NewsOnline.com

Easements expire unless Re-recorded periodically

Steve Lipowski and Andrew Raymonds

GUEST COLUMNISTS

Legal

Under a long-standing law in Wisconsin, those parties holding easements will need to re-record their easement rights periodically or their ability to enforce those easements will be lost.

Even easements that are "perpetual" by their written terms will expire if they are not re-recorded within the prescribed statutory period.

The Wisconsin Court of Appeals has in the TJ Auto LLC v. Mr. Twist Holdings LLC case interpreted the applicable statute of limitations set forth in Wis. Stat. § 893.33(6) to require property owners to re-record their easement rights within 40 years of the original grant of easement, or risk the legal conclusion that the easement is no longer enforceable.

This holds true even if you purchased the property during the easement's lifespan, did not know about the statute, used the easement after its statutory expiration without any objection from the owner of the land burdened by that easement, or even if the landowner has full knowledge of the existence of the easement.

The relevant section of the Wisconsin Statutes has a two important components which give guidance to easement holders based on whether their easement was recorded prior to or after July 1, 1980. These provisions are summarized as follows:

• Easements recorded prior to July 1, 1980. Under Wis. Stat. § 893.33(8), easements recorded prior to July 1, 1980 ,expire upon the earlier of 60 years after their recording date or 40 years after July 1, 1980, unless they are re-recorded.

As a result, for any property owners who wish to preserve the benefit of a written easement that was recorded before July 1, 1980, the property owner has a period of 60 years in which to re-record the easement. As such, it is possible these easements may be already expiring.

• Easements Recorded On or After July 1, 1980. Wis. Stat. § 893.33(6) states that written easements recorded on or after July 1, 1980, expire 40 years after their recording date, unless they are re-recorded.

Therefore, these easements will not begin to expire until June 30, 2020.

Both grantees and grantors of easements should be aware of an easement's expiration date.

> "Both grantees and grantors of easements should be aware of an easement's expiration date. Grantees must re-record their easements in a timely manner to extend its enforceability for an additional 40 years and avoid the risk of losing their rights. At the same time, grantors should be aware of the expiration dates of any easement burdening their property in the event they want to take action when the easement's expiration date has passed."

Grantees must re-record their easements in a timely manner to extend its enforceability for an additional 40 years and avoid the risk of losing their rights.

At the same time, grantors should be aware of the expiration dates of any easement burdening their property in the event they want to take action when the easement's expiration date has passed.

Steve Lipowski and Andrew Raymonds are attorneys with Ruder Ware.

SCORE offers free counseling sessions

(3) The mere use of a way over unenclosed land is presumed to be permissive and not adverse.

History: 1979 c. 323; 1985 a. 297 s. 76.

893.29 No adverse possession against the state or political subdivisions. (1) No title to or interest in real property belonging to the state or a city, village, town, county, school district, sewerage commission, sewerage district or any other unit of government within this state may be obtained by adverse possession, prescription or user under s. 893.25, 893.26, 893.27 or 893.28 unless the adverse possession, prescription or user continues uninterruptedly for more than 20 years and is based upon a continuously maintained fence line which has been mutually agreed upon by the current landowners.

(2m) Subsection (1) does not affect title to or interest in real property obtained by adverse possession, prescription or user under s. 893.25, 893.26, 893.27 or 893.28 before April 29, 1998.

History: 1979 c. 323; 1983 a. 178; 1983 a. 189 s. 329 (16); 1997 a. 108.

Judicial Council Committee's Note, 1979: This section is based on present s. 893.10 (1), but the period for adverse possession against the state is reduced from 40 to 30 [20] years. The previous provision presumably applied to the property of political subdivisions of the state, but this has been made express in this section. Note that regardless of which of ss. 893.25 to 893.28 apply against a private owner, this section requires 30 [20] years for the obtaining of any rights in public land.

Because of the 30–year [20–year] period, adverse possession of the kind described in the 20–year statute is sufficient so that recording and good faith affect only the type of possession required and the amount of land possessed (see s. 893.26 (3) and (4)). Payment of taxes is irrelevant. [Bill 326–A]

Adverse possession provisions have prospective application only; possession must be taken after provision goes into effect. Petropoulos v. City of West Allis, 148 W (2d) 762, 436 NW (2d) 880 (Ct. App. 1989).

This section does not apply to a railroad. A railroad right–of–way is subject to adverse possession, the same as other lands. Maiers v. Wang, 192 W (2d) 115, 531 NW (2d) 54 (1995).

