

Property Law

OWNERSHIP AND POSSESSION OF PERSONAL PROPERTY

Personal property is all property that is not real property; it includes both tangible and intangible property. Owners and possessors of personal property have legally protected rights, which vary by the circumstances of the property's creation and the type of ownership.

In addition to buying personal property, a person can acquire ownership of personal property by creating intellectual property or through accession, confusion, gifts, or bailments.

Basic Concepts of Property Law

Property is the real estate, buildings, objects or articles, intangible assets, or rights with exchangeable value of which someone may claim legal ownership. Ownership is the unrestricted and exclusive right to something. In the United States, the law views property as a bundle of legal rights (interests), which are generally insurable, and protects them. In some societies, the concept of private property ownership is either nonexistent or more limited than in the U.S.

Property falls into two categories.

Real property, or realty, is land, including structures or rights attached to the land. Real property includes rights to water, minerals, and things attached to land, such as buildings, trees, and fixtures that have become part of the realty. It also includes rights closely related to land, such as the right to pass over another person's land. Personal property is all property that is not real property. Some personal property, such as goods one possesses physically, is tangible. Other property, such as patents and insurance policies, is intangible.

Ownership is a relationship between the owner and the rest of society that includes three features:

- The right to exclude all others from use and enjoyment of the property owned
- The right to pass valid ("good") title to the property
- The obligations of ownership, such as the obligation to pay taxes and to use property so as not to interfere with others' rights



Another term for legal ownership of property is title. Title is the highest right to property that a person can acquire.

Possession is the exercise of custody or control over property and is not, of itself, ownership. A person can possess property without owning it. When a person possesses property, the law generally protects that possession against everyone except the owner. When the owner grants possession, the possessor's rights to custody and control can be superior in some situations to the owner's, at least during the period for which possession is granted.

Creation of Intellectual Property

One can create intellectual property from one's own endeavors, such as writing a book or a song, inventing a device, or developing a process. In relation to intellectual property, the creative process leads to two results:

- The intellectual property itself, that is, the expressed form of an idea or intangible subject matter
- **Intellectual property rights**, which include copyrights, trademarks, trade secrets, and patents

Intellectual property rights
The legal entitlement attached to the expressed form of an idea or of other intangible subject matter.

Intellectual property rights are insurable rights that protect the creations of a person's mind and talents. For most purposes, federal, not state, law governs all intellectual property rights, although the states have limited jurisdiction over common-law intellectual property rights.

Copyrights

A **copyright** grants the exclusive right to copy or otherwise reproduce the copyrighted material and to create additional, or derivative, works from the original. The federal Copyright Act of 1978¹ permits the "fair use" (that is, for purposes such as teaching, research, criticism, or comment) of copyrighted material without the owner's consent. Thus, people other than the copyright owner can use portions of copyrighted material. What constitutes fair use is not always easy to determine. Courts consider the following in determining fair use:

- Purpose of the use
- Nature of the work
- Amount and substantiality of the portion used
- Effect of the use on the work's value
- Extent to which the use might deprive the copyright owner of economic advantage

For works created on or after January 1, 1978, the copyright extends for 70 years after the author's death. For anonymous and pseudonymous works for which the author's identity is not revealed in the Copyright Office records, and for works created for hire, the copyright extends for 95 years from publi-

Copyright
The legal right granted by the United States government to a person or organization for a period of years to exclusively own and control an original written document, piece of music, software, or other form of expression.



cation or 120 years from creation, whichever is shorter. For works originally created before January 1, 1978, but not published or registered until after that date, the duration of copyright is determined in the same manner.

For works created and published or registered before January 1, 1978, the duration of copyright protection has changed over the years. Initially, the copyright extended for twenty-eight years from the date of publication, or registration of an unpublished work, with an option to renew in the twenty-eighth year. Changes to the law now allow for a renewal term of sixty-seven years for a total copyright protection of ninety-six years.²

Patents

The federal government grants a **patent** to a person who has given physical expression to an idea. For example, Michael conceives of an invention and then physically creates it. He obtains a patent giving him the exclusive right to make, use, and sell the invention for seventeen years.

A patent is not renewable, and, once the period has elapsed, others can use the idea. To be patentable, an invention can be a new and useful device or machine or a combination of known elements that would perform an additional or different purpose. Over-the-counter and prescription drugs are examples of patentable items.

Patent

The right granted by the United States government to an inventor or applicant for a limited time period to exclusively own and control a new, useful, and nonobvious invention.

Accession

Accession can be by natural accretion, as when an animal produces offspring. It can result from a union of one thing with another, as a coat of paint applied to a house; or it can result from transformation of raw materials into a finished product, such as wood into barrels. The owner of an animal that gives birth also owns the offspring; for example, the owner of a cow owns each calf born to the cow.

Questions of ownership arise when one person adds value to another's personal property, knowingly without the owner's consent. The owner is not required to pay for the added value. Similarly, a person who wrongly takes another's property and then improves it does not acquire title to the finished product and is not entitled to payment for the improvements.

However, if the property is taken innocently, as when one mistakenly cuts trees on another's land and transforms them into lumber, a relative value test may be applied. Under this test, if the value of the finished products were greatly disproportionate to the value of the original goods, the innocent trespasser would retain title to the finished goods after reimbursing the owner for the reasonable value of the goods before improvement. The relative value test is applied to restore innocent parties to a status as close to their original status as possible.

Accession

An increase or addition to property.



Confusion

In property law, the intermingling of goods belonging to different owners.

Confusion

Fungible goods are goods that are commercially interchangeable with other property of the same kind. **Confusion** usually arises when fungible goods, such as wheat, belonging to different owners, are mixed so that identification and separation of the goods are impossible.

In such cases, courts consider whether the confusion resulted from willful misconduct or from an innocent act. If the intermixture of goods was willful or fraudulent, the wrongdoer loses title to the goods, and the other original owner obtains title to the wrongdoer's portion of the goods. When the confusion is innocent or accidental, the parties jointly own the entire mass in proportion to their respective interests.

If the parties can determine the original numbers or amounts they own, they will each own a proportionate interest in the mass. If determination of the original amounts contributed is impossible, the loss falls on the party who caused the intermixture. See the exhibit "Confusion of Goods Example."

Confusion of Goods Example

Bill and George own sheep in adjoining pastures. A storm breaks down a fence between the pastures, and the sheep intermingle. They are unidentifiable. Although Bill and George each know the number of sheep they had, they now jointly own the sheep. Each has an interest in the mass of sheep in proportion to the original number owned.

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Gift

The voluntary and gratuitous transfer of property without consideration.

Gifts

A **gift** requires three elements:

- **Donative intent**—The donor must intend to make a gift in the present. A promise to make a future gift is not enforceable. Although the donor's subjective intent determines donative intent, objective manifestations, such as the donor's comments and statements, can help prove intent. Subjective intent is what the donor believes is being done, and objective manifestations are what others might interpret as the donor's intent.
- **Delivery**—Delivery of a gift can be by actual physical transfer or by constructive delivery, which is delivery implied by law. In either case, the donor must give up all control over and possession of (dominion over) the property, and the **donee** must assume dominion over the article. If the donee already has the property, the donor need not repossess it and then return it to the donee. A donor handing car keys to a donee, for example, can establish constructive delivery of a car. When the tangible property is so extensive as to be incapable of physical delivery, a symbolic act is suf-

Donee

The recipient of a gift.



ficient to accomplish delivery. A written document can prove delivery of an intangible item, such as a bank account.

