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Chapter 8

The Property System

LEARNING OBJECTIVES

After reading this chapter, you should understand different classifications of property, including personal property and real property, as well as different types of interests in real property. You will also learn about methods of acquisition and transfer of real property. At the conclusion of this chapter, you should be able to answer the following questions:

1. What is the difference between real property and personal property?
2. How is ownership interest in personal property transferred?
3. What interests in real property exist?
4. How is real property acquired and transferred?
5. What legal relationships exist between landlord and tenants?

The concepts of property and ownership are fundamental to any society. Property refers to tangible and intangible items that can be owned. Ownership is a concept that means the right to exclude others. Disputes over both have been at the root of conflicts and wars since time immemorial. Without laws to protect property ownership, the stability of our society would be seriously undermined. For example, if law did not protect ownership interests in property, then people would have to protect their property themselves. This means that people would have to hire their own security forces to protect their property, or they would have to stand guard over their property personally. It would be difficult to get anything else done. Such a system would likely result in the development of powerful factions. Those with the greatest power would dominate property ownership, and weaker members of society would be at their mercy. For example, one of the opening scenes of the movie *Black Hawk Down* illustrates a U.N. food distribution point in Mogadishu, Somalia. As depicted in that scene, people were waiting to receive the distribution of food, but a

powerful, armed faction seized the cargo and opened fire on them. Obviously, such a system of property ownership would prove to be very unsettling, and it would lead to great instability in our economic system.

Our legal system creates a peaceful means to acquire, retain, and divest of property, and to settle property disputes. It punishes those who operate outside of those rules. Indeed, those who do not acquire property lawfully or who do not settle property disputes within the confines of our legal system are subjected to criminal and civil penalties.

In the United States, our legal system ensures the ability to own property to everyone that the system recognizes can own property. Of course, not everyone has always been able to own property. The history of the United States is replete with examples of exclusion from the property ownership system. For example, at various times and in different ways, married women, African Americans, and people of Chinese and Japanese descent have been subject to restrictions regarding the ownership of real property. Because property law is a state law issue, those restrictions and exclusions varied from state to state. Today, no such restrictions exist. Indeed, even a nonhuman legal person, such as a corporation, can own property. However, some biological beings cannot own property. For example, nonhuman animals cannot own real or personal property in our legal system. This is because nonhuman animals are not legal persons. However, a nonhuman animal can be a beneficiary of a trust in many states.

Moreover, not everything is subject to ownership. For instance, the human body cannot be owned by another, though historically, in legal systems that recognized slavery, certain human bodies could be owned. Today, public policy discourages the treatment of human body as personal property, rendering “gifts” of body parts to specific individuals largely suspect. For example, organ donees may have a need for an organ destined for transplant into their own bodies after the donor’s body dies, but they do not have a legal right to it. *Colavito v. New York Organ Donor Network*, 2006 NY Slip Op. 09320 (NY App. Ct. 2006). Similarly, the question regarding whether human genes may be owned through patent is a hot topic. Check out [Note 8.7 "Hyperlink: When DNA Is Isolated from the Human Body, Is It Subject to Ownership by Patent?"](#) and consider whether the benefits of

patentability of certain body parts, like genes, might outstrip the concerns surrounding ownership of the human body.

Hyperlink: When DNA Is Isolated from the Human Body, Is It Subject to Ownership by Patent?

<http://www.nytimes.com/2010/03/30/business/30gene.html>

Before engaging in questions regarding the evolution of property ownership rights, it is necessary to lay the foundation for studying this fascinating area of law. It is this foundation to which we now turn. This chapter explores the differences between real and personal property, and the acquisition, transfer, and protection of real and personal property interests. Additionally, it examines different interests in real property.

Key Takeaways

The U.S. legal system protects the rights to own, acquire, protect, and divest of real and personal property. These protections are necessary for peaceful civil society. Historically, different groups of people have been subjected to discriminatory practices—both legal and illegal—regarding property ownership. Today, legal persons can own, acquire, transfer, and sell property. However, not everything is subject to property ownership concepts.

8.1 Personal Property

LEARNING OBJECTIVES

1. Distinguish between personal property and real property.
2. Understand classifications of property.
3. Examine methods of acquisition of personal property.
4. Understand the concept of bailment, and the legal duties associated with bailment.

Let's begin with an understanding of the differences between types of property. This is important, because different laws apply to different types of property. While it might be perfectly legal to destroy a piece of personal property—like a chair—without obtaining permission from the government, destruction of real property is a different matter altogether. For example, the owner of an office building who wishes to demolish it would be subject to many local laws, such as requirements to obtain the necessary permits. Such an activity might also be subject to further legal scrutiny, if the building in question holds particular historic value, for example. Let's compare this to the destruction of a chair, which is personal property. Even if the chair is the chair that Abraham Lincoln sat in while drafting the Emancipation Proclamation, as long as the chair is owned by the person who wishes to destroy it, the owner may simply load it into his or her truck and haul it to the dump. No special permission is required, because there are few legal restrictions to the destruction of private property.

As you can see, property can be classified as real or personal. Real property is land, and certain things that are attached to it or associated with it. Real property is raw land, such as a forest or a field, as well as buildings, like a house, a condominium, or an office building. Additionally, things that are associated with land, like mineral rights, are also real property. People often talk about real property by using the term real estate, which reflects both the concept of real property and the ownership interest concept of estate.

