the party who was granted a faulty deed) possesses the land in the manner required by law for the full statutory period, his or her color of title will become actual title as a result of adverse possession.

Color of Title as it applies to claiming Federal Lands
If a party can show the federal government that they have a probable title for a piece of land claimed by the US, they may file the claim in order to more or less buy the land (at a fair and market value price) and obtain clear title.

This includes alleged titles based on land warrant, land right, land scrip, and irregular chain of title.

Color of title claims against federal lands comes in two types or classes:

Class 1

In Class 1, the claim can be filed if the land owner has treated the public land as their own, without knowing it was public land for at least 20 years. In addition, the owner must have improved the land during those 20 or more years. Improvements must be valuable or the land must have been used for cultivation (farming).

Class 2

In a Class 2 claim, the land owner has always believed the public lands to have been part of their property and can show proof of this consideration dating back to at least January 1, 1901.

Documentation that all taxes, state and local, have been paid on the land for the entire time must be provided. Even one missed tax payment, no matter

who owned the land at the time, can cause this claim to be denied.

Good Faith

The element of “good faith” refers to the notion that a person truly believes that a legally valid title has been obtained through proper conveyance, whether it has or not.

The element of good faith is not required in all states, but for those that do have this requirement, this is usually coupled with the element of color of title.

A holder that obtains a deed that is known to be defective does not obtain that property in good faith.

A deed which has been altered or falsified by the holder is not considered to be a deed acquired in good faith.

Good faith as it applies to adverse possession does not exist if there is the presence of any form of scheme, or the existence of dishonesty and manipulation on the part of the deed holder.

Recognizing a Potential Adverse Possession Situation

Recognizing Adverse Possession

One of the most challenging tasks when surveying is to accurately recognize and define a potential case of claim for adverse possession.

One might assume a great deal of liability if a case of adverse possession or prescriptive easements goes unnoticed; or by failing to correctly monument a property according to deed, thus giving undue weight to existing conditions that may reflect an adverse possession case which is yet to ripen.

As adverse possession is an undocumented right or claim, a surveyor is usually alerted to such a claim when they observe one of the following:

- Fencing that obviously exceeds the recorded boundaries for the property
- Verbal claims made, that an owner possesses land beyond that defined in the deed or existing surveys
- Buildings or other structures which overlap a boundary line, or encroach into the property
- Evidence of cultivating, farming, or other agricultural uses that, practically, extend one owner's land use into that of another owner
- Evidence of any type of earthwork, clearing or grubbing which appears to be for purposes other than that of the owner
- A deed that contradicts a series of reputed surveys or deeds for a given parcel, (that in its description has expanded previously described limits for a given parcel, and that is claimed by a party to represent his limits of ownership)
- Monuments that do not match existing surveys, and appear to excessively define land held by one party against another
- Any other physical uses of the property that appear to be for, or by someone other than the true owner

Torrens Title (based on a land registration or land court title)

Of particular note, when a surveyor suspects a potential claim of adverse possession, they must be aware of whether the parcel of land may be titled through a land registration system which offers a "Torrens title."

In the US, when the title to a property is held under a Torrens title, adverse possession cannot be claimed. Although this is an uncommon type of title, twenty states have existing land registration systems. In states which have land registration systems, the majority of real property is not held under this form of title.

Chapter 2: The Principle Elements of Adverse Possession Law

The Principal Requirements of Adverse Possession

Elements of Adverse Possession

Though state or other jurisdictional statutes differ, they all require the same basic elements to qualify for adverse possession.

For adverse possession to eventually “ripen” into a legally obtained title of ownership, the following fundamental conditions must be met by the adverse possessor:

- Be in actual possession of the property (the adverse possessor must physically possess the land)
- Exhibit open and notorious behavior (the adverse possessor must act as the actual owner)
- Be under a cover of claim or right (claim of ownership)
- Have exclusive occupancy (ie. - not concurrently occupied with the actual owner or other parties)
- Possess the land in “hostility” (ie. - occupied against the will and without consent of the actual owner)
- Continuous and uninterrupted (with no gaps in occupancy for the statutory period of time)

Additional elements which vary from state to state:

- Good Faith
- Color of Title
- The Intent of the Deseisor

Preponderance of Evidence (Burden of Proof)

The burden of proof usually falls on the desseisor and not the dessee to prove their case to claim ownership. In an adverse possession case, this means that the desseisor has the burden of proving the facts and claims that they have met all of the principal requirements to qualify for ownership of

the property. The characterization, location and present state of the property, as well as the means in which the property has been utilized and possessed, are all evaluated in each court case.

The adverse possessor has the responsibility to prove through evidence and testimony that each of the elements of possession has been satisfied, thus presenting the “greater weight” of evidence when proving their claim of title.