- Acceptance—Parties rarely dispute acceptance. However, when a donee does not want the burdens of ownership, such as having to pay taxes, acceptance becomes important. One cannot force a gift on a donee. The donee must agree to accept the goods.

Bailments

A person who takes clothes to a cleaner or a car to a garage for repair, or who lends a lawnmower to a neighbor, is a bailor. One who borrows a car or undertakes to care for someone else's personal property becomes a bailee.

A **bailment** has these three elements:

- The transfer of possession of personal property without transfer of title—The transfer of possession is more than the transfer of mere custody. In other words, when a shopkeeper hands an article to a customer to examine, the customer has custody, not possession, and therefore is not a bailee. Similarly, an employee such as a milk-delivery person is not a bailee of the company's milk; the employee merely has custody of the milk for delivery.
- The bailee's acceptance of the bailed property—For example, a restaurant customer who hangs her coat in an unattended cloakroom in the restaurant does not create a bailment, because no delivery to the restaurant owner has occurred. A bailment does arise, however, if the customer leaves the coat with a cloakroom attendant.
- The bailee's express or implied agreement to redeliver the property to the bailor or to a designated third person—If the person receiving the goods has the option to return other property in exchange for the goods or to pay for the goods, no bailment exists.

Bailment

The temporary possession by one party (the bailee) of personal property owned by another party (the bailor) for a specific purpose, such as cleaning or repair.

BAILEE'S AND BAILOR'S RIGHTS AND DUTIES

Everyone is a bailor or bailee at some time. Bailors and bailees have rights and duties related to the property in bailment, which vary depending on the nature of the bailment. The principal consideration in determining these rights and duties is whom the bailment is intended to benefit.

A bailment can benefit the bailee, the bailor, or both. A bailee has a duty to take reasonable care of bailed property, and the extent to which a bailee may use that property depends on the type of bailment. Also, the bailee's right to compensation depends on the type of bailment. The bailor has the right to have bailed property returned and can sue the bailee if property is not returned or is damaged. In some cases, the bailor must provide the bailee with goods that are fit for the purpose of the bailment.



Bailee's Rights

The extent of the bailee's right to use bailed property varies depending on whom the bailment is intended to benefit: the bailee, the bailor, or both.

In a bailment for the bailee's sole benefit, as when a bailee borrows a bailor's car for personal use, the right to use the property is limited to the bailor's contemplated use when lending the car. If the purpose is to travel between two points, any deviation from the route reasonably contemplated by the bailor can make the bailee liable for any loss that occurs during the deviation.

In a bailment for the bailor's sole benefit, the bailee may use or handle the property only to the extent necessary to preserve and protect it. For example, a bailee who accepts a fur coat for safekeeping should not wear it.

In bailments for mutual benefit, the bailee can use the property as specified within the agreement or contract. A person who leases a car can use it only according to the lease agreement's terms. On the other hand, if a person bails a car for the purpose of storage or parking, the bailee can only store or park the vehicle and cannot use it for other purposes.

Some bailment contracts require compensation. For those that do not, courts assume that the bailor intended to pay a reasonable value for the bailee's services if a reasonable person would have realized the services require payment. A bailment for the bailee's sole benefit does not imply a charge for services because it is not reasonable to assume charges. When expressed or implied compensation is not paid, the bailee can assert a lien or even a **possessory lien**. For example, an auto repair shop can keep a car until the owner pays the repair bill.

The lienholder is entitled to exclusive possession of the property until receipt of money owed. The lienholder, as a bailee, must take reasonable care of the property, including making repairs and expenditures reasonably necessary to protect and preserve the property.

Possessory lien

A bailee's right to retain possession of a bailor's property as security for the payment of a debt or performance of some other act.

Bailee's Duties

A bailee must take reasonable care of the bailed goods. If the bailee exercises due care, any loss or damage to the bailed property falls on the bailor because the bailor has title to it. Each type of bailment requires a different degree of care:

- When the bailment is for the bailor's benefit, the bailee is gratuitously in charge of the goods and only slight care is required. For example, if a bailor asks the bailee to care for his car, the bailee is liable for damage



to the vehicle only if damage was foreseeable and the bailee could have prevented it without substantial trouble or expense.

- When the bailment is for the bailee's sole benefit, the bailee must exercise an extraordinary degree of care. For example, a bailee who borrows the bailor's car must exercise great care.
- When the bailment is for the bailor's and bailee's mutual benefit, the bailee must exercise reasonable care under the circumstances. For example, a bailee who rents a tent for a lawn party must exercise reasonable care to ensure it is not damaged.

A bailee can extend or limit liability for the bailed goods in the bailment contract. For example, household goods movers and airlines restrict liability for goods and baggage, often to a certain amount of money per pound. The right to limit liability extends only to liability for ordinary negligence, not to willful or wanton misconduct.

Because of the bailee's legal duty to care for the goods and to return them to the bailor, the bailee has an insurable interest in the goods and can obtain insurance to protect that interest. In the absence of a statute or specific contract requirement, however, the bailee has no duty to obtain insurance on the bailed goods. The bailee must hold insurance proceeds paid for the bailed property's damage in trust for the bailor, except for that amount representing the bailee's interest under the bailment agreement.

A bailee has possession only and therefore cannot transfer title to a third party. If the bailee sells the bailed goods to a third party, the bailor can recover them from the third party unless the bailor has represented the bailee as the owner of the goods.

The bailee must surrender the goods to the bailor on request unless the bailment is for a term, such as a car rental, in which case the bailee can retain possession for that period. A bailment for a specified period entitles the bailee to possession only for that period. If the bailment has no set period, the bailor can terminate at any time and end the bailee's right to possession. The bailee must redeliver the goods within a reasonable time after the bailment period ends. A bailee's attempt to sell bailed goods, or to cause extensive damage to the goods, automatically terminates the bailment and entitles the bailor to immediately recover the goods, as well as any repair or replacement costs.

Bailor's Rights and Duties

In mutual benefit bailments and in bailments for the bailee's benefit, the bailor has a right to compensation according to the agreement. However, in bailments for the bailor's sole benefit, the bailor is not entitled to compensation.

A bailor can sue a bailee who does not return the bailed property at the end of the bailment term. If the goods have been damaged, either negligently or



willfully, the bailor can sue either the bailee or a third person responsible for the damage.

In mutual benefit bailments, the bailor owes the bailee a duty to supply goods that are reasonably fit for the purpose the parties envision. The bailor must make a reasonable inspection of the goods to determine any defects. The bailment agreement implies a warranty that the goods are in proper condition, and the bailor is responsible for any damage the bailee suffers because of unknown defects. In a bailment for the bailee's sole benefit, as when the bailor lends the goods to the bailee, the bailor must notify the bailee of known defects.

A bailor is not usually liable for a bailee's negligent use of bailed property. However, a bailor who negligently entrusts property to an incompetent bailee can be held liable for resulting injuries to third persons. Negligent entrustment is leaving a dangerous article, such as a gun or car, with a person who the lender knows, or should know, is likely to use it in an unreasonably risky manner. For example, a car owner who permits an unlicensed minor to operate the car on the highway can be liable to a third party who is injured in an accident caused by the minor.

