

Adverse Possession: When Ignorance Is Not Bliss

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Practice Area: Construction Law and Litigation

There is no dispute that real estate is valuable. Therefore, protecting one's ownership interests against those that would take or otherwise enjoy it without permission is very important. This principle is no less true for Wisconsin's seasonal residents. Indeed, as seasonal residents, many do not have the ability to keep a constant vigil against encroachers. Because of that, seasonal residents may have a concern that people may be using or otherwise appropriating parts of the property as their own and, as such, acquiring some legal ownership right. This type of ownership is typically referred to as "adverse possession," which is a well-established Wisconsin legal doctrine.

Adverse possession is the taking of title to real estate by possessing it for a certain period of time. Title means ownership of real estate. The person claiming title to real estate by adverse possession must have actual possession of it that is open, notorious, exclusive and adverse to the claims of other persons to the title. By its very nature, a claim of adverse possession is hostile to the claims of other persons. It cannot be hidden but must be open and notorious in order to put others on notice as to one's claim for possession of the real estate.

In Wisconsin, there are two basic ways upon which an adverse possession claim can be founded—color of title (or documented) and undocumented. Color of title means a claim to title by way of a fact which, although on its face appears to support a person's claim to title, is in some way defective and falls short of actually establishing title to the real estate. For example, a deed whose execution was defective or is in question, a claim arising from another's will, and a claim based upon two or more persons having received separate deeds to the same parcel of real estate. If the claim is based on color of title and the claimant has paid property taxes on the property, the claimant must have maintained possession for seven years. If the claim is based on color of title but the claimant did not pay taxes, the time period for maintaining possession is 10 years.

If no documents are involved and the adverse possessor has not paid property taxes on the property, then the time period for maintaining possession is 20 years. Title by adverse possession must be established by a court decree.

There are some basic guidelines to minimize the chances of a claim for adverse possession. Among them, obtain an abstract of title or title insurance and a gap endorsement when purchasing the property to verify the chain of title and minimize other claims to the real estate. Title insurance has the advantage of insuring against loss. Title policies typically cover forged instruments, undisclosed heirs, misfiled documents, incorrect marital status, confusion over similarity of names, and mistaken legal interpretation of wills. A title insurance company obtains an abstract of title for its review, and excepts from its coverage all those defects discovered by the abstractor. A gap endorsement insures over defects which arise between the date the abstract is prepared and the closing on the real estate transaction.

Next, have the property surveyed to verify the property lines and any encroachments thereon and have the boundaries clearly staked. Also, inspect the property from time to time for encroachments. If there is an encroachment, alert the encroacher and demand removal for what essentially constitutes a trespass.

Also, be sure to pay the property taxes and be suspicious of any failure to receive property tax notifications, assessments, and bills.

Further, if permission to use any portion of the land is given, it is strongly recommended that it be set out in a clear written agreement as permission is a vital defense to an adverse possession claim. However, be cautioned that permission carries with it its own set of issues, i.e. potential liability.

It is important to note that if there is an encroachment of which you object and have knowledge, ignoring it and allowing it to continue increases your risk that an adverse possession claim will succeed against you. But on the other hand, ignorance is not bliss as ignoring an otherwise obvious encroachment opens the door to a claim of adverse possession and other potential issues.

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