Principal One - Actual Possession

Physically Possessing the Property

The party occupying the land must have physical possession, acting in such a manner as the property owner. This differs from a party only visiting the land. For example, someone hunting on a regular basis on a given property does not qualify them to claim adverse possession.

Actual adverse possession consists of actually occupying the property with an intent to keep it strictly for oneself. Simply claiming the land or paying taxes on it, without actually possessing it, is not enough.

Entry onto and occupation of the land, whether legal or not, is essential. The act of trespassing may commence the time period of adverse possession, but there must be more than temporary use of the property by a trespasser for adverse possession to be established.

Physical acts must show that the possessor is exercising the sort of control over the land that an average owner of similar property would exercise.

Ordinary day to day uses and improvements of the property would qualify, such as mowing grass, or planting and harvesting of crops. In some states, physical acts that constitute actual possession are described within their statute.

Principal Two - Open and Notorious

Open and Notorious Behavior must be observable and obvious

An adverse possessor must possess land openly for the entire world to see, as a true owner would.

Covertly occupying the land away from the eyes of the public and the true owner provides the occupant little chance of eventually obtaining legal rights to the land.

Acts which show open and notorious behavior
Clearing and grubbing, mowing grass, installing fencing, cultivating and farming, or otherwise improving the land will help demonstrate open and notorious possession, while setting up actual residence on the land is the most open and notorious possession of all.

Acts of possession which damage the property are not favored positively by the courts, and can be cause for civil and criminal charges against the desseisor, in addition to the loss of claim.

The action of paying property taxes on a possessed property year after year may be legally argued as an open and notorious act.

When the owner observes that their property taxes are being paid by another party, it should be blatantly clear that they are aware of a trespasser's presence on their land; hence this should prompt them to take steps to eject the trespasser.

When the owner ignores the fact that taxes are being paid for their property, this may only serve to strengthen the trespasser's case that the owner has all but abandoned the property.



Publicly mowing grass
(to show open and notorious behavior)

Image Source: youtube.com

Fencing provides "constructive notice"

The use of substantial and obvious fencing is the most common and overt means by which to possess a property.

Erecting a fence provides "constructive notice" to the owner that their land is being claimed by a desseisor. The fence must be clearly noticeable, restrictive to random foot traffic, and not sporadically placed along the boundary.

Putting the owner on notice through the notoriety of the possession

Making sure that the owner is aware of the adverse use is important to establishing the validity of the claim, or the claimant's possession must be so notorious that it is generally known by the public or the fellow residents in the neighborhood.

The notoriety of the possession puts the owner on notice that the land will be lost unless he or she seeks to recover possession of it through ejection.

To do nothing once the trespass is discovered is an indication that the owner's interest in the land is being abandoned.

Principal Three - Exclusive Occupation

No "concurrent usage" of the property with other parties

The property's occupation must be exclusive, and not in a manner which is concurrent with the actual owner or with the general public. The desseisor does not have to exclude others from the land in order to claim "exclusive" use.

However within the statutory period of time, the disseisor must have been the only person to treat the land in a manner as the owner, with the exception of when “tacking” occurs.

An exclusive adverse possession of the property will not ripen into titled ownership, unless the claimant has had exclusive possession of the land, meaning the sole physical occupancy.

Physical improvements of the land, such as through the construction of fencing or landscaping, is evidence of exclusive possession.

Though two individuals may claim title by adverse possession as joint tenants if they share occupancy of the land through consecutive usage and not concurrent usage, (consecutive usage by more than one disseisor is known as “tacking”).

When others or the general public have regularly used or occupied the land at the same time as the adverse claimant, the requirement of exclusive possession is not satisfied. Casual use of the property by others is not, however inconsistent with exclusive possession.

Generally, easements do not affect the exclusive possession by an adverse possessor. In some jurisdictions easements exercised by the public or railroad rights of way will destroy exclusive possession.

What is Hostile Claim?

Hostile Intent

When we use the term “hostile claim or hostile intent,” we are not implying that the occupier must seize the land by use of aggression or force; rather that possession is “hostile” to the titled owner's interest in the property.

“Hostility” does not imply the presence of malice or ill will. In the context of adverse possession, “hostility” simply means that the individual claiming possession of a disputed piece of land

must demonstrate to a court that their possession is an actual invasion of, or infringement upon, the true owner’s property rights.

The use of certain adverse possession terminology dates back through centuries of common law, to when the meaning of “hostile” may have had a slightly different connotation than that of the present day use of the word.