A bailor who knows that the bailed property is in a dangerous condition can be liable for injury to a third party if the bailee is not aware of the danger.

In some cases, a bailor has a duty to reimburse the bailee. The cost of repairs ordinary and incidental to the use of bailed goods under a rental contract is usually the bailee's responsibility. However, the bailor must pay the cost of extensive repairs to the property. For example, if a bailee makes repairs that the bailor should have made, such as installation of a new transmission in a car, the bailor must reimburse the bailee.

REAL PROPERTY OWNERSHIP

There are various types of ownership interest in real property. Understanding the rights and constraints associated with each can help insurance professionals meet the needs of their clients.

Real property includes the surface of land and everything that is in, on, or above it, including oil, water, minerals, and gravel under the surface, as well as trees, shrubs, and plants on the surface. Real property also includes buildings and other structures permanently affixed to the land.

There are two types of estate, or ownership interest, in real property:

- Fee simple estate
- Life estate



When more than one person owns property, that ownership can take different forms:

- Joint tenancy
- Tenancy by the entirety
- Tenancy in common
- Community property
- Cooperative ownership
- Condominium ownership

Estate in Fee Simple

The owner of a **fee simple estate** can leave the property to heirs and sell, lease, or use it. The typical owner of a single family home has a fee simple estate.

Fee simple estate

A full ownership interest in property with the unconditional right to dispose of it.

Life Estate

Property owners can carve out part of a total interest to create lesser interests either in terms of the quality of the ownership or for the length of time ownership exists. A **life estate** is one type of lesser property interest. A life estate lasts only until the death of a specified individual. For example, David grants land to Mary for the period of her life. Alternatively, David grants land to Mary for the period of Betty's life. In each case, Mary is the life tenant. On Mary's death, or Betty's, title to the property reverts to David or to David's estate.

Life estate

An interest in which a person, called a **life tenant**, is entitled to possession of real property and to all income the land produces for the duration of that person's or someone else's life; the interest terminates on the death of the life tenant (or of the other person during whose life the life tenant possesses the property) and does not pass to his or her estate.

If the life tenant sells the land, the buyer's interest lasts only as long as the life estate. Therefore, a prospective buyer must be concerned with the life expectancy of the person on whose life the estate is based.

Concurrent Estates

Two or more persons, particularly husband and wife, often own property concurrently. Concurrent ownership can be in any of these forms:

- Joint tenancy
- Tenancy by the entirety
- Tenancy in common
- Community property

In each of these situations, the property owners can have **tenancy** interests they can insure even though they share the property with at least one other person.

Tenancy

A right to possession or ownership, or both, of property.



Joint tenancy

A concurrently owned and undivided interest in an estate that transfers to a surviving joint tenant upon the death of the other.

Joint Tenancy

Joint tenancy is probably the oldest form of concurrent ownership and usually occurs today among members of the same family. The distinguishing feature of joint tenancy is that, on one joint tenant's death, the estate goes entirely to the other joint tenant. If David, Mary, and Betty are joint tenants and David dies, his interest goes equally to Mary and Betty. If Mary then dies, the whole estate goes to Betty. If David is married, his wife has no interest in the property through marriage.

The parties create joint tenancy at one time, from one grantor, in equal shares. With two joint tenants, each must hold a one-half share, and so on. One of the joint tenants cannot be subject to a condition that does not apply to the others. The same deed must name them all as owners.

Tenancy by the entirety

A joint tenancy between husband and wife.

Tenancy by the Entirety

The usual form of deed for **tenancy by entirety** is "to Husband and Wife, as tenants by the entirety." If the deed does not state "tenants by the entirety" explicitly, the law considers that phrase implied in joint tenancy between husbands and wives. Half an estate may be taken as tenants by the entirety, and the other half by another person, as "to Husband and Wife, and Third Person." For example, Doris and Rick own half of a farm as tenants by the entirety, and Cheryl owns the other half.

A tenancy by the entirety is similar to a joint tenancy because the survivor takes the entire property. It differs from a joint tenancy in several ways:

- A sale or contract to sell does not sever the tenancy.
- Individual creditors of either the husband or the wife cannot subject the property to a claim. Unless both spouses are found liable for the same tort, judgment creditors cannot execute on the marital property. This can prevent a family from losing its home after either the husband or the wife causes a serious accident.
- Neither party individually owns a portion that can be mortgaged.

Divorce ordinarily severs a tenancy by the entirety, and both spouses can terminate it by joining in a transfer of the property or by transferring one spouse's interest to the other.

Tenancy in Common

Tenancy in common

A concurrent ownership of property, in equal or unequal shares, by two or more joint tenants who lack survivorship rights.

Tenancy in common differs from joint tenancy and tenancy by the entirety in these ways:

- It involves no survivorship.
- The parties can own unequal shares.
- The parties need not derive their interests in the same deed from the same grantor.



A will or deed can create a tenancy in common expressly, as when a deed is “to David and Mary, as tenants in common.” More commonly, operation of law creates a tenancy in common. For example, if David dies intestate (without a will) and has three heirs, they inherit David’s real property as tenants in common.

Community Property

Some states follow the Spanish civil law concept of **community property**. Under this concept, two types of property can belong to a spouse—separate property and community property. The separate property of either spouse is that which the spouse owned at the time of marriage as well as any property that the spouse acquires individually after marriage by gift or inheritance. Separate property is the respective spouse’s sole property because communal effort did not produce it, and it is free from the other spouse’s interest or control.

Under the community property concept, a husband and wife share equally in all community property, and the amount of their individual contribution to the joint effort does not change the equal interest. A gift to both spouses becomes community property. On a spouse’s death, unless a will states otherwise, the property is divided in half. One-half goes to the surviving spouse; the other half goes to the deceased spouse’s heirs, if any. A spouse cannot, by will, dispose of more than one-half of community property.

Community property

Property owned or acquired by both spouses during a marriage by their communal efforts. Each spouse has an undivided one-half interest in the community property.

Cooperative Ownership

Cooperative ownership is similar to concurrent ownership. However, it does not involve unity of possession or an equal right to occupy the entire premises with all other tenants. Cooperative ownership is a common method of owning real property, usually apartments.

In **cooperative ownership**, a corporation holds title to the property. The cooperative owner purchases stock in the corporation and receives a long-term proprietary lease for a certain apartment. The lease sets forth the parties’ rights and liabilities, including provisions for monthly payments. The number of shares in the corporation that each tenant owns can be equal or can vary according to the values of the apartments. For example, ten people form a cooperative venture to construct ten apartments at a cost of \$1 million. The five apartments on the ground floor are each valued at \$120,000; the five on the second floor at \$80,000 each. The corporation issues 100 shares of \$10,000 stock. Those desiring ground floor apartments purchase twelve shares, and those wanting the second floor purchase eight shares each.

The corporation ordinarily obtains a mortgage, constructs the building, and then operates it. Each tenant, as a shareholder in the corporation, has a proportional vote in its affairs based on the number of shares owned. The corporation levies monthly assessments to pay mortgage principal and inter-

Cooperative ownership

Ownership, usually of real property such as an apartment building, by a corporation, the stockholders of which receive long-term proprietary leases to a portion of the property and a proportional vote in its affairs based on the number of shares owned.



est, taxes, cost of operations, insurance on the structure in the name of the corporation, and other items.