893.30 Presumption from legal title. In every action to recover or for the possession of real property, and in every defense based on legal title, the person establishing a legal title to the premises is presumed to have been in possession of the premises within the time required by law, and the occupation of such premises by another person shall be deemed to have been under and in subordination to the legal title unless it appears that such premises have been held and possessed adversely to the legal title for 7 years under s. 893.27, 10 years under s. 893.26 or 20 years under s. 893.25, before the commencement of the action.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is based on previous s. 893.05. The last sentence is expanded to recognize the new 7–year statute in s. 893.27. The words "and in every defense based on legal title" are added to make clear that the presumption of this section applies whether the holder of legal title is suing to recover the land, or a claiming adverse possessor is suing to establish title to it. [Bill 326–A]

Lowest burden of proof applies in adverse possession cases. Kruse v. Horlamus Industries, 130 W (2d) 357, 387 NW (2d) 64 (1986).

893.31 Tenant's possession that of landlord. Whenever the relation of landlord and tenant exists between any persons the possession of the tenant is the possession of the landlord until the expiration of 10 years from the termination of the tenancy; or if there is no written lease until the expiration of 10 years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title or may have claimed to hold adversely to his or her landlord. The period of limitation provided by s. 893.25, 893.26 or 893.27 shall not commence until the period provided in this section expires.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This is present s. 893.11 renumbered for more logical placement and revised slightly for the purpose of textual clarity only. It complements and supplements s. 893.30 (previous s. 893.05). The 10–year period is retained as the period during which adverse possession (for any statutory period) cannot begin to run in favor of a tenant. Adoption of a 7–year statute in s. 893.27 does not affect the policy of this section. [Bill 326–A]

893.32 Entry upon real estate, when valid as interruption of adverse possession. No entry upon real estate is sufficient or valid as an interruption of adverse possession of the real estate unless an action is commenced against the adverse possessor within one year after the entry and before the applicable adverse possession period of limitation specified in this subchapter has run, or unless the entry in fact terminates the adverse possession and is followed by possession by the person making the entry.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section replaces previous s. 893.04, which was very difficult to interpret with certainty. No change in substance is intended from the most reasonable probable interpretation of s. 893.04; indeed, the intention is to articulate that policy with greater clarity, consistent with the one decided case applying that section, Brockman v. Brandenburg, 197 Wis. 51, 221 N.W. 397 (1928). [Bill 326–A]

893.33 Action concerning real estate. (1) In this section "purchaser" means a person to whom an estate, mortgage, lease or other interest in real estate is conveyed, assigned or leased for a valuable consideration.

(2) Except as provided in subs. (5) to (9), no action affecting the possession or title of any real estate may be commenced, and no defense or counterclaim may be asserted, by any person, the state or a political subdivision or municipal corporation of the state after January 1, 1943, which is founded upon any unrecorded instrument executed more than 30 years prior to the date of commencement of the action, or upon any instrument recorded more than 30 years prior to the date of commencement of the action, or upon any transaction or event occurring more than 30 years prior to the date of commencement of the action, unless within 30 years after the execution of the unrecorded instrument or within 30 years after the date of recording of the recorded instrument, or within 30 years after the date of the transaction or event there is recorded in the office of the register of deeds of the county in which the real estate is located, some instrument expressly referring to the existence of the claim or defense, or a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction or event on which the claim or defense is founded, with its date and the volume and page of its recording, if it is recorded, and a statement of the claims made. This notice may be discharged the same as a notice of pendency of action. Such notice or instrument recorded after the expiration of 30 years shall be likewise effective, except as to the rights of a purchaser of the real estate or any interest in the real estate which may have arisen after the expiration of the 30 years and prior to the recording.

(3) The recording of a notice under sub. (2), or of an instrument expressly referring to the existence of the claim, extends for 30 years from the date of recording the time in which any action, defense or counterclaim founded upon the written instrument or transaction or event referred to in the notice or recorded instrument may be commenced or asserted. Like notices or instruments may thereafter be recorded with the same effect before the expiration of each successive 30–year period.

(4) This section does not extend the right to commence any action or assert any defense or counterclaim beyond the date at which the right would be extinguished by any other statute.