Many businesses, from grocery stores to coffee shops to hotels, rely on real property for customers or clients to visit to conduct business. Today, many businesses are also conducted virtually, and have only virtual shops. Virtual stores, such as those found on eBay, are *not* forms of real property. However, certain virtual real properties, such as those found on Second Life, are traded for real money. Check out the two links in Note 8.13 "Hyperlink: "Unreal" Property" to read about this "property" boom, where real business occurs over nonreal property.

Hyperlink: "Unreal" Property

<http://realestate.msn.com/article.aspx?cp-documentid=13107800>

<http://secondlife.com/land>

Personal property is property that is not real property. Tangible property is something that can be touched. Moveable, tangible personal property is chattel. Many businesses exist to sell personal property. For example, the primary purpose of retailers such as Wal-Mart, Amazon.com, and Sears is to sell personal property. Some property can also be described as fungible property. Property that can easily be substituted with identical property is said to be fungible. For example, if you bought a pound of sugar from a container containing ten pounds of sugar, you wouldn't care which specific grains of sugar made up your purchase, because all the sugar in the container is fungible. Other types of fungible goods include juices, oil, metals such as steel or aluminum, and physical monetary currency.

Some personal property is intangible. Intangible property does not physically exist, but it is still subject to ownership principles, including acquisition, transfer, and sale. For instance, the right to payment under a contract, the right to exclude others from a patented product, and the right to prohibit others from using copyrighted materials are all examples of intangible property.

Sounds simple, right? Your iPod, your flash drive, and your computer are all personal property. Your dorm room, apartment, or house is real property. So far, so good. But imagine that you found a Jacuzzi for sale that you loved. You plunked down \$5,000 to buy it, and you have it delivered to your house. You pay for construction of a deck to surround it and plumbing to service it. Is the Jacuzzi personal property or is it real property? This is an example of personal property that becomes attached to the land as a fixture. A fixture is something that used to be personal property, but it has become attached to the land so that it is legally a part of the land. Fixtures are treated like real property. Accordingly, when real property is transferred, fixtures are transferred as a part of the real property. In our example, if you move, you will have to leave your beloved Jacuzzi behind, unless you make express provisions to remove it. What if you were just renting? Since removing a fixture would cause substantial harm to the property, that fixture remains with the land. The landlord might be very happy about that!

Some things that are attached to the land are not fixtures but are part of the real property itself. Imagine a farm with one thousand acres planted in corn. Is the corn crop personal property, or is it real property? Or imagine a forest. Maybe the owner has been thinking about timbering the forest for some extra money. Is the forest personal property, or is it real property? Both the corn crop and trees are examples of real property that can become personal property, if they are severed from the land. This means that when an ear of corn is picked from the stalk, the ear of corn becomes personal property, even though while it was growing and still attached the land, it was real property. Likewise, when a tree is felled, that tree is transformed from real property to personal property.

Besides property *types*, property can be *classified by ownership*, too. Personal property and real property can be private or public. Private property is owned by someone or something that is not the government. Individuals, corporations, and partnerships, for instance, can own private property. Private property can include real property like land or buildings, and personal property, such as automobiles, furniture, and computers. Property that is owned by the government is public property. Yellowstone National Park and the Gifford Pinchot National Forest are both examples of public property that is real property. Public property can also include personal property, such as automobiles, furniture, and computers owned by state or local governments.

Methods of Acquisition of Personal Property

Personal property may be acquired for ownership in several different ways. For example, if you produce something, then you may own it, unless you are producing it in the capacity of your work for someone else. If you buy four yards of wool fabric and sew a coat out of it, then you own that coat by virtue of having produced it with your own materials. This is ownership by production. However, if you sew a coat as part of your job while working for your employer, then the employer will own the coat.

If you are in the business of producing coats to sell, then you may be a merchant, and the rules of the Uniform Commercial Code (UCC) would govern transactions involving the sale of goods and the purchase of supplies from other merchants. Regardless of whether someone is a merchant or not, purchase is a means of acquiring ownership. Indeed, in today's world, purchase may be the most common method of acquiring property.

Property may also be gifted. A gift is a voluntary transfer of property. Generally, the donor of the gift must intend to gift the property, the donor must deliver the gift, and the gift must be accepted by the intended recipient, known as the donee. A conditional gift is a gift that requires a condition to be met before the gift will transfer. For example, if your parents said, “You can have a new car, if you graduate from school,” then that would be an example of a conditional gift. If you do not graduate from school, then you cannot have the gift of the car.

What if you find something? Dating at least to the Institutes of Justinian in Roman law, the concept of “finders keepers” is one known to every preschooler: *finders keepers, losers weepers*. However, in law, things are not quite so simple. Property that someone finds can be classified in several ways. A finder of personal property may claim ownership of the property if it is abandoned. The owners of abandoned property must intend to relinquish ownership in it. For example, if you take your chair to the landfill, you have abandoned the chair. Someone may come along and take possession of it, which will place ownership of the chair in that person. If you change your mind later, that’s too bad. The chair now belongs to the new owner. However, if the property is simply lost or mislaid, then the finder must relinquish it once the rightful owner demands its return. If the finder refuses to return lost or mislaid property to its rightful owner, the owner can sue for conversion, which is a tort. Conversion is intentional, substantial interference with the chattel of another. Another classification of personal property applicable to found property is treasure trove. A treasure trove is money or precious metals, like gold, for which the concept of “finders keepers” sometimes is applicable.