Cooperative ownership provides for operation and maintenance by someone other than the tenant, while guaranteeing a right of occupancy for as long as desired. A disadvantage is the owner's limited control over external conditions, which can lead to a deterioration of the investment. Finding a purchaser for the premises can be difficult, particularly if it is beginning to deteriorate. Additionally, if other tenants do not keep up their payments, and as a result the mortgage payments lapse, the mortgagee can foreclose on the property. In that case, all tenants can lose any equity they have built up in the property.

Condominium Ownership

Condominium

A real estate development consisting of a group of units, in which the air space within the boundaries of each unit is owned by the unit owner, and all remaining real and personal property is owned jointly by all the unit owners.

Condominium ownership, like a cooperative, is concurrent ownership. However, it is closer to a true concurrent ownership than the cooperative and has two legal elements:

- Individual ownership of a “unit,” or separate, defined area
- An undivided interest in common or public areas (common elements) that serve all individual units

Unless both elements exist, no condominium interest exists, and the two elements cannot be separated. A unit owner cannot retain title to a unit and sell the undivided interest in the common element. Condominiums are usually multi-unit buildings, but sometimes groups of single-unit buildings qualify in this category.

The common element is essentially the land and the building, together with attached or outside areas, such as parking and storage areas, and heating and cooling systems. The unit an individual owns often is described as a “box of air.”

A condominium is created by a written declaration that details the number of units and the percentage interest that each unit has in the common elements. Bylaws usually govern day-to-day operations of an association established to run the common elements. All unit owners have interests as tenants in common in the common elements that can be, but usually are not, equal.

In contrast to cooperative ownership, the condominium owner, as a tenant in common, has a direct property interest in the land and buildings, rather than a secondary interest as a shareholder of a corporation. The individual can sell, transfer, mortgage, or leave to heirs his or her condominium interest.

REAL PROPERTY SALES

In the sale of real property, the contract of sale is the agreement between the buyer and the seller that outlines the terms and conditions of the sale.



The document that actually transfers title to the property is the deed. Understanding the requirements in both contracts of sale and the transfer of title to real property helps protect the interests of both purchaser and seller.

To be legally binding, a real estate contract of sale must meet certain requirements. It must be in writing and must include a description of the premises to be sold and the price. After property has been sold, a deed transfers title to the purchaser. There are three principal types of deeds: warranty deeds, bargain-and-sale deeds, and quit-claim deeds. Deeds are typically recorded as official documentation that transfer of ownership has occurred.

Deed

A written instrument that transfers interest in real property.

Elements of a Contract of Sale

Execution of a contract of sale usually precedes a transfer of real property. The contract need not be complex or lengthy, but it must contain certain elements to be binding, and the parties must be competent to enter into a contract.

Vendor and **vendee** are the terms that apply, respectively, to the real property seller and purchaser. After they execute the deed, they become the **grantor** and **grantee**, respectively. Even if title is in the vendor's name only, if the vendor is married, the spouse should sign the contract of sale.

A contract of sale for real property requires these elements:

- **Writing**—Under the statute of frauds, any agreement to transfer an interest in real property must be in writing and signed by the persons to be bound. If the vendor attempts to enforce the contract against the vendee, the vendee must have signed it, and vice versa. The parties, however, can orally rescind a contract of sale because the rescission does not transfer an interest in real property. Any modification of the contract must be in writing.
- **Essential terms**—The contract must describe the premises to be sold and the price. The description need not be precise but must be sufficient to identify the property. Thus, a reference to "1000 Park Avenue, to be sold for \$100,000" would be sufficient.

Certain additional, nonessential terms are usually covered in a complete contract of sale. For example, the time of closing, if not stated, is to be within a reasonable time, and payment usually occurs at closing.

Vendee

The purchaser of real property.

Vendor

The seller of real property.

Grantor

One who conveys property to another.

Grantee

The buyer of real property after execution of the deed.

Types of Deeds

There are three principal types of deeds:

- The warranty deed can be of two types: general warranty and special warranty. A general warranty deed, in addition to transferring whatever title the grantor has, contains the grantor's warranty that the title is free of all encumbrances (prior claims on the property), that the grantor has the title being transferred, and that no one else has a better title. A special



warranty deed contains warranties against only those encumbrances and defects in title that might have been created since the grantor took title. A title insurance policy is particularly important for a special warranty deed because otherwise the grantee has no protection against earlier defects. In the event of breach of any of these warranties, also called covenants, the grantee can sue the grantor. The deed states whether an encumbrance, such as a mortgage on the property, exists.

- The bargain-and-sale deed transfers whatever interest a grantor has in real property to a buyer for valuable consideration but lacks any guarantee from the seller about the validity of the title, and it includes no warranties that the title is free from encumbrances.
- The quit-claim deed transfers only the title or interest (if any) the grantor has in the land at the time of transfer. It contains no warranties, and, if mortgages or liens encumber the land, or any other claimants assert rights to the land—for example, if the grantor does not actually own it—the grantee has no recourse against the grantor.

Requirements That Deeds Must Meet

A deed must be absolutely accurate—more so than the contract of sale because if the two conflict, the deed prevails. Deeds must meet basic requirements:

- Under the statute of frauds, a deed must be in writing.
- The grantor must be legally competent, the grantor's name must be in the deed, and the grantor must sign the deed.
- The deed must name the grantee.
- The deed must state the consideration.
- The deed must contain words that specifically state that a transfer of the property is occurring.
- The deed must contain a description of the property conveyed.
- The deed must be dated.
- The deed usually contains a paragraph reciting who transferred the property to the grantor, date of transfer, and the location of the recorded copy of the deed.
- Some states require the grantor's signature under seal.
- Several states require witnesses to the grantor's signature.
- The deed must be delivered in order to effect the transfer.
- Most states require an acknowledgment, which is a formal, written statement by a public official, usually a notary public, that the grantor has appeared before the official and has transferred the property voluntarily.



Recording Deeds

To record a deed, the buyer takes it to a local government office, usually known as the office of the recorder or registrar of deeds, and files it. The purpose of recording is to give notice to the world that the transfer of real property has occurred.

All states have recording acts under which any deed, mortgage, or other instrument affecting land is not valid against a subsequent purchaser for value who had no notice or knowledge of the previous sale unless the instrument has been recorded.

For example, if David sold land to Mary in 2005 and later sells the same land to Betty in 2010, Mary would prevail if she had recorded the deed, even though Betty knew nothing about the prior transaction. However, if Mary does not record the deed, and if Betty, unaware of the sale to Mary, purchases the land from David and records the deed, Betty's ownership takes priority over Mary's.

An unrecorded document affecting property rights is effective between the immediate parties and persons who are not purchasers (such as donees and heirs), but not against subsequent purchasers for value without notice or knowledge.

REAL PROPERTY SECURITY INTERESTS AND LIENS

Real property is commonly used as collateral for loans, often to secure the funds to purchase the same property. In this case, the lender is typically given an interest in the property by the borrower. In addition, contractors and material suppliers have statutorily created security interests (called liens) in specific property to ensure that they receive payment for their work or materials.

Mortgages, trust deeds, and land contracts are all security devices designed to protect the lender from default on the part of the borrower in a real estate purchase. With any of these three devices, the lender retains an interest in the property until the loan has been repaid. Similarly, tradespeople and materials suppliers use mechanics' liens to retain an interest in labor or materials used in improving, repairing, or maintaining real or personal property to help ensure that they receive payment.