(5) This section bars all claims to an interest in real property, whether rights based on marriage, remainders, reversions and reverter clauses in covenants restricting the use of real estate, mortgage liens, old tax deeds, death and income or franchise tax liens, rights as heirs or under will, or any claim of any nature, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within the 30–year period provided by sub. (2) there has been recorded in the office of the register of deeds some instrument expressly referring to the existence of the claim, or a notice pursuant to this section. This section does not apply to any action commenced or any defense or counterclaim asserted, by any person who is in possession of the real estate involved as owner at the time the action is commenced. This section does not apply to any real estate or interest in real estate while the record title to the real estate or interest in real estate remains in a railroad corporation, a public service corporation as defined in s. 200.01, an electric cooperative organized and operating on a nonprofit basis under ch. 185, or any trustee or receiver of a railroad corporation, a public service corporation or

an electric cooperative, or to claims or actions founded upon mortgages or trust deeds executed by that cooperative or corporation, or trustees or receivers of that cooperative or corporation. This section also does not apply to real estate or an interest in real estate while the record title to the real estate or interest in real estate remains in the state or a political subdivision or municipal corporation of this state.

(6) Actions to enforce easements, or covenants restricting the use of real estate, set forth in any recorded instrument shall not be barred by this section for a period of 40 years after the date of recording such instrument, and the timely recording of an instrument expressly referring to the easements or covenants or of notices pursuant to this section shall extend such time for 40–year periods from the recording.

(6m) This section does not apply to any interest in a conservation easement under s. 700.40.

NOTE: See note following s. 700.40.

(7) Only the following may assert this section as a defense or in an action to establish title:

(a) A purchaser of real estate; or

(b) A successor of a purchaser of real estate, if the time for commencement of an action or assertion of a defense or counterclaim under this section had expired at the time the rights of the purchaser in the real estate arose.

(8) If a period of limitation prescribed in s. 893.15 (5), 1977 stats., has begun to run prior to July 1, 1980, an action shall be commenced within the period prescribed by s. 893.15, 1977 stats., or 40 years after July 1, 1980, whichever first terminates.

(9) Section 893.15, 1977 stats., does not apply to extend the time for commencement of an action or assertion of a defense or counterclaim with respect to an instrument or notice recorded on or after July 1, 1980. If a cause of action is subject to sub. (8) the recording of an instrument or notice as provided by this section after July 1, 1980 extends the time for commencement of an action or assertion of a defense or counterclaim as provided in this section, except that the time within which the notice or instrument must be recorded if the time is to be extended as to purchasers is the time limited by sub. (8).

History: 1979 c. 323; 1981 c. 261; 1985 a. 135; 1987 a. 27, 330; 1991 a. 39; 1997 a. 140.

Judicial Council Committee's Note, 1979 [deleted in part]: This section is based primarily on previous 893.15. That section, an interesting combination of limitations statute and marketable title statute, was of significant help to real estate titles since enactment in 1941. The beneficial effects were strengthened and expanded by enactment of s. 706.09 in 1967. This draft preserves the useful essence of previous s. 893.15, while updating some language. Changes which affect substance are:

(1) The 60–year provision relating to easements and covenants is reduced to 40 years.

(2) New subs. (8) and (9) are transitional provisions applying to limitation periods already running the period specified in previous s. 893.15, or the period in this statute, whichever is shorter.

(5) This draft makes explicit that only those who purchase for valuable consideration after the period of limitation has run or their successors may avail themselves of the benefits of this statute. There is no requirement that the purchaser be without notice, which is to be contrasted with s. 706.09 of the statutes where periods far shorter than 30 years are specified in many subsections. [Bill 326–A]

"Transaction or event" under s. 893.15 (1), 1975 stats. as applied to adverse possession means adverse possession for time period necessary to obtain title. Upon expiration of this period, the limitation under s. 893.15 (1), 1975 stats. commences to run. Leimert v. McCann, 79 W (2d) 289, 255 NW (2d) 526.

This section protects purchasers only. State v. Barkdoll, 99 W (2d) 163, 298 NW (2d) 539 (1980).

Public entity land owner was not protected from claim which was older than 30 years. State Historical Society v. Maple Bluff, 112 W (2d) 246, 332 NW (2d) 792 (1983).

Hunting and fishing rights are an easement under sub. (6). There is no distinction between a profit and an easement. Figliuzzi v. Carcajou Shooting Club, 184 W (2d) 572, 516 NW (2d) 410 (1994).

893.34 Immunity for property owners. No suit may be brought against any property owner who, in good faith, terminates a tenancy as the result of receiving a notice from a law enforcement agency under s. 704.17 (1) (c), (2) (c) or (3) (b).

History: 1993 a. 139.