Imagine finding the next-generation iPhone just lying on a bar stool. It has not been released yet, but there you are with an actual prototype in your hands! This is valuable property because it embodies the cutting-edge intellectual property of Apple, both in utility and design. Brian Hogan found himself in this position. Apparently, an Apple software engineer had accidentally left the prototype on a bar stool one evening. Hogan decided to sell the prototype to Gizmodo, a tech site, which was willing to pay for it so that it could write an early and exclusive review of this soon-to-be hot item on the market. Gizmodo subsequently discovered that Apple had lost an iPhone prototype and wanted it returned. Regardless of that fact, Gizmodo dismantled the prototype and published photos on its Web site. Subsequently, it returned the property to Apple.^[1]

Was the prototype of the next-generation iPhone abandoned, lost, mislaid, or a treasure trove? If Apple filed a civil lawsuit against Gizmodo, what would the claim be and who should win? Since we know that Apple wanted the property back, we know that it had no intention of relinquishing ownership of it. Therefore, the property was not abandoned. Since a next-generation iPhone is not money or precious metals—even though it is very valuable and worth a lot of money to Apple—the concept of treasure trove does not apply. A phone is not actual coin or cash. In this case, the property was either lost or mislaid, because it was unintentionally relinquished or set down for later retrieval, but the owner had forgotten where it was placed. In either case, if the phone had not been returned, Apple could have brought a suit for conversion. A successful conversion claim would have awarded damages to Apple. Just like any successful conversion claim, damages would not include a requirement to return the property itself. Incidentally, California has captured the duty to return lost or mislaid property in its criminal statutes, and the facts of this case are being investigated for possible theft charges. Check out Note 8.32 "Hyperlink: Finders Keepers?" for this story and two additional cautionary tales about claiming found property.

Hyperlink: Finders Keepers?

Be careful what you wish for. These stories might seem like a miracle to the cash-strapped, but they are cautionary tales.

Next-Generation iPhone

Gizmodo published the details of a found iPhone prototype here <http://gizmodo.com/5520164/this-is-apples-next-iphone>, but the prototype became the subject of law enforcement and an Apple complaint, as seen here: <http://www.cnn.com/2010/TECH/04/30/wired.iphone.finder/index.html?iref=allsearch>

Cold Cash, Hot Lead

This found “money” along an interstate might be abandoned, lost, or mislaid, but it is unlikely to be claimed by its rightful owner:

<http://www.cnn.com/video/#/video/us/2008/12/05/wa.found.money.KING?iref=allsearch>

A Renovator's Fantasy

This found money in the walls of a house might be an example of a treasure trove, but the treasure was quickly dissipated by legal troubles:

<http://www.cbsnews.com/stories/2007/12/13/eveningnews/main3617369.shtml> and the epilogue: <http://www.nytimes.com/2008/11/09/us/09house.html>

Bailment

Sometimes it is necessary to intentionally leave personal property with someone else. For example, imagine that you own a cat. If your cat, which is considered to be chattel, needs to have surgery, you will need to leave her at the veterinary hospital. Clearly, taking your cat to a veterinary hospital does not constitute abandonment. Likewise, you have not lost or mislaid your cat. And, precious though she may be, your cat is not subject to the concept of treasure trove. Instead, in this situation you will be known as bailor, and you will be seeking a bailment with your veterinarian. A bailor is someone in the rightful possession of personal property who gives the property to someone else to hold. A bailment is the arrangement in which when the rightful possessor (such as the owner) of personal property gives the property to someone else to hold. The holding party, known as the bailee, agrees to accept the property and has the duty to return it. The bailee is someone who is in possession of someone else's property. In our example, you rightfully have possession of your cat because she is your personal property. You give your cat to the veterinarian to hold, who has agreed to accept the cat. You also rightfully expect that the cat will be returned to you on demand. Indeed, the veterinarian has a duty, by virtue of the bailment, to return the cat to you. Consider Note 8.36 "Hyperlink: Lost Dog", where Delta Airlines was the bailee of a dog, which it lost.

Hyperlink: Lost Dog

Check out this link. Do you think the remedy offered by Delta Airlines is adequate in this case? Why or why not?

<http://www.clickondetroit.com/news/23515167/detail.html>

The bailee has certain duties to the bailor. For example, a bailee has a duty to take reasonable care of the property while the property is in his or her possession. This means different things for different types of bailment. If the bailee is the only party who benefits from the bailment, then the bailee must take extraordinary care with the personal property. A common example of a bailee being the only party who benefits is where the owner of the property loans the property to someone for his or her use. For instance, if you loan your neighbor a snow shovel without asking for something in return, then your neighbor receives the sole benefit of the bailment. His or her duty of care is that he or she must take extraordinary care with the snow shovel. However, when both parties receive benefit from the bailment, such as when you rent a DVD from Blockbuster, only the duty of ordinary care is imposed on the bailee. The bailee receives the DVD and Blockbuster receives a rental fee. When the benefit of the bailment exists for the benefit of the bailor only, then only minimum care is required. Gross negligence will give rise to liability, but there is no great duty for the bailee to be as careful as he or she would be if he or she were receiving some benefit. If someone asks you to hold his or her books while he or she jumps into a swimming pool, you would have a minimum duty of care. If you lost the books, then you would not be liable. However, if you intentionally threw the books into the pool, then you would be grossly negligent and liable for damages.