Mortgages

The mortgage used in most states today is in the form of a deed or transfer of land by the borrower to the lender, with a statement of the debt and a provision that the mortgage will be void at full payment of the debt.



A real estate mortgage transfers an interest in real property; it must be in writing and signed in the same manner as a deed. If not properly executed, it may not be eligible to be recorded in the local government office that gives notice to the public of the transaction. Between the parties, a mortgage's validity does not depend on compliance with other formal requirements. Thus, if the parties intended the transaction as a loan and security type of transaction, it is a mortgage, regardless of the form of the contract. However, an unrecorded mortgage is not valid against good-faith purchasers, subsequent mortgagees without knowledge, or creditors with liens on the property.

Mortgagor

The person or organization that borrows money from a mortgagee to finance the purchase of real property.

Mortgagee

A lender in a mortgage arrangement, such as a bank or another financing institution.

The **mortgagor** has the specific rights to sell, lease, or even put another mortgage on property. The mortgagor is effectively the property owner as far as everyone else except the **mortgagee** is concerned. However, transactions after recording of a mortgage do not affect the mortgagee's rights.

For example, assume that David mortgages land to Mary to secure a loan of \$70,000 and records the mortgage properly. David then conveys the land to Melissa. The sale is appropriate, but if David or Melissa does not pay the loan when it falls due, Mary has a right to foreclose the mortgage. Melissa can lose her interest because it is subject to Mary's mortgage rights. If the proceeds of the sale are insufficient to satisfy the debt to Mary, she has the right to obtain a deficiency judgment against David as the original mortgagor, and possibly against Melissa, the subsequent buyer, for the amount of the deficiency. If the sale yields excess money, it goes to David as mortgagor or to Melissa, the subsequent buyer.

A purchaser's rights and liabilities depend on the wording in the deed. A purchaser who takes property subject to an existing, properly recorded mortgage, on which the mortgagor later defaults, can be liable to the mortgagee for a deficiency in payments. However, if the deed states that the buyer takes the property "subject to" the mortgage, the buyer is not liable for any deficiency in mortgage payments.

If the deed states that the buyer "assumes and agrees to pay the mortgage debt," the buyer also becomes liable for any deficiency. The original mortgagor who sells a property remains liable on the original agreement to pay the debt and cannot be relieved of this liability without the mortgagee's consent. In most states, the original mortgagor is a surety, or guarantor, for a buyer who assumes the debt. Therefore, if that buyer defaults in paying the mortgage and a deficiency in payments occurs, the mortgagee can proceed against either the original mortgagor or the purchaser. However, an original mortgagor who pays when the buyer defaults can recover the amount paid from the buyer, if the buyer is solvent.

The mortgagee's interest in the property is assignable at any time, and the assignment must include the debt. If a note, or series of notes, evidences the debt, assignment is accomplished by negotiating the notes and making an outright assignment of the mortgage paper to the assignee. In most states,



negotiation of the notes carries with it the right to the security, and their holder receives the benefits of the mortgage.

Mortgage **foreclosure** is the mortgagee's remedy when the mortgagor defaults on mortgage payments. Foreclosure through public sale is the most common method.

To foreclose, the mortgagee sues the mortgagor. Following trial, the court enters a judgment for the amount owed and orders the property's sale. The proceeds of the sale first pay the judgment to the mortgagee. The surplus, if any, goes to the mortgagor. Generally, the mortgagor, or any other party claiming an interest in the property that a foreclosure might cut off, can redeem the property after default and before expiration of a redemption period, usually six months or one year.

Foreclosure

A legal proceeding to terminate a mortgagor's interest in property; the mortgagee's remedy when the mortgagor defaults on payments.

Trust Deeds

A regular mortgage has only two parties, the borrower (mortgagor) and the lender (mortgagee). The **trust deed** (deed of trust or trust indenture) has three parties: (1) the borrower (trustor) who transfers the land; (2) the trustee, to whom the land is transferred; and (3) the beneficiaries, for whose benefit the transfer is made. In many respects, the trustee is a mortgagee, and the standard mortgage clause in an insurance policy usually refers not only to a mortgagee but also to a trustee.

Trust deed (deed of trust or trust indenture)

A secured interest in real property that is held by a trustee to protect the lender (beneficiary) until the loan is repaid by the borrower (trustor).

Trust deeds have three important advantages:

- In several states, the trust deed can be foreclosed by a trustee's sale without any court proceedings, although some states treat it exactly like a mortgage and require court foreclosure.
- The trust deed facilitates borrowing large amounts of money. For example, a company borrows a large sum from a bank and executes a trust deed on its property to the bank as trustee. The bank, in turn, sells a large number of notes or bonds authorized by the trust deed to investors who are secured by the trust deed, simplifying what might have been a very complicated mortgage procedure of separate notes and separate mortgages for each investor.
- The holder of a bond secured by a trust deed can sell the bond with minimum expense and effort. Sale of a note secured by a mortgage requires an assignment of the mortgage, a complex arrangement.

The principal disadvantage of trust deeds arises when the number of beneficiaries or bondholders is large. When the borrower pays off the trust deed, the trustee must be certain that all bondholders are paid. If not, the trustee is personally liable. Additionally, in a sale resulting from foreclosure, the trustee cannot purchase the property at a foreclosure sale in most states, and a committee of bondholders must consummate the purchase.



Land Contracts

Under a land contract, the parties enter into an agreement of sale of property with a stipulation that the seller will not transfer title to the property until payment of a certain percentage of the price, frequently 100 percent. The percentage can be less than 100 percent, with the option to enter into a standard mortgage arrangement for the balance.

Land contracts are frequently used when buyers have poor or inadequate credit ratings or do not have enough money for down payments. The buyer takes possession of the land, pays all the taxes and assessments, insures the property, repairs it, and assumes all the obligations of an owner. In fact, the law treats the buyer as the owner, and the seller has only the legal title. If the buyer defaults, the seller can declare the contract breached and repossession the property, treating the buyer as an ordinary tenant.

Mechanics' Liens on Real Property

Artisans and contractors (traditionally referred to as “mechanics”) and material suppliers furnish labor and material for the construction of improvements on land. Because those improvements become part of the real property, mechanics and material suppliers have statutorily created security interests in the property, called liens to ensure that they receive payment.

Mechanic's lien

A lien, granted by law to anyone who repairs a specific piece of property, that secures payment for the repairs.

A **mechanic's lien** may cover labor or materials supplied in improving, repairing, or maintaining real or personal property, such as a building or a car. Usually, for real property, the work done or material used must become a permanent part of the property in order for a mechanic's lien to apply.

A general contractor who seeks to assert a lien usually must show certain facts:

- Substantial performance of the contract
- Improvement of a specific piece of property under the contract
- Specific mention in the contract of the property to be improved

State statutes usually require the filing of a notice of lien in the appropriate public office within a specified period after completion of the work. Generally, the notice must state this information:

- Amount claimed
- Claimant's name and address
- Type of improvement
- Description of the land
- Owner's name

A mechanic's lien is usually operative for a specified time, and the lienholder must take steps to enforce or foreclose the lien within that time. Foreclosing a mechanic's lien resembles foreclosing a mortgage. In some states, the lien



attaches only to the building but not to the land, and in some places only to the additions or improvements themselves. Because removal of the materials furnished may often damage the property, courts frequently order the sale of the property and give the mechanic's lienholder a share of the proceeds.