Courts follow one of three legal definitions of “hostile intent” when it comes to adverse possession:

“Maine rule” (An awareness of trespassing)

this ruling requires that the person be aware that he is trespassing. For example, a property owner who has acquired ownership of neighboring acreage by using it for years.

If the property owner was aware that this was not his acreage, the court would characterize his actions as “hostile.”

“Connecticut rule” (requires occupation only, whether aware or not of a trespass)

this ruling which is presently followed by most states, defines “hostile” simply as the mere occupation of the land. The occupier does not have to be aware that the land belongs to someone else.

An example would be a situation where an occupier is not sure where his property line ends, but assumes a fence marks the boundary. He then proceeds to build a storage shed next to the fence line, which in actuality is on his neighbor's property.

Under the Connecticut rule, the occupier’s intent doesn't matter, as his occupation is hostile even though he is under the assumption that he is on his own land.

“Good faith mistake” (Complete unawareness of a trespass)

This is the opposite of the Maine rule which requires intentional trespassing to occur. A few states follow this rule, which requires that the

trespasser must be completely unaware of any wrong doing, and must have made a good faith mistake, such as relying on an invalid or incorrect deed (a "color of title" scenario).

For example, a land owner attempts to claim a strip of their neighbor's land by adverse possession. The court would deny the claim if it could be proven that they knew it was not their property, even though they had treated the property as their own for the statutory period.

If possession is not hostile, it may still be possible to advance a claim of ownership under a theory of "acquiescence," or the reluctant acceptance of the adverse possession without protest. (refer to the next page for an explanation of this rule).

A desseisor cannot claim "adverse possession" if they are engaged in the permitted use of somebody else's land. Possession must be hostile from its commencement and must continue throughout the statutory period.

Also a possession may still be considered as hostile if it occurs when the desseisor occupies the land under color of title.

Recognition and "Acquiescence"

Title through Acquiescence

Another complication in the rule of adverse possession is the element of "acquiescence," (referring to a state of such neglect on the part of the owner, as to imply their abandonment of a claim of right).

Acquiescence was originally created to supplement the adverse possession requirement of "adverse or hostile intent."

The requirement of adverse intent was viewed as being harsh, and courts began to find in favor of desseisors even without an adverse intent, if the true owner acquiesced, or silently consented to the possession for statutory period.

Eventually the notion of acquiescence blended into the general rules of adverse possession, and in most cases the focus is now on the adverse character of the possession itself, rather than on a party's state of mind.

Over time, specific exceptions to the requirement of the statutory period of time of possession have developed around the element of acquiescence.

When one of the exceptions applies, a person in possession might be able to acquire title based on a period of possession for less than the statutory time.

Parties from both sides of an adverse possession case must carefully consider the doctrine of acquiescence and its implications if faced with any of the following four situations:

- a boundary dispute has been settled
- a boundary dispute is between parties who purchased from a common grantor (seller)
- a third party purchases the property while relying on an incorrect boundary
- neighbors have procured a survey to locate a boundary

Principal Four - Under "Cover of Claim" or "Claim of Right"

Claim of Right

Anyone pursuing a claim for adverse possession must assert that they are acting under a "claim of right" (a claim of ownership), stating that they have a right to the land.

There are various arguments as to why they may assert a claim of right to the property, such as:

- The previous owner has abandoned the property; thus they have proved (through occupancy) that they will properly utilize the property if the previous owner will not
- They were given title to the property; although it was under color of title
- They have been using the property for the statutory period of time while the owner has not

- The owner has acquiesced, or has not properly defended their claim of right

In common law, an adverse possession claimant did not need to believe that they had somehow acquired actual title to the disputed property or that a title search would show the land to be owned by them rather than by another.

Also, a claimant who had actual knowledge of another party's ownership was permitted to assert a "claim of right." All that was needed was for the possessor to claim the disputed land as their own.

Revised legal definition of "claim of right" (reasonable basis for claim)

In certain jurisdictions, the state legislatures redefined what it meant to assert a "claim of right."

Now, a claimant seeking to acquire a title by adverse possession is required to have a reasonable basis in their belief that the property already belongs to them, thus tightening the scope of any argument for a claim in court.

Principal Five - Under Continuous and uninterrupted

Continuous and Uninterrupted

All of the principal conditions required by law must occur throughout the specified time period in order for the desseisor to successfully claim the land.

Adverse possession must be continuous and uninterrupted for the full statutory period if title is to vest. Using the property on occasion or sporadically is not sufficient.

Continuity is sometimes explained as the daily control of the land by the adverse claimant for the length of the statutory period. If a person has continuously controlled just a portion of the land claimed under adverse possession, they will acquire title only to the occupied portion.

Though continuous possession is required to acquire title by adverse possession, it is not

necessary that only one person hold the land continuously for the statutory period.