An involuntary bailment is created when someone finds lost or mislaid property. The finder may not destroy the property, though the duties that he or she owes regarding the property may vary from state to state. A voluntary bailment is created when intention exists to create the bailment, as described in the previous paragraph.

As you can imagine, bailment is common in business. Examples of bailment in business include placing packages or goods with common carriers for delivery, warehousing goods with a third party prior to sale or delivery, or taking clients' or customers' automobiles in a valet service. Consider whether a business should be able to disclaim bailment (and the duties that go along with bailment). For example, if a hotel required its guests to sign a "no bailment created" clause on check-in, should that excuse the hotel from liability if the guests' personal property is damaged while the property is left in the hotel?

KEY TAKEAWAYS

Property is classified as real property or personal property, tangible or intangible, and private or public. Personal property can be transformed into real property when it is affixed to the land. Real property can be transformed into personal property when it is severed from the land. Personal property can be acquired for ownership through production, purchase, or gift or, in certain circumstances, by finding it. Bailments are legal arrangements in which the rightful possessor of personal property leaves the property with someone else who agrees to hold it and return it on demand.

EXERCISES

1. Classify the following as (1) personal property or real property, (2) tangible or intangible property, and (3) fungible property:
 - a. A prosthetic device, for example, an artificial leg
 - b. An expected inheritance of stock
 - c. Draperies hanging in a dining room
 - d. A bank account with a five-hundred-dollar balance
 - e. A fictional story that you created
 - f. A condominium on the thirty-second floor of a building in lower Manhattan
 - g. The right to receive payment for your work (e.g., wages, salary)
 - h. A wig that someone is wearing
 - i. A silo filled with wheat
 - j. The wheat in a silo

Would you be willing to pay real money for nonreal property in a virtual world like Second Life? Why or why not? What are people buying when they buy virtual real property? How does this differ from buying actual real property, like land?

If you found a prototype of the next-generation iPhone lying on a bar stool, what would you have done with it? What would be the consequences of your chosen action?

Think of an example of when you have asked for a bailment. Did you feel confident that you would receive your personal property when you demanded it? Did you worry that it would be damaged in any way? If it had been misdelivered, what would your legal remedies be?

Should bailees be permitted to disclaim liability for bailment agreements? Why or why not?

At major league baseball games, who do you think owns the baseball when it is being played, and who owns it when the ball enters the stands where members of the public sit? Who owns the ball if a member of the public picks it up?

[1] Edward C. Baig, "Gizmodo: Lost Next-Gen iPhone Returned to Apple," *USA Today*, April 21, 2010, http://www.usatoday.com/tech/products/2010-04-20-iphone_N.htm (accessed September 27, 2010).



8.2 Real Property

LEARNING OBJECTIVES

1. Understand the concept of real property.
2. Examine methods of acquisition of real property.
3. Understand different interests in real property, including ownership interests and scope of interests.
4. Examine the landlord-tenant relationship.

Real property is land, and certain things that are attached to it or associated with it. Real property includes undeveloped land, like a forest or a field, and it includes buildings, such as houses, condominiums, and office buildings. Real property also includes things associated with the land, like subsurface rights. Fixtures are personal property that have become attached to the land, and they are transferred with the land. Fixtures in a house include things like the lights affixed to the ceiling, the furnace, and the bathtub. Plants and trees that grow on the land are real property until they are severed from the land. For example, farmers' crops are part of their real property until they are separated from the land, at which time they become personal property.

Methods of Acquisition

Real property may be acquired for ownership (the title may be obtained) in one of several ways. It may be purchased, inherited, gifted, or even acquired through adverse possession. Ownership rights are transferred by title. Ownership of real property means that the owner has the right to possess the property, as well as the right to exclude others, within the boundaries of the law. If someone substantially interferes with your use and enjoyment of your real property, you may bring a claim in nuisance (a form of tort law). For example, if a neighbor decides to start burning tires on his property, the smell of the burning tires might substantially interfere with your use and enjoyment of your property, so you would have an actionable claim in nuisance. Similarly, if you own real property, you might rightfully seek damages against those who enter your land without your consent or permission. This would be a trespass to land claim. Owners of real property may also sell the real property, in whole or in part.

The most common way that real property is acquired is through purchase. Property law is a state law matter, and state laws vary regarding conveyance of property. Typically, someone who is interested in acquiring real property will ask a third party, such as a real estate agent or a broker, to help locate a suitable property and to facilitate the terms of the deal. The buyer and seller will negotiate a contract, which will contain all essential terms of the sale, such as location of the real property, price, fixtures that will be excluded from sale, and the type of ownership interest that is being transferred. Both parties will perform their promises under the contract (e.g., the buyer will pay the seller, and the seller will transfer the title via deed) to close the deal (“closing”), and then the deed will be recorded. A contract for any interest in property must be in writing to be valid against the defendant according to the Statute of Frauds.

