

The Title Opinion: An Overview

A title opinion may only be drafted by a licensed attorney. This overview is provided only for educational use and does not constitute and may not be used to give legal advice.

The first step in a title opinion is a title search. A title search entails the detailed review of real property records in the county where the land is located. Each state maintains a recording system, which is like a library made up of title-related documents.

In West Virginia, real property records are stored in the county clerk's office. These records include copies of deeds, mortgages, and other instruments that convey an interest in real property to a new owner. The county also maintains estate records, which become relevant when land is given to a new owner through a will.

One step in a title search is researching the chain of title: an attorney develops a full chronology of how the property has transferred between owners. For example, A deeds to B; B deeds to C; D inherits property from C; D deeds to E; E mortgages to X; E deeds to F subject to X's mortgage; X executes a satisfaction of the mortgage; F deeds to G; and so forth.¹ The history of the property is frequently much more complicated because, for example, properties may be divided into multiple parcels or conveyed to multiple owners.

After the chain of title has been established, the title attorney will identify other encumbrances and activities appearing in the records that have the potential to cloud title.

Potentially Adverse Documents:

- *Deed of Trust* – an agreement between a lender and a borrower to transfer an interest in the borrower's land to a neutral third party, a trustee, to secure the payment of a debt by the borrower. This type of deed resembles a mortgage.
- *Judgment Lien* – can be imposed on a person's real property if a landowner is sued and loses the lawsuit and the opposing party wins a money judgment against the landowner. In most states, the judgment creditor (the person or company who won the lawsuit) must then record the judgment by filing it with the county or state.
- *Execution* – judicial enforcement of a money judgment by seizing and selling the judgment debtor's property.
- *Mechanics' Lien* - a security interest in the title to property for the benefit of those who have supplied labor or materials that improve, repair, or maintain real or personal property, such as a building or an automobile.
- *Lis Pendens* - a written notice that a lawsuit has been filed concerning real estate, involving either the title to the property or other claimed ownership interest. The notice is intended to warn potential buyers that the property is the subject matter of litigation, and that any interests that would be acquired during the pendency of the suit are subject to the outcome of the lawsuit.

¹ HERBERT HOVENKAMP, SHELDON F. KURTZ & THOMAS P. GALLANIS, *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* 538 (6th ed. 2014).

- *Tax Lien* – the government’s legal claim against property when the owner neglects or fails to pay a tax debt. The lien protects the government’s interest in all property, including real estate, personal property, and financial assets.
- *Mineral Severance* – occurs when the underlying minerals are separated from the surface land of the property. When severance occurs, a different person than the surface owner could own the minerals. The mineral owners may lease the minerals to an oil and gas company that requires access to the minerals, risking damage to the surface.
- *Easement* – a right to cross or otherwise use another person’s land for a specified purpose. An easement is a property interest that allows the holder of the easement to use property that he or she does not own or possess. Some examples include: the right of a municipality or utility company to run sewer lines or power lines across the owner’s property or the right of a property owner who has no street frontage to use a particular segment of a neighbor’s land to gain access to the road.
- *Right-of-Way* – a type of easement, typically the right to pass through property owned by another. A right-of-way may be established by contract, by longstanding usage, or by public authority. Common right-of-ways include utility right-of-ways and open areas alongside highways and public roads needed for public safety and signage.

Generally, a title opinion contains a description of the subject property; current ownership; interests; chain of title; taxes; potentially adverse actions; and attorney comments, conclusions, and recommendations.

In the past, one attorney might perform the record search, write the title opinion, and then close the real estate transaction. Because the volume of records affecting each parcel of real property has so multiplied over time, few attorneys today find it cost-effective to do complete title searches themselves. Instead, either an abstract company or a title insurance company will perform the title search. Attorneys then write title opinions based on their examination of abstracts of the title or title reports prepared by title insurance companies. The attorney weighs the facts shown and provides the client with a written opinion on the status of the title. The attorney’s opinion sets out any requirements regarding information that must be obtained, prior liens that must be satisfied, or instruments that must be recorded before the transaction is closed in order for the purchaser to receive marketable title to the particular interest being conveyed. The attorney also has an obligation to explain to the client the nature and extent of the risk presented by each of the disclosed title defects. Based on this information, the client may decide whether to assume the risk and complete the transaction or forego the purchase or loan unless the seller can clear the title.

It is important to note that the way records are catalogued or recorded can create questions of reliability:²

- (1) The recorded documents may appear to be valid and enforceable, yet may turn out to be fatally defective for reasons that cannot be detected by reading them. For example, the description that is used in the deed is incorrect, or a prior deed was not signed by all of the parties who had an interest in the property when it was conveyed to the new owners.

² ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY: HORNBOOK SERIES STUDENT EDITION* 824 (2d ed. 1993).

- (2) There are a variety of events and claims that do not appear in any public record. For example, a person who does not have an interest in the property and has not formalized his or her ownership by recording a deed in the county clerk's office could be living on the land.
- (3) Attorneys commonly limit their searches to the most recent 40 to 60 years. Limiting the search in this way creates a risk that unexamined documents could adversely affect the title.
- (4) There is a possibility that the attorney may make a clerical error in the search or a mistake when analyzing the documents that results in the attorney making an incorrect conclusion as to the state of the title.

Action to Quiet Title: A lawsuit to establish a party's title to real property against anyone and everyone, and thus "quiet" any challenges or claims to the title. Such a suit usually arises when a defect of title—commonly referred to as a “cloud”—has been discovered through the course of a title examination.

A “cloud” on title is an outstanding claim or encumbrance that could affect or impair the title for the owner or a prospective owner. Clouds on title are generally limited to written records that cast doubts upon the validity of the title. Accordingly, verbal claims or oral assertions against an ownership interest do not constitute clouds.

Examples of clouds on title:

- Wrongfully recorded deeds
- Imperfect deeds
- Void deeds
- Forged deeds
- Void tax deeds
- Deeds conveying land by mistake
- Abandoned, unreleased oil and gas leases
- Vendor's liens
- Mechanic's liens
- Hostile claims under a will

The complainant in an action to quiet title must show a clear and certain interest in the property. In West Virginia, unlike other states such as Pennsylvania and Ohio, it is not necessary that the complainant have actual possession of the property by physically occupying it.³ Mere demonstration of ownership is sufficient grounds to initiate an action to quiet title. In application to reconditioning a dilapidated property, this means that a municipality, rural development authority, land bank, or other similar entity does not have to actually occupy a building or land to initiate an action to quiet title.

However, municipalities and other local governments do not commonly initiate actions to quiet title in effort to deal with dilapidated buildings for three primary reasons. First, municipalities and local governments do not typically take any ownership interest in dilapidated properties in their jurisdictions.

³ See *Tate v. United Fuel Gas Co.*, 137 W. Va. 272, 278, 71 S.E.2d 65, 69 (1952) (stating that “[i]t was formerly the rule that a plaintiff in a suit brought to remove a cloud on title must own the title and be in possession. But possession is no longer necessary in this jurisdiction.”).

As stated above, the most fundamental prerequisite to bringing an action to quiet title is actually having an ownership interest in the property. Second and third, in cases where municipalities do take ownership, local governments are often inhibited by the time and cost of an action to quiet title.

Estimated Cost for Actions to Quiet Title in West Virginia⁴

- Uncontested: \$8,000 - \$10,000
- Contested: \$8,000 - \$100,000

⁴ Russell L. Schetroma et al., *Quiet Title Actions: Tools to Address Select Appalachian Title Defects*, 34 ENERGY & MIN. L. INST. 15, 618 (2013).