893.35 Action to recover personal property. An action to recover personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins. An action for damage for wrongful taking, conversion or detention of personal property shall be commenced within the time limited by s. 893.51.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is based on previous s. 893.19 (6), without change in substance, but with some expansion of language to make clear that accrual of the cause of action is not delayed until the person bringing the action learns of the wrongful taking or detention. The limitation with respect to an action for damages is contained in s. 893.51. [Bill 326–A]

893.36 Secured livestock. (1) An action by a secured party to recover damages or property, based upon the sale of livestock which when sold is the secured party's collateral, against the market agency which in the ordinary course of business conducts the auction of the livestock, or against a buyer in ordinary course of business shall be commenced within 2 years after the date of sale of the livestock, or be barred, if:

(a) The debtor signs or endorses any writing arising from the transaction, including a check or draft, which states that the sale of the livestock is permitted by the secured party; and

(b) The secured party does not commence an action, within 2 years after the date of sale of the livestock against the debtor for purposes of enforcing rights under the security agreement or an obligation secured by the security agreement.

(2) This section does not apply to actions based upon a sale of livestock occurring prior to April 3, 1980, nor to an action by a secured party against its debtor. Section 893.35 or 893.51 applies to any action described in sub. (1) if the limitation described in sub. (1) is not applicable.

(3) In this section:

(a) "Buyer in ordinary course of business" has the meaning provided by s. 401.201 (9).

(b) "Collateral" has the meaning provided by s. 409.105 (1) (c).

(c) "Debtor" has the meaning provided by s. 409.105 (1) (d).

(d) "Market agency" means a person regularly engaged in the business of receiving, buying or selling livestock whether on a commission basis or otherwise.

(e) "Secured party" has the meaning provided by s. 409.105 (1) (L).

(f) "Security agreement" has the meaning provided by s. 409.105 (1) (m).

History: 1979 c. 221 ss. 837m, 2204 (33) (b); 1983 a. 189 s. 329 (24).

893.37 Survey. No action may be brought against an engineer or any land surveyor to recover damages for negligence, errors or omission in the making of any survey nor for contribution or indemnity related to such negligence, errors or omissions more than 6 years after the completion of a survey.

History: 1979 c. 323 s. 3; Stats. 1979 s. 893.36; 1979 c. 355 s. 228; Stats. 1979 s. 893.37.

The discovery rule applies to statutes of limitations which limit the time to sue from the time when the action "accrues", setting the time that the action accrues as being the time of discovery. The discovery rule does not apply to this section because it is a statute of repose, a statute which specifies the time of accrual (in this statute the time when the injury occurred) and limits the time suit can be brought from that specified date. Castellani v. Bailey, 218 W (2d) 245, 578 NW (2d) 166 (1998).

SUBCHAPTER IV

ACTIONS RELATING TO CONTRACTS AND COURT JUDGMENTS

893.40 Action on judgment or decree; court of record. Except as provided in s. 846.04 (2) and (3), action upon a judgment or decree of a court of record of any state or of the United States shall be commenced within 20 years after the judgment or decree is entered or be barred.

History: 1979 c. 323; 1997 a. 27.

Judicial Council Committee's Note, 1979: This section has been created to combine the provisions of repealed ss. 893.16 (1) and 893.18 (1). A substantive change from prior law results as the time period for an action upon a judgment of a court of record sitting without this state is increased from 10 years to 20 years and runs from

Wisconsin REALTORS® Association
(/)

Easements

Unlike the immortal jellyfish, easements do not last forever

From the Wisconsin Land Title Association | June 08, 2020

The Wisconsin Land Title Association graciously prepared the following general FAQ regarding private ingress/egress easements in Wisconsin, in response to the request of the Wisconsin REALTORS® Association. This FAQ is informative but does not take the place of legal advice. If members or their clients and customers have questions about the existence or enforceability of a particular easement, they are strongly encouraged to seek the advice of a qualified real estate attorney.

We hear that there are concerns about the expiration of easements. What's happening?

The brief answer to this question is yes, easements do not live forever and do have expiration periods.

By way of background, an express easement is an interest in real property that gives someone the right to use another person's property — a right which is not automatic and must be in writing. Most often, these easements are used for access to landlocked parcels, so this Q&A will generally cover issues related to access easements.

