

CHAPTER I

The Marketable Record Title Act

STANDARD 1.1

EFFECT OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE MARKETABLE RECORD TITLE ACT REMEDIES TITLE DEFECTS WITHIN ITS SCOPE.

Authorities: MCL 565.101 through 565.109. *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 423 NW2d 266 (1988).

Comment: The stated legislative purpose of the Marketable Record Title Act is to simplify and facilitate land title transactions by providing a statutory basis for establishing record title with reference to a period of at least 40 years (at least 20 years for certain mineral interests). The effect of the Act is to extinguish by operation of law certain interests and claims which arise out of any act, transaction, event or omission preceding the 40-year period (or the 20-year period for certain mineral interest), subject to specified exceptions and limitations. The 20-year period applies only to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner.

An interest in land is preserved under the Act by the recording during the 40-year period (or during 20-year period for certain mineral interests) of a notice, verified by oath, setting forth the nature of the interest claimed. A mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner, is also preserved by the recording within three years after December 22, 1997, of a notice setting forth the nature of the interest claimed. See also Standard 15.4 with respect to certain severed oil and gas interests. The title resulting from application of the Act's remedial provisions is marketable record title. MCL 565.103. Marketable record title under the Act may not be equivalent, however, to

a marketable title at common law or to a commercially marketable or merchantable title, as those terms are generally used. One may have a marketable record title under the Act which is still properly subject to objection.

STANDARD 1.2

ELEMENTS OF MARKETABLE RECORD TITLE

STANDARD: A PERSON HAS MARKETABLE RECORD TITLE IF:

(A) THERE IS AN UNBROKEN CHAIN OF RECORD TITLE FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); AND

(B) THERE IS NO ONE IN HOSTILE POSSESSION OF THE LAND.

Authorities: MCL 565.101, 565.101a and 565.103. *Cook v Grand River Hydro-electric Power Co.* 131 Mich App 821, 346 NW2d 881 (1984); *Rush v Sterner* 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Railway Co.* 167 Mich App 562, 423 NW2d 266 (1988).

Comment: The required period of an unbroken chain of record title is 20 years with respect to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner.

STANDARD 1.3

UNBROKEN CHAIN OF RECORD TITLE

STANDARD: A PERSON HAS AN UNBROKEN CHAIN OF RECORD TITLE IF:

(A) THERE IS EITHER:

(1) A CONVEYANCE OR OTHER TITLE TRANSACTION WHICH PURPORTS TO CREATE AN INTEREST AND HAS BEEN A MATTER OF RECORD FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); OR

(2) A SERIES OF CONVEYANCES OR OTHER TITLE TRANSACTIONS OF RECORD IN WHICH THE FIRST CONVEYANCE OR TITLE TRANSACTION HAS BEEN A MATTER OF RECORD FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); AND

(B) THERE IS NOTHING OF RECORD PURPORTING TO DIVEST THE PERSON OF TITLE.

Problem A: Frank Thomas was the grantee in a deed of Blackacre recorded in 1960. No instrument affecting Blackacre has been recorded since 1960. In 2003, does Thomas have an unbroken chain of record title?

Answer: Yes.

Problem B: Arthur Gates was determined to be the owner of Blackacre by a final court order entered in 1961. A certified copy of the order was recorded in 1962. No other instrument affecting Blackacre has been recorded since 1962. In 2003, does Gates have an unbroken chain of record title?

Answer: Yes.

Problem C: Frank Thomas was the grantee in a deed of Blackacre recorded in 1960. He conveyed Blackacre to Janet Tillson by a deed recorded in 1965. In 1985, a deed of Blackacre from Janet Tillson to Richard Cook was recorded. No other instrument affecting Blackacre has been recorded since 1965. In 2006, does Cook have an unbroken chain of record title?

Answer: Yes.