Priorities for Mechanics' Liens

States use four rules to determine when a mechanic's lien attaches to property to create priority over other secured interests:

- In most states, mechanics' liens relate to the day the work started. A mortgage recorded on the following day is subordinate to the lien of a subcontractor who was not hired until later because that lien relates back to the start of the work. Lienholders have no priorities.
- In some states, the lien attaches when the mechanic starts work. The lien cannot have priority over a mortgage recorded earlier.
- The lien attaches on the date the mechanic makes the contract for improvement. Such a lien is called a "secret lien" because improvement contracts are usually not recorded, and even an inspection of the property would not disclose that work is starting in the future. Nevertheless, a mortgage recorded after the date of the improvement contract is subordinate to the mechanic's lien.
- The lien attaches on the notice filing. A previously recorded mortgage, therefore, has priority.

Waiver of Lien

Parties can waive the right to a mechanic's lien in a contract for improvements. In some states, such a provision is not valid unless the contract is filed. In some states, the waiver is valid against everyone, including subcontractors, but in other states, it is valid only against the general contractor.

Another method of waiver is to obtain a partial waiver from the mechanic as work progresses and when the mechanic receives partial payments. The waiver usually states that the mechanic waives all liens "for work and materials furnished" up to the date of the waiver. A property owner can pay off a lien and then clear the public records by filing a release of mechanic's lien form in the office where the lien is filed.

INCIDENTAL REAL PROPERTY RIGHTS

Ownership of real property need not necessarily result from the purchase of that property. It can also result from possession. And ownership includes more than a right to the real property itself. It comprises a number of other, incidental rights as well.



Five important incidental rights arise from either possession or ownership of land:

- Adverse possession
- Rights under, above, and on the land's surface
- Rights to lateral and subjacent support
- Water rights
- Ownership of fixtures

Adverse Possession

Conflict can arise when a person who possesses land claims ownership and another who does not possess it also claims ownership. For example, Elliott lives on a lot, for which Dianne has had legal title, for over thirty years. During that thirty-year period, Dianne knew of Elliott's residence and, although she regularly asserts to Elliott that she owns the land and wants him to leave, she does not pursue legal action to have him evicted. Dianne, the person who is not in possession but who claims legal ownership, can sue the person in possession, Elliott. Elliott may claim he owns the land by **adverse possession**, which has four elements:

Adverse possession

The claim of ownership of land by possession that is exclusive, open, hostile, unpermitted, and continuous for a statutory period.

- The adverse party must have exclusive possession of the property and occupy it in the usual way, such as living in a residence.
- Possession must be open and obvious.
- Possession must be adverse, or hostile, and without the owner's permission.
- Possession must be continuous for a statutory period, usually a lengthy period, such as twenty years or more.

Rights Under, Above, and on the Land's Surface

Ownership of land includes the incidental rights to whatever is under, above, and on the surface.

Ownership of land below the surface includes such things as minerals, clay, stone, gravel, and sand. A transfer of land also transfers these materials; however, a seller can reserve mineral rights in the deed. Oil and gas, on the other hand, flow freely under the surface, and no person owns them without possessing the land.

Ownership of land carries with it limited rights over the air space above the land. An owner can halt unauthorized intrusion into this air space, such as projections from an adjoining building or utility lines stretched across the air space. Generally, planes can fly over land as long as they do not interfere unreasonably with the owner's use and enjoyment of the land.



The property owner also has rights to products of the soil. Annual products, such as crops, are personal property. Perennial products, such as timber, can be real property.

Rights to Lateral and Subjacent Support

A landowner also has the right to lateral and subjacent support systems that might not be on the landowner's property.

The right of **lateral support** applies to land in its natural condition only. For example, David and Mary own adjoining vacant lots, and David excavates his land close to the property line, causing a part of Mary's land to fall into the excavation. David is liable to Mary for the damage to her land. However, if Mary's lot has a building on it, David is not liable for damage to the building because the duty to provide lateral support extends only to land in its natural state. The support of the land need not be natural; for example, David can avoid liability by building a retaining wall to support Mary's land.

If a building stands on Mary's land, David must give her reasonable notice of his intent to excavate so that she can take steps to support the building. David must also excavate with reasonable care. If David fails to give notice and fails to excavate with reasonable care, he might be liable to Mary for damages should Mary's building collapse.

Two parties can have rights in one piece of land: one party may own the land, and the other may own the rights to minerals under that land. For example, Bob sells mineral rights to Chang but retains a natural right of **subjacent support** from the underlying mineral area. If Chang removes minerals, withdrawing subjacent support for Bob's land, and the surface subsides, Bob can recover damages without proving any negligence on Chang's part.

As with lateral support, a subjacent owner can furnish artificial supports, such as columns or braces, to prevent damage to the surface land.

Lateral support

A property owner's right to have land supported by the land adjacent to it.

Subjacent support

A property owner's right to have land supported by the earth below it.

Water Rights

Another incidental land ownership right is water rights. Property owners have rights to both underground and surface waters.

An owner can remove underground waters that percolate through the soil and follow no defined course. The owner can remove any quantity of the water, even if it deprives adjacent owners of water, so long as the owner uses it on the land and does not sell it at a distance, to the adjoining landowners' detriment. When water is scarce, an owner can use only a reasonable amount.

Discharging surface water from one's land onto another's land is not a basis for a suit as long as the water is not collected by artificial means and discharged on the adjoining land in new or concentrated channels, causing damage.



Streams and rivers can be property boundaries or can pass through property. Owners of the property can use as much water from the waterway as needed for domestic purposes but must use only a reasonable amount for industrial purposes and must consider downstream owners' needs. Owners have a right to a pollution-free stream, and polluters may be liable to them for resulting damages. Water beneath the surface and flowing in a well-defined course, such as an underground river, is subject to the same rules as those applicable to surface streams.

Ownership of Fixtures

Fixtures are property installed on, attached to, or used with land or buildings in such a way as to become real property themselves. Thus, if a tenant installs fixtures that were originally personal property, they become part of the real property and at installation belong to the owner of the real property. For example, a tenant installs a cabinet purchased as personal property at a home improvement store. Installation can make the cabinet part of the real property.

A seller of land transfers personal property that has become a fixture, without specific reference, along with the sale of land. Three tests help determine whether an item is a fixture:

- An article that cannot be removed without substantial injury to the realty is a fixture, even though the damage can be repaired. For example, a fireplace insert is a fixture even though the fireplace from which it is removed can be repaired.
- An article that is specially constructed or fitted for use in a building, or that is installed in the building to enable people to use the building, is a fixture. A heater and a door in a house are examples.
- If the party who attached an item intended it to become part of the land or building, that item is a fixture. The relationship of the parties often controls what becomes a fixture. For instance, a landlord who hangs a mirror that cannot then be removed from the wall without substantial damage to the premises might intend it to stay there permanently. However, a tenant who attaches a similar mirror might intend to remove it at the end of the lease term.

Trade fixtures

Fixtures and equipment that may be attached to a building during a tenant's occupancy, with the intention that they be removed when the tenant leaves.