In order to memorialize the easement, best preserve the rights of the owner of the property using the easement (called the "benefited property"), and provide public notice of the right to use the property the easement crosses (called the "burdened property"), the easement agreement should be recorded with the Register of Deeds in the county where the property is located. Wis. Stat. § 893.33 has long required that to continue the effectiveness of an easement, another instrument must be timely recorded expressly referring to the original easement ("re-recorded"), even if the original easement on its face says it never expires. Until July 1, 1980, the requirement to re-record was 60 years. That meant the easement had to be put of record at least every 60 years or it was no longer enforceable.

In the late 1970s, the Wisconsin Legislature changed the statute so that on July 1, 1980, the 60-year re-recording period was reduced to 40 years. Easements recorded on and after July 1, 1980, are enforceable for 40 years, unless properly extended. The legislative change also meant that any document initially covered by the 60-year recording requirement now, at least arguably, has to be re-recorded on or before July 1, 2020. In other words, documents recorded between July 1, 1960, and June 30, 1980, appear to have the shortened period of 40 years for re-recording of, at the latest, June 30, 2020. That date, June 30, 2020, is now upon us.

The seller has a property benefited by an easement recorded in 1970. How does he make sure it continues?

Many easements recorded between July 1, 1960, and June 30, 1980, may not be enforceable unless properly re-recorded on or before June 30, 2020. Thus the best practice would be to re-record the easement now to continue its enforceability, or alternatively the parties can enter into a new easement. Property owners should consult an attorney to assist.

How does a property owner re-record the easement to restart the statute of limitations?

Unfortunately, the statute does not provide specific guidance on re-recording. In part, the statute states that, "… the timely recording of an instrument expressly referring to the easements …" will operate to restart the statute of limitations for another 40 years. Although vague, there are some best practices that should be considered, and we strongly encourage the parties to contact their attorney to assist in maintaining the enforceability of easements.

One option to consider for the re-recording would be to create an affidavit with the owner's attorney that says the easement is being re-recorded for purposes of complying with the statute and

attach a copy of the original easement. To ensure that the re-recorded easement can be found in the public records by all affected parties, it would be best practice to properly identify the current owners of the land (both benefited by the easement and burdened by the easement) and the legal descriptions of the property (both of the benefited parcel and the burdened parcel) in the affidavit.

Additionally, if a property owner is conveying a parcel for a new transaction now and the property being conveyed is benefited by an access easement, they should strongly consider having the new deed drafted with a specific reference to the recording data of the previous easement and including the legal description of the easement area if available.

What happens if the easement is not timely re-recorded?

If not timely and properly re-recorded, the easement probably is no longer enforceable as originally intended. It is strongly advisable to consult an attorney before placing anything of record.

How will this impact the ability to get title insurance?

This is very fact intensive, but where the easement was not timely re-recorded, it is likely a title company will not be able to provide insurance that the easement is enforceable or ensure that the property has legal access. It is also important to know, in most cases, that the title insurance policy only insures issues prior to the date of policy.

Does the statute of limitation for easement enforcement apply to all types of easements?

No. There are a number of different easements this statute does not currently apply to, with certain conservation easements, utility easements and easements benefiting railroads being a few of the named exceptions.

Where can one get more information about easements?

Generally Wisconsin access easement law is set forth in Wis. Stat. § 706.02, § 893.33 and case law interpreting those statutes. Whether an easement is or is not enforceable typically is fact intensive and many times must be vetted through the courts when neighbors are in a disagreement.

As to whether a particular easement either benefits or burdens a particular property, a party may want to review its title insurance policy or engage a local title insurance company that can provide a search of the property for a fee. Finally, as to the scope of the easement or whether the easement is enforceable, consult with an attorney.

DISCLAIMER: The information contained in this article is solely for general interest. This information is general in nature and is presented without any warranty or representation. This article should not be relied or acted upon or construed as legal advice and is not a substitute for obtaining legal advice from an attorney licensed in Wisconsin.

Founded in 1906, the Wisconsin Land Title Association (WLTA) is an association dedicated to the advancement of the profession of evidencing title to real property. WLTA members consist of a cross section of real estate professionals including title insurance agents and underwriters, attorneys, REALTORS®, mortgage lenders and registers of deeds. The WLTA aligns itself with other associations and organizations to streamline homeownership and transfers of real property.

Resources

Learn more about easements from the following WRA resources:

- "Private Access Easements" in the Thursday Takeaways video series: www.wra.org/ThursdayTakeaways/Episode33 (www.wra.org/ThursdayTakeaways/Episode33)
- "Easements: Re-record or Lose?" in the January 2015 *Wisconsin Real Estate Magazine*: www.wra.org/WREM/Jan15/Easements (www.wra.org/WREM/Jan15/Easements)