The time periods that successive adverse occupants have possessed the land may be added together to meet the continuity requirement if privity exists between the parties. As stated previously, concurrent occupancy of the property by multiple parties is called tacking.

Privity

This refers to voluntarily passing on possession of the land, from one owner to the next so that it is continuously occupied by a possessor.

Privity exists between different persons whose interests are related to one another by a sale or inheritance of the land or by operation of law, as possession by a trustee in bankruptcy.

*Privity is the legal term for a close, mutual, or successive relationship to the same right of property.

Any interruptions between parties will reset the clock

Interruption of continuous possession deprives the adverse possessor of the legal effect of his or her prior occupancy. The statute of limitations will begin to run again from the time he or she starts actual, open, hostile, notorious, and exclusive possession.

The length of the interruption is insignificant as long as it disturbs continuous possession. At that time the law restores constructive possession of the land to the true owner.

A lawsuit by the owner will cause an interruption. The commencement of a lawsuit by the owner against the occupant over the right of ownership and possession of the land is one way to interrupt continuous possession.

It may be an action to quiet title, for trespass, for an injunction involving possessive rights, or to file a petition for registration of land title. Such lawsuits

Principal Six - Statutory Time Period

will destroy the continuity of possession only if successfully pursued to final judgments.

If the owner chooses to abandon or settle a suit or if a court dismisses it, the continuity of possession is not breached.

The owner entering the land will interrupt continuity of possession

When the owner enters the land with the intent and purpose to repossess it, would be construed as a clear exercise of ownership that will disturb the continuity of possession.

A survey of the land will not interrupt continuity unless it is for the purpose of reclamation

A survey of the land made at the request of the true owner does not interrupt possession unless the purpose is to help the true owner take possession. The owner's actions must be notorious and open so there can be no doubt as to what is intended.

An accidental, casual, secret, or permissive entry is ineffective. While the entry must be notorious, it must also be peaceable to prevent aggression by either party, which might otherwise result.

Payment of property taxes by the owner

The payment of real estate taxes by the owner, while demonstrating that he or she has not abandoned land, is not considered to have any impact on continuous possession.

The adverse claimant may destroy his or her continuous possession by abandoning the land or giving it to someone else, even the owner, before the time at which title to it would vest. It does not matter how long or brief the abandonment is as long as it was intentional.

A temporary absence from the land is not the same as abandonment and has no effect on the occupancy, provided it is for a reasonable period of time.

Statute of Limitations on Time

Each state's laws specify a statutory period of time (or statute of limitations) that a party must hold possession of the property before it can be legally claimed through adverse possession.

The period of time required to occupy a property is governed by the "statutes" branch of law (enacted by the legislative branch of government), as opposed to the common law (judicial branch) or regulatory branch (executive branch).

The time period of the statute of limitations that must expire before title can be acquired by adverse possession varies from state to state. Also, the time periods within a state may vary based on a particular situation.

No statute will begin to run until the adverse claimant actually possesses the property in question under either "color of title" or "claim of right."

Reasons for Suspending the Statute of Limitations

If the statute of limitations has been suspended, for reasons such as a lawsuit pending between the owner and the claimant, the owner is mentally deficient, is under the legal age, or is serving in the armed services, that amount of time will not be counted toward the time necessary for the acquisition of title.

Requirement of Paying the Property Taxes

In some states, in order to make an adverse possession claim, the trespasser must have paid the property taxes on the land during the statutory time period.

Other states don't require payment of property taxes, but will apply a shorter time period requirement of land occupation if the trespasser has paid the taxes.

Payment of property taxes alone is not sufficient to establish adverse possession. It is also required

that the element of continuous possession occur for the full statutory period.

Some states don't mention tax payments at all in their adverse possession statutes, while other states only allow an adverse possession claim if the trespasser has some form of a document or deed related to ownership of the property, even if the document is not accurately drawn up or carries no legal weight.

In court, proving continuous use for the entire statutory period, may be challenging. Proving that a desseisor has fully complied with the elemental requirements of adverse possession or prescriptive easements can be difficult. The burden of proof falls on the desseisor to prove their case, and not the desseisee.

This usually requires the testimonies of witnesses, receipts for property taxes, photos, and any other tangible evidence to prove a case of open and notorious, continuous and uninterrupted occupancy for the statutory period. For this reason, many adverse possession cases fail in court.

Chapter 3: Prescriptive Easements

What is a Prescription Easement?

Prescriptive Easement

“Easements by prescription” or “prescriptive easements,” are implied easements* granted after a disseisor has used the property in a hostile, continuous and open manner for the statutory period of time.

* An easement being the right to cross or otherwise use someone else's land for a specified purpose, such as for a driveway or utility lines.