Different types of deeds convey different types of interests. A quitclaim deed, for instance, conveys whatever interests in title that the grantor has in the property to the party to whom the quitclaim is given. Of course, that means if the grantor has no interests in the real property, a conveyance by quitclaim will not grant any interests in the property. For example, if you grant a quitclaim deed to your friend for the Empire State Building, then that means that you have transferred your interests in title to that building to your friend. If you have no interests in the title to the Empire State Building to begin with, then on conveyance of the quitclaim deed, your friend will not have any interests in the building either. You cannot convey interests that you do not have. On the other hand, many states allow a warranty deed, which conveys title and a warranty against defects in title as well as encumbrances. Buyers typically demand a warranty deed when they purchase property.

After title is transferred by the deed, the deed is typically recorded. Recording the deed is not necessary for ownership. However, recording a deed to property is important because it places others on notice that whoever has recorded the deed to the property owns the property. Some states favor the rights of those who record the deed first (under a race statute), while other states favor the rights of those who acquired the interest first without notice of other claims to the property (under a notice statute).

A race/notice system, which has a race/notice statute, is one in which priority is given to the first bona fide purchaser to record when there is a conflict in ownership claim. A bona fide purchaser is simply a purchaser who takes title in good faith, with no knowledge of competing claims to title.

Besides outright purchase, another common way in which real property may be obtained is through inheritance. Real property may be bequeathed through a will or may transfer per state statutes when a decedent dies intestate. Generally speaking, people have the right to dispose of their property as they wish when they die, providing that their will or other transfer instrument meets their state's requirements for validity. When someone dies intestate, state statutes will determine who among the decedent's relatives receives the property. For example, state statutes often specify that property will go to the spouse, and if there is no spouse, then to the children. If there are no children, then to the parents. If there are no living parents, then to the siblings, and so on. If no such person exists, the property may finally escheat to the state.

Real property may also be acquired through a gift. Providing that the person who is giving the property actually intends to make the gift of title, delivers the deed to the recipient, and the gift is accepted, then the gift is valid. If one of these elements is not met, for instance, if the deed is not delivered to the intended party (or to a third party to hold for the intended party), then the gift has not been successfully made, and the title will not be conveyed.

A less common way to acquire real property is through the doctrine of adverse possession. Colloquially, this is often referred to as "squatter's rights." At its heart, this method of acquiring property captures the deeply held belief that a land's value is in its use for profit. If a land sits idle at the owner's hands but someone else puts it to use, then the law may—just may—favor the user's claim to the land over that of the actual owner.

Adverse possession is when someone who is not the owner of real property has claimed the real property for his own. To be successful under this doctrine, several elements must be met. These include the following:

- The possessor must be in actual possession.
- The possession must be open and notorious, which means that it must be obvious to others (visible).
- The possession must be hostile, which means that it is against the actual owner's interests.
- The possession must be continuous, which means that the possessor cannot have been evicted during the statutory length of time required to obtain title through possession.

- The possession must be exclusive.
- The state statutory length of time must be met, and this time varies from state to state. For example, some states, like Maine, require a twenty-year period, while other states, like Nevada, require only a five-year period.

Some states' adverse possession laws also require that the possessor pay property taxes on the property during the course of the adverse possession. If all of these elements are met, then the possessor can bring a claim to quiet title. If successful, the possessor becomes the owner, without any compensation being made to the former owner.

Adverse possession and claims for quiet title often occur around property lines, where one party has routinely used another's property because a fence has been misplaced. Other instances involve claims concerning land owned by people who do not visit it, such as land owned in a remote area. Still other examples exist in cases of ouster, when a tenant in common constructively or actually evicts others with valid ownership interests. Remember that all elements of an adverse possession must occur for the entire statutory length of time for an action for quiet title to be successful. This means, for instance, if the owner checks on the property and finds someone there, the owner must interfere with those elements. The owner should evict the trespasser, and this can be accomplished by summoning the police. Doing so would break the continuity requirement.

A recent case in Boulder, Colorado, prompted the Colorado legislature to substantially alter the state's adverse possession laws. In that case, a married couple, composed of a judge and an attorney, met the requirements for adverse possession and successfully brought an action for quiet title. In that case, the adverse possessors were clearly versed in the law. The actual owners of the property had purchased the land many years before to build a future retirement home. Check out Note 8.59 "Hyperlink: A Question of Ethics" and see whether you think the Colorado legislature overreacted.

Hyperlink: A Question of Ethics

Is adverse possession a legally sanctioned form of theft?

http://www.denverpost.com/news/ci_7494276

Interests and Scope

Owning real property carries many responsibilities, as well as the potential for great profit and great liability. It is important to recognize the duties associated with property ownership, and learn how to protect yourself against potential liability associated with it. For instance, if a toxic waste site is discovered on your real property, you may very well be liable for its cleanup, even if you did not realize that such a site was there when you purchased the land. Each buyer of real property has a duty to exercise due diligence when purchasing land. The idea is that you should have known about the site, if it was discoverable on inspection. Knowing this, along with familiarity with the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), helps us recognize that we should never agree to buy land “sight unseen,” or at least without a professional inspector that we trust. But what if an old toxic waste site is located on property that you wish to sell? You would have a duty to disclose such a defect in the land to prospective buyers before conveying ownership.

