



Life in upstate New York: The difference in the practice of real estate law from downstate

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I have practiced law and worked in the title industry for over 25 years. Boy, I must be getting old! It continues to surprise me how different the practice of real estate law is in our part of the state, than it is in New York City and the surrounding counties.

An abstract of title? What is that? In WNY, it is customary practice for the seller to pay for and provide a search of the applicable county clerk records. This search, a certified/guaranteed document, is prepared by a local title company. In the downstate world the search is done by the company that issues the title insurance policy and the cost for the search is included in the title insurance premium. As a result the cost for title insurance downstate is 20% higher than it is in WNY.

In addition to the search product being prepared, the method of searching is quite different. In N.Y.C. and some of the surrounding counties the real property is searched by section, block, and lot. Plug in this information and everything that affects that parcel will show up. It is then the title examiner's role to determine which of the documents shown on the search are still relevant to the status of title.

Upstate N.Y. is based on a grantor/grantee index system. Under this system the names of all of those in the chain of title are searched. It is then the role of the abstractor and title examiner to evaluate the information and again report to the customer what matters affect the seller's ability to convey marketable title.

Now I've raised another concept that divides our state. The normal contract used in WNY provides that the seller must convey "marketable title." The definition of what makes a title marketable could be the subject of a whole other article. Suffice it to say for our purposes, that marketable title is one which a reasonable purchaser would accept as being free from potential litigation. The seller in WNY, particularly on residential transactions, conveys title by a warranty deed, in which he or she warrants or guarantees that the title is without defects. Downstate the seller customarily conveys title by use of bargain and sale deed. While this deed potentially conveys just as good a title as the warranty deed, there is no warranty that the back title is clear of defects. This form in essence only provides that the seller has done nothing to cause a problem with title.

In the N.Y.C. area, it is standard practice for the buyer to order various municipal searches from the title company. These consist of certificate of occupancy searches, street reports, and other various and sundry searches that while they may provide important information to a potential buyer are irrelevant from the standpoint of issuing a title insurance policy. This due diligence responsibility in upstate N.Y. therefore falls to the buyer and their counsel.

Finally the recording process varies greatly between upstate and downstate. In most upstate counties, after the physical closing takes place, usually at the lender's attorney's office, the

documents to be recorded are delivered to the appropriate title company. That company then searches the records one last time to cover the gap between when the abstract was last redated through the date of closing. Assuming no new defects to title are disclosed, the papers are presented to the county clerk for recording. The documents are reviewed by an employee at the clerk's office and if deemed acceptable they are recorded and a receipt is furnished showing the date and time of recording and further showing the book and page that the instruments are recorded in.

Life is not so simple in the downstate world. Although the title company does search the records on the day of closing, documents are not recorded nearly as quickly. Rather a recording package is delivered to the clerk's office and you may get a receipt showing when the package was received. However, there is a delay of somewhere between a couple of weeks to a couple of months, depending on what county you are dealing with, before the documents are actually recorded. In addition, the documents are not reviewed upon presentation. Therefore you might get your recording package returned to you as rejected where the clerk's employee finds some defect. The return package might not show up for several weeks and therefore it is incumbent upon all parties, but especially the title company, to have a good system in place to ensure that all packages submitted for recording are tracked properly to establish that all transactions are recorded in a timely manner. This is of particular importance to the title company as the title insurance policy insures over defects in title that arise between the date of closing or other date the parties make the title insurance policy effective, and the date of recording.

This article has tried to give the reader a flavor for wide variations in customs and practices within NYS. It is by no means exhaustive. The other factor that has become more prevalent in our industry is that quite often all of the parties to the transaction are from states other than N.Y. Imagine trying to explain all of our nuances to whom many of these concepts are foreign.

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