Once a prescriptive easement becomes legally binding, it carries the same legal weight as a written or verbally condoned easement. Prior to becoming binding, a prescriptive easement carries no legal weight and is invalidated if the true property owner takes appropriate action to defend their ownership rights.

A prescriptive easement may not be established if the use is for an encroachment that prevents a landowner from using their own land in the same manner as existed prior to the easement being granted.

Exclusivity is not an Elemental Requirement of Prescription

The case of a prescriptive easement is different from the circumstances in an adverse possession case, as they do not have the element requirement of exclusive occupancy. For obvious reasons, prescriptive easements normally do not require the disseisor to actually establish occupancy on the seized portion of property.

In states which do have exclusivity requirements, “exclusivity” is interpreted to mean that the prescriptive user must make use of the easement in a manner that is different than the general public might use it; referring to a use that is “exclusive” to that user.

Statutory Period of Time for Prescriptive Easements

The time of continuous usage required for a prescriptive easement to become legally binding is similar to the statutory time requirements of adverse possession.

If the original property owner acts in an appropriate manner to defend their rights at any time during the required time period, the hostile use will end, any claim of adverse possession right is voided, and the period of continuous use will begin again at day one of the occupation.

When consent is given by the owner:

In some jurisdictions, if the use is not hostile but given actual or implied consent by the legal property owner, the prescriptive easement may become a regular or implied easement rather than a prescriptive easement and would immediately become legally binding.

In other jurisdictions, such actual or implied permission would immediately convert the easement into a terminable license (a permission which may be revoked), or reset the time period for obtaining the prescriptive easement.

Affirmative vs Negative Easements

In most U.S. jurisdictions, a prescriptive easement can only be considered as legal for an affirmative easement and not a negative easement. Most easements are affirmative easements, giving the non-owner the right to use the owner’s land in some way.

However, there are also negative easements, which give the easement holder the right to restrain or control the use of the owner’s land in some way.

An example of a negative easement may be one which restrains development of a property to preserve the easement holder’s view. In most US jurisdictions, an easement for view cannot be created by prescription.

Use of Prescription to end an Existing Legal Easement

Prescription may also be used to end an existing legally obtained easement. For example, if a servient tenement holder (deeded land owner) were to erect a fence blocking a legally deeded right-of-way easement, the dominant tenement holder (the deeded easement holder) would be required to defend their easement rights within the statutory period or the easement may cease to carry any legal weight, even though it remains a deeded document.

The failure of an easement holder to use an easement, in turn leading to the loss of that easement, is generally referred to as a "non-user."

Paying of Property Taxes

The payment of property taxes is not always necessary for a prescriptive easement claim to succeed. In states that require the payment of property taxes to obtain ownership by a desseisor, courts may grant a prescriptive easement, but not ownership, when all requirements have been met with the exception of paying the taxes.

Also, to acquire a prescriptive easement a desseisor does not always need to be the sole user of the land. A trespasser might gain the easement when others are also using the property even the owner. Also, more than one person can acquire a prescriptive easement in the same portion of land.

For example, a common situation in which multiple parties may gain a prescriptive easement is by using a driveway or road on another's land over the years without it being contested by the owner.

Such was the result in a case where neighbors treated a driveway as their own for several decades, finally expanding it into a road. When the owner attempted to reclaim the portion of land, the court ruled in favor of the neighbors, as they had clearly established a valid and legal right to use the road by prescriptive easement.

Courts sometimes appear more willing to grant a prescriptive easement than actual ownership (through adverse possession) to a trespasser.

In the circumstances of a prescriptive easement as opposed to adverse possession, the easement does not take away the ownership of the property; it only requires the owner to allow that particular use of the property by the other party.

Establishing a Prescriptive Easement

When to create a Prescriptive Easement

A prescriptive easement is usually created when someone uses land for access, (such as a driveway or pathway or shortcut across a property). But often, a party has simply begun using a part of their adjoining property without obtaining the proper consent from the owner. After the time requirement is met, the trespasser might seek to gain a legal right to use the property.

Public Use (Implied Dedication)

When the general public is the trespassing party, a public right to use property might be created. This is generally called an "implied dedication" instead of a prescriptive easement. A public dedication is often created if an owner allows the city or county to make improvements or maintain a portion of their land.

For example, an owner of beachfront property may allow the county to pave their private drive, which is used by many people for access to the beach. The public would then gain a right to use the drive.

When disputes over prescriptive easements end up in court, there are varied rulings as to what type of use of someone's property would justify creating an easement.

Some courts may assert that the use of a pathway regularly as a shortcut is sufficient for a prescriptive easement. However, others are reluctant to casually grant rights over someone else's property and require the public use to be substantial.