Additionally, we must consider duties that landowners have to other people who enter the land. What are our duties to people who visit our home? Or our retail establishment? What if they are not invited but instead are trespassers? These duties of landowners will vary depending on the status of the person who was injured.

What if a gold mine were discovered on land that you used to own? Can you profit from that discovery? Probably not, if you conveyed full ownership to someone else.

As these examples illustrate, it is important to know about the *duties of landowners*, how to *limit liability* associated with the ownership of land, and when severance of liability occurs. These types of questions can be considered more fully when we consider ownership interests.

Additionally, it is important to know how an owner of real property may use the property, or the *scope* of his or her rights. Consider these questions: If you owned a lot in the middle of a city, can you build an apartment building that blocks the neighboring landowner’s light? Or if you own a piece of raw land where you discover oil, can you drill on your land if it siphons oil from underneath your neighbor’s land, or if it causes your neighbor’s land to collapse due to lack of subsurface support? If you live on a coastline

and your neighbor builds a dyke that causes your waterfront property line to erode so that over the years your property is reduced in size, do you have an actionable claim against your neighbor? Conversely, if the ebb and flow of water along the coastline increases your property due to natural accretion, do you own the “new” property, even though it wasn’t part of the original purchase? Consider water disputes, which are a very hot topic in the western states. If you live next to a river, can you divert the entire stream of water, even if you wanted to divert it for a capricious reason? Imagine that you dreamed of having a very large private water park for your family, but you needed all the water in a river that adjoined your property to make that dream a reality. If you diverted all that water, other riparian owners might very well have an actionable claim. What if it was a drought year and you relied on water from a river to irrigate your commercial crops, but endangered salmon in the river needed the water for their habitat? Can you take the water for your crop, or must the water be left in the river for the endangered salmon? These types of legal questions can be addressed when we consider the scope of rights.

The following sections address duties of landowners, ownership interests, and scope of interest in real property.

Duties of Landowners

Landowners owe different duties to different types of people who enter their land. These responsibilities vary, depending on whether the person is a trespasser, a licensee, or an invitee.

A trespasser is a person who voluntarily, intentionally enters the land of another without permission or privilege. A landowner has a duty not to intentionally injure a trespasser. For instance, booby traps, pitfalls, or anything of the sort are simply not permitted. Trespassers injured from such a trap have valid claims against the landowner for injuries.

A licensee is someone who has permission to be on the land. Landowners have a higher duty of care to such a person. Not only must a landowner not intentionally injure a licensee, but the landowner must also warn the licensee of known defects. For example, if a landowner knows that the steps to his or her porch are icy, he or she has a duty to warn a licensee—such as a visiting friend—that those steps are icy. Failure to do so may result in liability for the landowner.

An invitee is someone who has entered real property by invitation. Businesses have issued invitations to the public. Public places have issued invitations to the public. Anyone who arrives at the invitation of an owner is an invitee. Landowners must inspect their property for defects, correct those defects when found, and warn invitees about such defects. This is why you will see a “caution” sign on the floor of a grocery store, after it has been mopped or after a liquid spill.

Ownership Interests in Real Property

Different types of interests may be owned in real property. For example, real property may be owned without restriction, subject only to local, state, and federal laws. Or ownership interests may be narrower, subject to conditions, the violation of which can lead to loss of those ownership interests.

The most complete ownership interest is represented by fee simple absolute. The owner of property in fee simple absolute has the greatest ownership interest recognized by law. Generally, if someone wants to buy real property, he or she is looking to buy property in fee simple absolute.

Compare that with a defeasible fee. A fee simple defeasible is subject to a condition of ownership or to some future event. For instance, if you donated land to “the City of Nashville, so long as it is used as a public greenway,” then the land would be owned in defeasible fee by the City of Nashville, unless it decided to do something else with the land, besides maintain it as a public greenway. Once the condition is violated, the land would revert back to either the original owner or whoever owned the reversion interest, which is a future interest in real property.

Another ownership interest is a life estate. This interest is measured by the life of the owner in the life estate. If you wished to grant ownership rights in real property to your mother for the length of her life, but then expected the property to be returned to you upon her death, you might grant a life estate to her. Similarly, a common investment, known as a reverse mortgage, employs the concept of life estate. A reverse mortgage is an arrangement where the purchaser of real property agrees to allow the seller of the property to retain possession of the property for a specified period of time (such as the remainder of his or her life) in exchange for the ability to purchase the property at today’s price. This can be an attractive investment, if the investor believes that the value of the property will increase in the future, and if the

investor does not need immediate possession of the property. These arrangements essentially gamble on life expectancies of the sellers of real property by granting life estates to them in the property. However, sometimes this backfires. Check out Note 8.70 "Hyperlink: Reverse Mortgage" for an example of a seller who outlived her investor in such an arrangement.

Hyperlink: Reverse Mortgage

“In life, one sometimes makes bad deals,” said Jeanne Calment, the oldest living woman in history, concerning the investor who “reverse mortgaged” her apartment.