Improvements and betterments

Alterations or additions made to the building at the expense of an insured who does not own the building and who cannot legally remove them.

When a tenant rents a building for business, the test of intention regarding fixtures usually applies in the tenant's favor. Between a landlord and tenant, the law considers all **trade fixtures** as removable, including such articles as bakery ovens, cabinetry, and steam boilers. An article is a trade fixture if the tenant can remove it without permanent injury to the land or building and if the tenant installed it solely for trade purposes.

For insurance purposes, a tenant's **improvements and betterments** become part of the leased structure. For example, painting and wallpapering as a part



of a general plan of altering the premises for a tenant's initial occupancy is an improvement, not a repair and not a fixture.

LAND USE RESTRICTIONS

Land ownership does not confer unlimited rights in terms of the use of the land. It can involve restrictions that benefit either private parties or the public.

Land use restrictions include incorporeal interests such as easements, profits *à prendre*, a seller's restrictions on the use of land, licenses, and government controls such as zoning, building codes, and the exercise of eminent domain.

Incorporeal Interests

The law recognizes four major **incorporeal interests**. This section discusses three of those interests. Lease situations, which include rentals, are the fourth.

Incorporeal interest
A nonmaterial interest in real property.

Easements

An **easement** can be created by express words, by implication, or by prescription. Parties can expressly create an easement by reserving it when the land that is subject to the easement is sold. The usual easement must benefit adjacent land.

Easement
A nonpossessory right to use another person's real property for a particular purpose.

For example, David owns a piece of land fronting on a road. He subdivides the property into two lots. Lot 1 is on the back of the property with no access to the road. Lot 2 is in front with all the road frontage, and it blocks access to Lot 1. David's house is on Lot 1. David sells Lot 2 but expressly reserves a right of access to the road across Lot 2 from his Lot 1.

Parties also can create an easement by implication. In the previous example, if David sells Lot 2 without expressly reserving an easement, the easement might be implied by law to give David access to the road.

Profits à Prendre

The rights to mine coal, remove sand and gravel, and cut down trees are examples of **profits à prendre** rights. The profits *à prendre* right includes the right to do anything reasonably necessary to obtain the materials, including entering the land and digging holes to get to the substances.

Profits à prendre
A right or privilege to enter another's land and take away something of value from its soil or from the products of its soil.

Seller's Restrictions on Land Use

In selling real property, an owner can restrict its use to preserve or enhance the value of any land retained by the seller or to benefit the public.

Examples of legally valid restrictions are contracts prescribing the minimum cost of homes to be built on land, the minimum size of buildings, and the



types of construction. On the other hand, discriminatory agreements prohibiting sale to certain racial or ethnic groups are unenforceable.

Some states expressly limit restrictions on land use to a statutory period of, for example, thirty or forty years. Changed conditions, such as economic conditions in the area, can make restrictions unenforceable.

Licenses

License

The permission to use real property for a particular purpose.

A ticket for a theater seat and rental of a hotel room are typical **licenses**.

A license grants no interest in the land. However, without the permission granted by a license, the licensee's use of the land would be a trespass (illegal entry) or another illegal act.

A license can be oral, written, or implied. For example, by implication, the public has a license to use the public halls in an office building.

Government Controls

Government has certain powers over the use of land on the public's behalf. The government cannot, under the guise of protecting the public, interfere arbitrarily with lawful land use or impose unreasonable and unnecessary restrictions on it. An example of the lawful exercise of government's power is the regulation of the number of oil and gas wells allowed on property and the flow of oil and gas from those wells. The government can protect the public as well as adjoining landowners against waste from wells. The most common methods governments use to restrict land use are zoning, building codes, and eminent domain.

Zoning

A government's regulation of building construction and occupancy and of land use according to a comprehensive plan.

Exclusionary zoning

The act of restricting land use either by prohibiting additional building or by requiring high standards.

Spot zoning

A provision in a general zoning plan that assigns a different use for a small area of land than that of the surrounding area.

Special exception

A land use explicitly permitted by a zoning ordinance but subject to certain limitations.

Zoning

A **zoning** ordinance must provide a comprehensive general plan for the entire community and must be uniform for each class or kind of occupancy or use of land within a given district. Requirements can vary by district. However, within limits, all property in like circumstances must be treated the same. Matters affected by zoning laws and **exclusionary zoning** include, for example, lot size, minimum building size, number of families that may reside in the buildings, maximum height of each building, and parking areas. A zoning ordinance cannot allow **spot zoning** when the result would benefit the owner of that area to the neighbors' detriment.

Two ways to relieve a property from compliance with a zoning ordinance are special exceptions and variances.

Special exceptions can apply to uses considered desirable for the general welfare, but only when controlled, such as the building of a school or a church in a residential zone. An ordinance can permit the use, but only if the governing body approves it.



There are two types of **variances**:

- The governing body can grant a **hardship variance** if strict application of the zoning requirements would result in peculiar and exceptional difficulties or undue hardship on the owner.
- In particular cases and for special reasons, the government can grant a **use variance** to allow for a use that would benefit the general welfare. In some cases, governing bodies allow **nonconforming uses**. To avoid the constitutional prohibition against taking property without due process, any nonconforming use existing at the time an ordinance passes can continue. The use cannot be enlarged and can be terminated by total destruction of the structure, by abandonment of the use, or by a change in use.

Building Codes

Many cities and states have adopted **building codes** that sometimes overlap zoning ordinances. However, they address the more technical construction details, such as electrical wiring and heating. An owner must submit building plans to a government regulator to determine whether construction conforms to the building code. If it does, a building permit is issued.

After the structure's completion, an inspector from the regulatory agency inspects the structure before anyone can occupy it and, if approved, issues a certificate of occupancy.

Eminent Domain

Governments can seize private property through **eminent domain**. This action usually requires a **condemnation proceeding**. The petition states the exact property desired and the public use involved and seeks a court's permission to seize property. There are two conditions for granting the petition:

- The land must be taken for public use or public benefit.
- The "Takings Clause" of the Fifth Amendment to the U.S. Constitution provides that the federal government cannot take private property for public use without paying just compensation to the property owner. The due process clause of the Fourteenth Amendment to the Constitution extends the principle to state governments. Just compensation is the fair market value at the time of the taking.

THE LANDLORD AND TENANT RELATIONSHIP

Landlord (lessor) and tenant (lessee) law governs lease interests in real property. State and local laws vary significantly regarding the landlord-tenant relationship.

Variance

An exception to the strict application of a zoning ordinance to permit a use that is not permitted otherwise.

Hardship variance

An exception to the application of a zoning ordinance for lots that, because of size, topography, or other physical limitations, do not conform to the ordinance requirements for the zone.

Use variance

An exception to the application of a zoning ordinance to permit an otherwise prohibited use within the zone.

Nonconforming use

A land use that is impermissible under current zoning restrictions but that is allowed because the use was lawful before the restrictions took effect.

Building codes

Local ordinances or state statutes that regulate the construction of buildings within a municipality, county, or state.

Eminent domain

The right of a government to seize private property for public use.

Condemnation proceeding

A legal procedure by which a government body seeks a court's permission to seize private property by eminent domain.



Landlord-tenant law focuses on four specific areas:

- The types of landlord-tenant estates, or relationships
- Landlords' rights and duties
- Landlords' remedies
- Tenants' rights and duties

Types of Landlord-Tenant Estates

The three types of landlord-tenant estates are **tenancy at will**, an estate for years, and a **periodic tenancy**.