Types of Easements

Easement Types

Easements come in a variety of types, such as: Affirmative and negative easements - an affirmative easement is the right to use another's property for a specific purpose, while a negative easement is the right to prevent another from performing an otherwise lawful activity on their property.

Dominant and Servient Estate

An easement requires the existence of at least two parties. The party gaining the use of an easement is the *dominant estate* (or dominant tenement), while the party granting the use is the *servient estate* (or servient tenement).

Public and Private Easements

A private easement is held by private individuals or entities. A public easement grants an easement for a public use, such as to allow the public access across a parcel owned by an individual.

Floating Easement

A floating easement exists when there is no fixed location, route, method, or limit to the right of way. An example is a right of way crossing a field, without any visible path, or allowing egress through another building for fire evacuation routes. A floating easement may be public, private, appurtenant, or in gross

Appurtenant Easements

In the US, an easement appurtenant is one that benefits the dominant estate and runs with the land (an easement appurtenant would transfer automatically when the dominant estate is transferred).

Easement in gross

This type of easement benefits an individual or a legal entity, rather than a dominant estate.

The easement can be for a personal use or a commercial use. Historically, an easement in gross was neither assignable nor inheritable, but in the present day, commercial easements are freely transferable to a third party.

The easements are divisible, but must be exclusive to the easement holder(s), and all holders of the easement must agree to divide. If subdivided, each subdivided parcel benefits from the easement.

Express Easements

An easement may be either *implied* or *express*. An express easement may be granted in a deed or other legal document. It may be referenced within a subdivision plan or within the restrictive covenants of an HOA (homeowners association).

In most cases, the doctrines of contract law are applied to disputes regarding express easements, while disputes regarding implied easements usually apply the principles of property law.

Implied Easements or "Easement by implication"

Implied easements are more complicated and are determined by through the courts, based on the intended use of a property and the intention of the original parties.

Implied easements are not recorded or clearly stated until a court is required to rule on a dispute. Courts typically refer to the intent of the parties, as well as prior use, to determine the existence of an implied easement.

Easement by Necessity

In the law of implied easements, what constitutes as "necessary" is often the key issue. All that needs to be shown is "reasonable" necessity.

The test of necessity is if the party claiming the right can create a suitable substitute, at reasonable cost, on his own land and without trespassing on his neighbors' property.

"Necessary" does not mean strict necessity, but only that other possible routes of use may be substantially less convenient, or more expensive to develop and use.

Easement by prior use

An easement may also be created by prior use. Easements by prior use are based on the idea that

land owners can intend to create an easement, but forget to include it in the deed.

Easements by prescription, (or prescriptive easements)

Are implied easements granted after the dominant estate has used the property in a hostile, continuous and open manner for a statutorily prescribed number of years. Prescriptive easements differ from adverse possession by not requiring exclusivity.

Easement by estoppel

When a property owner misrepresents the existence of an easement while selling a property and does not include in the deed to the buyer an express easement over an adjoining property that the seller owns, a court may step in and create an easement.

Establishment of easements by estoppel takes into consideration verbal promises, funds spent by the benefiting party in relying on the representations of the burdened party, and other factors.

If the court finds that the buyer acted reasonably and in good faith and relied on the seller's promises, the court may create an easement by estoppel.

Specific types of easements:

- *Right to light, or solar easement* - the right to receive a minimum quantity of light
- *Aviation easement* - the right to use the airspace above a specified altitude for aviation purposes, such as low-altitude crop spraying of agriculture
- *Railroad easement* - an easement for rail system corridors
- *Storm drain or storm water easement* - an easement for stormwater channels, retention and detention ponds
- *Sanitary sewer easement* - an easement for wastewater pipelines
- *Electrical power line easement* - for transmission line infrastructure
- *Telephone line easement* - for a telephone cable line infrastructure
- *Fuel gas pipe easement* - for natural gas infrastructure
- *Sidewalk easement* - Typically sidewalks will be located within the public right-of-way alongside roads
- *View easement* – this is a negative easement which prevents a party from blocking the view of the easement owner, or permits the owner to remove the blocking vegetation on the land of another
- *Driveway easement or easement of access* – when a lot is landlocked, thus requiring an easement through another party's property for ingress and egress
- *Beach pathway access* - to provide public access to a public lake or beach by crossing adjacent private property or it may be a private easement to cross a private lake to reach a remote private property, or an easement to cross private property during high tide to reach remote beach property on foot
- *Dead end easement* - sets aside a thoroughfare for pedestrian traffic on a dead-end street in order to gain access the next public way
- *Recreational easement* - some US states offer tax incentives to larger landowners to grant permission to the public to use their undeveloped land for recreational use
- *Conservation easement* - grants rights to a land trust to limit development in order to protect the environment
- *Historic preservation easement* - similar to the conservation easement, typically grants rights to a historic preservation organization to enforce restrictions on alteration of a historic building's exterior or interior
- *Easement of lateral and subjacent support* - prohibits an adjoining land owner from deeply excavating in a manner which may cause structural or foundation damage, or cause a change of lateral earth pressure on their neighbor's property