<http://www.nytimes.com/1995/12/29/world/a-120-year-lease-on-life-outlasts-apartment-heir.html>

Sometimes, more than one owner owns the interest in the property. Several types of co-ownership interests are recognized in law. These ownership interests are important for matters of possession, right to transfer, right to profits from the land, and liability. For example, tenancy in common describes an ownership interest in which all owners have an undivided interest in the property, equal rights of possession, and a devisable interest. Compare this to a joint tenancy, which describes an ownership interest in which the surviving owner has the right of survivorship. Imagine that you own a gold mine with your partner, Frank. Would you rather have a tenancy in common or a joint tenancy? You would rather have a joint tenancy because if Frank dies, then his interest in the gold mine would vest in you, rather than in his heirs. After all, you may not want to be a partner with Frank’s grandson (or whoever), but that is exactly what might happen with tenancy in common. Similarly, a tenancy by the entirety includes the right of survivorship, but it can only occur between a husband and wife. This concept is recognized in some states, but not all states.

These different interests are created by specific wording in the instrument of conveyance. To create a tenancy in common, the language would be “To John and Frank,” if John and Frank were to be the co-owners. However, if a joint tenancy were intended, the conveyance would have to be more specific, like this: “To John and Frank, with rights of survivorship.” Note that John and Frank could not benefit from a tenancy by the entirety unless they lived in a state that recognized same-sex marriages, and unless they

were, in fact, married. Moreover, such questions have not yet arisen in our courts because the legal concept of same-sex marriage is still nascent and, in many states, not yet recognized in law.

Note that a tenant in tenancy in common may sell or transfer his or her rights without seeking permission from his or her cotenant. Imagine that you owned a farm with your best friend. At first, you agree to engage only in organic farming practices. Later, your friend wants to move to conventional farming practices. Since you do not want any part in the spraying of pesticides or herbicides on the land, you decide to sell your interests to someone else. Even if your friend opposes the sale, he or she cannot block it. This is because cotenants in a tenancy in common have the unilateral right to transfer their interests in property. Imagine, later, that someone working on that land becomes very sick from a pesticide sprayed there after you sold your interest. You would not be liable for any damages resulting from such an event, because your liability would be severed with the sale. Compare this to a joint tenancy, including tenancy by the entirety. To transfer one's interests, the consent and approval of the cotenant is required. In the case that joint tenants disagree about the use of the property or its disposal, the courts can step in to grant a partition of the land, which essentially results in a separate parcels being granted to the individual tenants. This recasts the formerly joint tenants into adjacent landowners, and it allows them to dispose of or use their property as each sees fit, with no rights to the other's property.

Scope of Interests in Real Property

Scope of ownership matters, because it is determinative of what can (or cannot) be done with the land.

The surface of the land and the buildings that are attached to the land are implicitly included when most people contemplate the scope of ownership of real property. However, other interests can be parsed and conveyed separately, including subsurface or mineral rights, and right to light or right to a view.

Moreover, water rights are granted differently, depending on whether the property is in the western or the eastern United States. Additionally, easements and covenants grant certain rights to nonpossessors of land.

Subsurface or mineral rights are rights to the substances beneath the actual surface of the land. If you are interesting in drilling for oil, but you do not want to buy every piece of land where you might wish to

speculate, then you probably are in the market to purchase or lease mineral rights. This would allow you the right to extract whatever you find under the surface of the land and sell it.

Water rights are determined in two different ways in the United States. Generally speaking, states east of the Mississippi River follow riparian water rights doctrine, which means that those who live next to the water have a right to use the water. The water is shared among the riparian owners. In a quite different scheme, most western states use the concept of prior appropriation, which grants rights to those who used those rights “first in time.” Moreover, under this concept, the use must be beneficial, but the owner of the right need not be an adjacent landowner. This policy has led to some unnatural uses of land in western states, where water rights are highly valued due to the scarcity. For example, we see flourishing farmlands in extremely arid climates because the owners of the water rights want to make sure that they retain their prior appropriation rights to the water by putting it to beneficial use (e.g., crop irrigation). If water is not put to beneficial use under a prior appropriation doctrine, then those rights can be lost. Prior appropriation is basically a “use it or lose it” doctrine. Moreover, adjacent landowners in prior appropriation states may have no right whatsoever to use the water that runs through their land. Indeed, such an outcome is very common.

Easements and covenants are nonpossessory interests in real property. An easement is created expressly or impliedly, and it generally gives people the right to use another’s land for a particular purpose. For example, an easement for utility companies to enter onto the land of others is common. This allows the utility companies to maintain poles, power lines, cable lines, and so on. Other examples include a landlocked property having an easement across another piece of property for the purpose of a driveway, or an easement granted to the public to walk along the property of another to gain access to the shoreline.

A covenant is a voluntary restriction on the use of land. Common covenants are homeowners associations’ rules, which restrict the rights of the owners to use their land in certain ways, often for aesthetic purposes. For instance, such covenants might require houses subject to the covenant to be painted only in certain preapproved colors, or they might contain prohibitions against building swimming pools.

Some covenants and easements run with the land, which means that the restrictions will apply to subsequent owners of the real property. Whether a covenant or easement runs with the land depends on the type of interest granted.