A landlord and tenant can create a periodic tenancy by an express agreement, usually called a "tenancy from year-to-year" or "from month-to-month." The parties also can create a periodic tenancy by implication. For example, a lease states no expiration date but states that the rental is \$10,000 per year, payable one-twelfth each month. This implies a tenancy from year to year, based on the periodic rent payments.

A periodic tenancy also can arise by implication of law. This occurs when a tenant is a **holdover tenant**. If the landlord expressly approves the occupancy or accepts rent, then a periodic tenancy is implied. If the landlord does not agree to the occupancy, the tenant becomes a tenant at sufferance and can be ejected by the landlord.

The periodic tenancy can be from month to month or year to year, depending on the terms of the prior tenancy. By statute in some states, it is a month-to-month tenancy unless the parties have agreed otherwise. The other terms of the prior lease continue to apply. The notice of lease termination period is usually one entire lease period. However, if the period is one year or longer, most states require three to six months' notice.

Landlord's Rights and Duties

The landlord's primary duty is to deliver possession of the premises to the tenant on the lease's inception date. The landlord's primary rights are to receive the rent when due and recover the premises at the end of the lease in the same condition in which they were leased, except for reasonable wear and tear.

If the tenant defaults, the landlord has no duty to lessen the financial loss by trying to find another tenant. If a tenant abandons the property, the landlord can treat abandonment as an anticipatory breach and receive as damages the amount of the remaining rent payments. In these cases, the landlord must mitigate, or lessen, the loss. Many long-term leases provide that, in the event of default, the landlord can accelerate the payments, reenter the premises, act as the tenant's agent to sublet, and sue the tenant for any resulting losses.

Estate for years

A landlord-tenant estate created for a definite period.

Tenancy at will

A landlord-tenant estate in which the tenant has permission to occupy a premises as a landlord desires.

Periodic tenancy

A landlord-tenant estate with no fixed termination date and automatic renewal until one of the parties gives notice of intent to terminate.

Holdover tenant

A tenant who has a lease for a number of years and, at the expiration of the lease, continues to occupy the premises.



Many landlords require tenants to pay a security deposit at the inception of leases. The lease usually provides that, in case of default or damage to the property, the security deposit represents damages that the landlord can retain. Some statutes provide that the security deposit is the tenant's property, that the landlord must keep it in a bank escrow account, and that the landlord must return it to the tenant after lease termination.

Landlord's Remedies

When a tenant remains in possession at lease termination, or if the tenant owes rent or has breached the lease, the landlord can evict the tenant with court assistance. Many states provide for summary eviction proceedings when the lease is terminated and the tenant refuses to move, or during the lease term if the tenant defaults on the rent. The landlord must send the tenant a written notice terminating the tenancy and demanding possession. After a period of time, the landlord serves a summons and complaint, and a hearing is held. If the landlord establishes a right to possession, the court enters an order of repossession followed by a warrant of removal. The tenant has only two defenses: that the tenant has paid the rent, or that the rent is not legally due.

Eviction can be either actual or constructive. Actual eviction from the whole or even a part of the premises ends the obligation to pay rent. Constructive eviction occurs when actions or inactions of a landlord prevent the tenant from enjoying a substantial or integral part of the premises. Examples include the landlord's allowing inadequate heat or hot water, leaky plumbing, serious disturbances by other tenants, and pest infestation. If a landlord seeks a court eviction for nonpayment of rent, the tenant may assert a defense of constructive eviction.

When the tenant defaults on rent, the landlord can seize possession of the tenant's property and hold it for the rent, a right called distraint. The landlord must seize the goods peacefully and sell them at a public sale.

Tenant's Rights and Duties

The tenant's rights and duties complement those of the landlord. For example, the tenant must pay rent and leave the premises in the same condition they were in at the lease inception, except for reasonable wear and tear. The tenant has a right to occupy the premises; and, on eviction, the obligation to pay rent can end.

When the property has a significant defect, the tenant need not pay rent if these three conditions have occurred sequentially:

1. The tenant has demanded that the landlord correct the situation.
2. The landlord has not corrected the situation within a reasonable time.
3. The tenant has left the premises at the end of that reasonable time.



The tenant's remaining on the premises can constitute a waiver of the right to withhold rent. The tenant has a right to vacate the premises and escape liability for rent but does not have an action for damages. However, if an express agreement in the lease requires the landlord to make repairs, the tenant might have a right to sue for damages, if any, for breach of contract.

Generally, landlords are liable to third parties for injuries sustained on the leased premises to the same extent they are liable to tenants. Liability is restricted to a landlord's negligent acts or latent defects on the premises.

In many states, the landlord can escape liability to the tenant by including an exculpatory clause in the lease in which the tenant agrees to relieve, or excuse, the landlord of any liability to either the tenant, third parties, or both. However, such a clause usually does not affect the landlord's liability to third persons.

SUMMARY

Real property is land, including structures or rights attached to the land. Personal property is all property that is not real property. Personal property can be obtained through creation, accession, confusion, gifts, or bailments.

In bailments, a bailor leaves personal property with a bailee. Bailments can benefit the bailor, the bailee, or both. A bailee has possession only, and cannot transfer title to the property, but may have a right to use the property. A bailee has a duty to take reasonable care of bailed property and to return it to the bailor at the end of the bailment. Depending on whom the bailment is intended to benefit, the bailee may have a right to compensation and, if payment is not received, may assert a lien or a possessory lien on the property. In mutual benefit bailments, the bailor owes the bailee a duty to supply goods that are reasonably fit for the purpose the parties envision. A bailor who knows that the bailed property is in a dangerous condition can be liable for injury to a third party if the bailee is not aware of the danger.

There are eight common forms of ownership interest:

- Fee simple estate
- Life estate
- Joint tenancy
- Tenancy by the entirety
- Tenancy in common
- Community property
- Cooperative ownership
- Condominium ownership



A real property sale involves a contract of sale and a deed, both of which, under the statute of frauds, must be in writing. To be valid, both documents must also meet other requirements. Recording of real estate transfer documents protects buyers against ownership claims made by subsequent purchasers.

Security interests in real property include mortgages, trust deeds, and land contracts. Liens give certain creditors rights to have their debts paid out of debtors' property, usually by sale. Mechanics' liens give those who repair property a right to retain the property to secure payment.

Incidental real property rights include adverse possession claims; rights under, above, and on the land's surface; the right to lateral and subjacent support; water rights; and the ownership of fixtures.

Land use restrictions include easements, profits à *prendre*, restrictions on land use, licenses, zoning, building codes, and eminent domain.

Landlord-tenant law governs lease interests in real property, which are limited interests of limited duration. A landlord's primary duty is to deliver possession of the premises to the tenant at the inception of the lease. The tenant must pay rent and leave the premises in the condition in which they were received, except for reasonable wear and tear. The landlord has the same liability to third parties for injuries sustained on the premises as does the tenant, and the tenant is liable to third parties for injuries caused by any of the tenant's acts.

ASSIGNMENT NOTES

1. 17 U.S.C., § 101.
2. United States Copyright Office, "Copyright Basics," www.copyright.gov/circs/circ1.pdf, p. 5 (accessed July 13, 2010).