- *Communications easement* - this easement can be used for wireless communications towers, cable lines, and other communications services
- *Ingress/egress easement* - this easement can be used for entering and exiting a property (such as with a driveway easement)

Termination of an Easement

To Terminate an Easement

When claiming the termination of an easement, one should prove that any of the following situations exists:

- *Release*: Mutual agreement to terminate, by the grantor and the grantee of the easement
- *Expiration*: The easement has reached an expiration date
- *Abandonment*: The easement holder communicates an intent to discontinue use of the easement
- *Merger*: When one owner gains title to both dominant and servient tenement
- *Necessity*: When the easement was created by necessity and the necessity no longer exists
- *Estoppel*: The easement is unused and the servient estate takes some action in reliance on the easement's termination
- *Prescription*: The servient estate reclaims the easement through adverse possession, with actual, open, hostile and continuous use of the easement
- *Condemnation*: The government exercises eminent domain or the land is officially condemned; this has no termination

Chapter 4: Fighting Adverse Possession and Prescriptive Easements

Action to Quiet Title

In an action to quiet title, the land owner is requesting that a state court judge issue an order declaring that the desseisee (land owner), and not the desseisor (trespasser), is the legal owner of the land. This order is particularly helpful when seeking to sell a property, and to reassure potential buyers.

These types of lawsuits are filed in courts which have jurisdiction over property disputes. This form of lawsuit is sometimes referred to as either a try title, trespass to try title, or ejectment action to recover possession of land wrongfully occupied by a defendant. However, an ejectment action is typically filed in court to remove a tenant or lessee in an eviction action, or an eviction after a foreclosure.

An action to quiet title is filed in order to "quiet" any and all claims against a title, and to remove a cloud over a title so that the plaintiff may forever be free of claims which may pop up in the future against their property.

The action to quiet title resembles other forms of preventive adjudications, such as the declaratory judgment which is a judgment of a court which determines the rights of the parties involved without ordering an action or awarding damages.

Grounds for a quiet title action or complaint
In filing a case for an action to quiet title, the owner is suggesting that the ownership of their parcel of land or other real property is defective in some way, such as with an ambiguous ownership history.

An example is where ownership has been conveyed by a quitclaim deed. With quitclaim deeds, the previous owner is stating that they relinquish all interest in the property, but cannot guarantee that

a good title has been conveyed to the new owner, meaning the title was potentially faulty when they received it.

Other grounds may be to eliminate a restraint on alienation (a clause in the deed which prohibits the recipient from selling or otherwise transferring interest in a property), or another party's claim of a nonpossessory interest in the land, such as with a prescriptive easement.

Other grounds for pursuing an action to quiet title include:

- adverse possession where the desseisor sues for title
- fraudulent transfers, forged deeds, or conveyance under coercion
- Torrens title registration (an action which terminates all unrecorded claims)
- treaty disputes regarding the boundaries between nations
- title claims in lieu of back taxes owed
- boundary disputes
- surveying errors
- competing claims by reverters, remainders, missing heirs and lien holders

Limits to a Quiet Title Action

Not all quiet title actions will completely clear a title. Some states allow a quiet title action for the purpose of only clearing a certain claim, title defect, or perceived defect.

Quiet title actions are always subject to scrutiny, and may be challenged years following a final court decree on the action.

The process of a quiet title action usually takes 3 to 6 months depending on the state. A quiet title action may also be subject to a statute of limitations, which can be 10 to 20 years.

Other ways to Fight off Claims of Adverse Possession

Post signs on the property deterring trespassing

Another means in which a land owner may partially protect a property they own but do not regularly visit, would be to post signs around the perimeter of the property.

By installing signs stating "Posted" or "No Trespassing" the owner can make a trespasser aware that the land belongs to someone else. However, signs do not necessarily protect against adverse possession unless state law requires the trespasser to believe that they are on their own land, in order to file a claim.

Signs are no substitute for routine inspections of the property. If a potential trespasser removes the signs, they have effectively removed the owner's claim of posted signage, thus allowing them to plead ignorance of the land belonging to another party.