Landlord-Tenant Relationships

A leasehold interest may be created in real property. For example, if you rent an apartment, house, or dormitory room from campus, you are a tenant with a leasehold interest. In such a relationship, you are the tenant and the property owner is the landlord. A leasehold is simply a possessory interest with certain rights and duties, which are typically specified in the lease agreement. For example, a tenant has the right to exclusive possession of the real property and the duty to follow the rules of occupancy set out by the landlord, and a landlord in a residential lease agreement has the right to be paid rent and the duty to ensure that the premises are habitable. If one party does not perform under the lease as required, the other party may seek legal remedy. For example, if a tenant does not pay rent, then a landlord may lawfully evict the tenant from the premises, even if the term of the lease has not run. Like other interests in real property, leases generally must be in writing to be enforceable against the defendant.

Different types of tenancies may be created. The most common tenancies are probably tenancies for years and periodic tenancies. Tenancy for years is simply a tenancy that lasts for a particular, specified period of time. When you rent an apartment, you might sign a lease for nine months to reflect the school year. That would be a tenancy for years, even though the term of the lease is less than one year. A periodic tenancy, on the other hand, is a tenancy that simply runs for a particular period of time and then automatically renews if it is not terminated by the landlord or the tenant. For instance, a one-year lease may become a periodic tenancy if neither party terminates. Imagine that you had a one-year lease but you did not move out at the end of the year, and the landlord continued to accept rent payments and took no action to terminate the lease. A new lease—for a one-year period of time—would be created. Less common types of tenancies are tenancy at will, which is a tenancy for no particular fixed period of time and subject to termination at will by either the landlord or the tenant, and tenancy at sufferance, which is a tenancy that occurs when a tenant remains on the property after the right of possession has ended and without the landlord's consent.

Tenancies may be created for residential purposes or commercial purposes. Commercial leases typically last for longer periods of time than residential leases. For example, it is not uncommon to hear about commercial leases that last five, ten, twenty-five, or even ninety-nine years. Many of the same responsibilities and duties exist with commercial leases, but there are some important differences. For example, a commercial tenant may demand that the landlord refuse to rent to a competitor of the tenant within the same building. For example, if a golf shop locates in a strip mall, it may require as a term in the lease that the landlord refrain from renting other retail space to a competitor golf shop within the same strip mall.

Lease interests are assignable unless those rights are expressly restricted by the lease agreement. This means that the rights conveyed by the lease, which is a contract, may be transferred to another party by assignment, unless an express restriction on assignment exists within the lease. You may have seen restrictions on assignment in your own residential lease in the form of a no-subletting clause. Commercial leases routinely contain a restriction on assignment without permission from the landlord.

Just as the owner of real property may sell any or all of his or her interests, any ownership interest in real property may also be leased. For example, someone who owns the subsurface rights of land may lease the right to drill for oil or gas to another.

KEY TAKEAWAYS

Real property may be acquired by purchase, inheritance, gift, or adverse possession. Owners of property must know the breadth and limits of their ownership interests to understand their rights to profits derived from the land and their liability resulting from use of their land. Interests in land may be absolute, conditional, or for a period of time. Additionally, co-owners may have different rights, depending on their kind of ownership. The scope of interest in land may include surface and the buildings attached to it, while other interests may be severed and conveyed separately, such as subsurface rights and water rights. Easements and covenants in real property convey nonpossessory interests. Leasehold interests are possessory, nonownership interests.

EXERCISES

1. Do you agree that a land's value is only its profits? If not, what makes land valuable? Does it have an "inherent" value, which has nothing to do with human profit?
2. Consider this contemporary take on the tort of nuisance. Some Gulf Coast landowners filed a nuisance suit against power companies for emitting carbon, arguing that the carbon led to global warming, which then led to increased sea levels, which then led to hurricane Katrina's unusual ferocity and strength. The district court dismissed the case, but a three-judge panel on the Fifth Circuit reversed, saying the landowners had standing to proceed and that the claim was justiciable. Do you think that this is a valid nuisance claim? Why or why not?
3. Do you think that adverse possession should be abolished? Why or why not? If you discovered a squatter on your land, what should you do to protect your title?
4. What type of due diligence can be performed to ensure that property does not contain a buried toxic waste dump?

5. Classify the following as trespasser, licensee, or invitee to determine the duty owed by a landowner:

- a. The mailman
- b. A customer in Wal-Mart
- c. A person who cuts across your land to reach the other side, without your permission

Think of a situation in which you would grant a life estate to someone in property that you own. How does that situation differ from renting property to a tenant?

Find a story in the newspaper about liability resulting from the ownership of real property. Do you think that landowner should be liable in the case that you located? Why or why not?

What benefits can you see for both the landlord and the tenant for extremely long leases? What are the risks?

8.3 Concluding Thoughts

An understanding of the nature of property is imperative, because at the heart of many transactions is the acquisition, rights to possession or use, or sale of personal or real property. Clearly, these transactions are central to many businesses and the livelihoods of the people involved in business.

When thinking about acquiring property, it is important to know not only whether the property is “right” for your or for your business but also about the rights and duties associated with acquiring it, the protections afforded to you by law as the owner of it, and how to transfer it to another party at the time of sale, lease, or licensing the right to use it. Additionally, liability often attaches to property, and limiting one’s liability is at the heart of what your study of law should encourage you to do.