Law & Accounting

What does the term 'good and marketable title' mean?

You may have seen the phrase "good and marketable title." Do you know what it means?

■ **What is marketable title?** Marketable title means a title that a reasonably prudent person with knowledge of all of the applicable facts and law would be willing to accept. The title must be reasonably free from doubts that would affect the market value of the property and must be reasonably certain not to be called into question in the future such as to subject the purchaser to the hazard of litigation.

So how do we decide what a reasonable buyer would accept in a particular situation? The answer often depends on traditional customs and practices in the industry. Colorado statutes, judicial decisions or the Colorado Real Estate Title Standards issued by the Colorado Bar Association may apply. This article is a general discussion of issues. You should consult with a lawyer to address specific circumstances that may be applicable to your situation.

■ **What is good title?** Good title means title that is unassailable. Can your title be good but not marketable? Yes. For example, if you have title via 18 years of adverse possession but haven't obtained a judicial decree quieting title, then your title may be good but not marketable. While having a good and marketable title does relate to value, they are not the same. You can own good and marketable title to a cheap digital watch, but that is not the same as owning a genuine Rolex.

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■ **What is insurable title?** Generally, insurable title means a title company will insure it. It is not the same as marketable title. A title company may be willing to insure an unmarketable title if the buyer purchases an endorsement and/or pays an increased premium. Accordingly, a title may be insurable but not marketable. Make sure you know which kind of title you are buying.

■ **Common misunderstandings about marketable title.** Marketable title relates to whether there are defects affecting rights in ownership rather than defects affecting physical condition or use of the property. For example, in Colorado, if you have to drive across your neighbor's property to access your property using an easement that your neighbor can revoke at will, you still may have marketable title. That is because vehicular access affects the physical condition or use of the property, not the right to ownership.

While many title policies do insure a limited right of access, the policy may not require an access suitable to the policyholder's needs. For example, a revocable access easement may be sufficient under this provision even though it would negatively impact market value. The policy also may not insure that you can use the access for a particular use, for example, for commercial use. You should carefully check that the access will be sufficient for your use before purchasing a property.

■ **Will a title policy insure me against unmarketable title?** The answer is it depends on the terms of the policy. Title policies typically include exclusions and exceptions that limit and/or exclude the title company's liability with respect to claims arising under them. These exclusions and exceptions can have a dramatic impact on value. To avoid overpaying, a careful buyer will examine them in detail and may request that they either be deleted from the title policy or ask the title insurance company to issue an endorsement to insure over the title defect.

■ **Does the sales contract require marketable title?** Some sales contracts require the seller to convey good and marketable title to the buyer. The Colorado Real Estate Commission approved forms only state that the seller must provide a title commitment for a policy but do not require the seller to deliver good and marketable title. Once the deed is conveyed, any warranties in the contract will merge into the deed such that the contract no longer applies. Only the deed will apply with respect to whether the seller had to pass marketable title.

■ **Does the deed require marketable title?** The answer is it depends on the type of deed and exceptions in the deed. For example, a general warranty deed includes a warranty that the property is free and clear from all encumbrances except as stated in the deed. While that may require passing marketable title, it is subject to the exceptions, which often are copied verbatim from the title commitment. A special warranty deed warrants title only against adverse claims asserted by someone whose interest is claimed to have been derived from the grantor. Always carefully check the warranties and exceptions in the deed to be conveyed before purchasing a property.

■ **Conclusion.** Title insurance and the Colorado Real Estate Title Standards help provide certainty and dependability for real estate transactions with respect to marketable title. However, you should always carefully review the title insurance commitment provisions, exclusions and exceptions, and the deed to be conveyed, to make sure you are getting what you are paying for.

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