Posting Signs which allow Trespassing

Signs that don't prohibit trespassing, but instead grant permission to use the property may actually protect an owner from losing a property interest to the public as a whole. This may also open up the land owner to other forms of litigation, should a trespasser be injured while on the property. Depending on posted signs alone for protection, is definitely risky and is seldom effective as the sole defense against adverse possession.

Blocking access to the Property with Locks and posted Gates

Using locked gates at entry points to the property when the land is enclosed, or across an access that is being used, will deter most trespassing. Even so, routinely checking to be sure someone is not ignoring them, or even removing them is critical.

Offering to rent a trespasser the property
If someone wishes to remain on a property, offering to lease or rent it to them, may be an option to force a decision to stay or leave. When a trespasser is presented with a rental agreement,

this can be very effective in getting some trespassers to immediately leave of their own accord. Also, having a strict background check, a high security deposit, and steep rent can further deter any trespasser from entertaining the thought of renting.

Provide written permission

One effective way to defend against a possible claim is by allowing permission to use the land. If a trespasser is treating another's property as their own land, to offset a claim of adverse possession or prescriptive easement, the owner can provide permission in writing and obtain an acknowledgment from the trespassing party.

Depending on the situation, the owner may not want to give someone the permission to use their land, as it may hinder their own usage of the property.

However, in other cases, this type of agreement might not cause an undue loss of usage. For example, granting permission for parking, using a pathway across the property or even allowing landscaping, will not greatly hinder the owner's usage of the land. It not only can defeat adverse possession claims, but also a claim to an easement across the property.

When using written permission, care should be taken to ensure that the portion of land being used is described in enough detail so that it is easily identifiable.

If the trespasser refuses to acknowledge the permissive use, this is a good indication of a future claim of adverse possession against the property.

File a Report with Law Enforcement

If a potential desseisor refuses to acknowledge a permissive allowance to use the property, or ignores a request to vacate the property, contacting law enforcement to have the person removed or arrested, may be an option.

Depending on the length of time that the occupier has used the property, may be a factor as to

whether it is a case of criminal trespass, or becomes a case for civil ejectment.

Notice to Evict

Depending on the jurisdiction, simply having law enforcement remove a trespasser might not be an option. In some states, and under certain conditions, trespassers may need to be provided a notice to vacate the premises in writing, and then when they refuse to leave willingly, full eviction in court may be the only option to remove them from the property.

Obtain an Attorney

Any time it appears that a trespasser may be entertaining the idea of claiming a property under adverse possession, obtaining a lawyer is strictly advisable. Even more so, if the desseisor has already obtained legal counsel.

Whether the plan is to file a lawsuit to eject the trespasser from the land, to have a structure removed, or a person prohibited from coming on the property, an attorney will be essential.

This must be done before the trespasser has been allowed the time to occupy the land for a sufficient period of time, to file a successful adverse possession claim.

Course Summary

Adverse possession and prescriptive easement issues can occur in many contexts involving real property.

In filing a claim or defending against a claim, the use of a good attorney who specializes in these types of cases within the given jurisdiction is paramount to winning the case regardless of which side of the court room the party is sitting on.

Highlights of this course:

Adverse possession is a complex, legally defined means of taking title to property by physical occupation.

Its definitions vary from state to state.

Possession must run for the statutory period (or statute of limitations), based on a particular state's requirements.

The adverse claimant is the party which is responsible for the burden of proof.

A survey by itself of original property lines cannot revive the rights to land lost in adverse possession. In all states and jurisdictions, adverse possession requires: occupation for the full statutory period, actual physical occupation, open and notorious occupation, and exclusive and adverse occupation for a statutorily prescribed period.

In certain states, the additional requirements of paying taxes, color of title, and good faith also exist.

Adhering to all of the basic elements of adverse possession required within a given state is necessary for a claim to "ripen" into clear title.

There are well-established exemptions from claiming adverse possession, which include claims against the federal government, states, and municipalities. Certain individuals may also be exempt, in special circumstances.

Concurrent possessors may use the principle of "tacking" to advance a claim of adverse possession. Adverse possession may be allowed in certain state, when the owner displays "acquiescence," or silent consent.

Some cases of adverse possession or prescription may be defended against by filing an action to quiet title.

Other cases may be promptly remedied prior to litigation by the posting of signs, providing permission to use, filing a report with law enforcement, the process of eviction, blocking entry to the property, or simply asking the party to leave.

Some will note that adverse possession is in essence, a punishment for being a negligent owner.

However, for someone to adversely possess another party's land, that property usually must have been neglected to the point of abandonment.

An owner does not have to fear the loss of a property when leasing or renting to another party, nor do they have to worry about the loss when it is shared with others.

The burden of proof on a claimant is high for adverse claims, because of the application of the statutory requirements, and in more cases than not, the owner is the prevailing party.