Problem D: In 1961, the estate of Arthur Gates was probated. Blackacre was included in the inventory of the estate, although Gates did not appear in the chain of record title. A certified copy of the order assigning the residue (specifically describing Blackacre) to his two daughters as sole heirs at law was recorded in 1962. A deed from the heirs at law to Ralph Allan was recorded in 1993. No other instrument affecting Blackacre has been recorded since 1962. In 2003, does Allan have an unbroken chain of record title?

Answer: Yes.

Problem E: Frank Thomas was the grantee in a deed of Blackacre executed in 1960 by a stranger to the title. The deed was recorded in 2001. No other instrument affecting Blackacre has been recorded. In 2003, does Thomas have an unbroken chain of record title?

Answer: No. Thomas's chain of record title begins with the recording of his deed in 2001.

Problem F: Frank Thomas, the owner of Blackacre, conveyed Blackacre to Janet Tillson, but reserved an undivided one-half interest in iron ore and coal. The deed was recorded in 1970. By deed recorded in 1980 Tillson conveyed Blackacre to Richard Cook, but the deed made no reference to Thomas's reserved iron ore and coal interest. There was no production of iron ore or coal from Blackacre. No other instrument affecting Blackacre was recorded after 1980. In 2001, does Cook have an unbroken chain of record title to all interest in Blackacre?

Answer: Yes.

Authorities: Problems A and B: MCL 565.102(a).

Problems C and D: MCL 565.102(b).

Problem E: MCL 565.101.

Problem F: MCL 565.101(a).

Comment: See the Comment in Standard 1.1 with respect to preserving an interest by recording a notice of the interest claimed.

STANDARD 1.4

MATTERS OF RECORD PURPORTING TO DIVEST

STANDARD: MATTERS PURPORTING TO DIVEST WITHIN THE MEANING OF THE MARKETABLE RECORD TITLE ACT ARE THOSE MATTERS APPEARING OF RECORD WHICH, IF TAKEN AT FACE VALUE, INDICATE THAT THE INTEREST HAS BEEN DIVESTED FROM A PERSON.

Problem A: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1999 a warranty deed describing Blackacre and executed by a stranger to the title was recorded. Is this deed an instrument purporting to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: No. The deed did not purport to divest Thomas of his interest because there is nothing in the deed indicating that the grantor had acquired the interest of Thomas.

Problem B: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1999 a mortgage of Blackacre with covenants of warranty executed by a stranger to the title was recorded. Does the mortgage purport to divest Thomas of any interest within the meaning of the Marketable Record Title Act?

Answer: No. The mortgage did not purport to divest Thomas of his interest because there is nothing in the mortgage indicating that the mortgagor had acquired the interest of Thomas.

Problem C: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1996 the estate of Arthur Gates, a stranger to the title, was probated. By Gates's will, Blackacre was specifically devised to Arthur Gates, Jr. Certified copies of the will and of the order assigning the residue of the estate were recorded in 1998. Do the will and the order assigning residue constitute instruments purporting to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: No. The reasoning is the same as in the preceding answers.

Problem D: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre from Janet Tillson to Harry Cook, recorded in 1998, recited that Frank Thomas died intestate and that the grantor was his sole heir at law. Does this deed purport to divest Thomas of his interest within the meaning of Marketable Record Title Act?

Answer: Yes. If the recitals in the Tillson deed are true, Cook has acquired the interest once vested in Thomas. Even if the recitals are not factually correct, the deed in question is one purporting to divest within the meaning of the Act.

Problem E: Wendy Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre recorded in 1998 was executed by Wendy Thomas, by John Smith, her attorney-in-fact. No power of attorney was recorded. Does this deed purport to divest Thomas of her interest within the meaning of the Marketable Record Title Act?

Answer: Yes.

Problem F: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre executed by Janet Tillson, referring to the land as “being the same land heretofore conveyed to me by Frank Thomas,” was recorded in 1988. No deed from Thomas to Janet Tillson was recorded. Does the deed executed by Janet Tillson purport to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: Yes.

Problem G: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1998, an affidavit was recorded in which a stranger to the title stated that “he and his predecessors in occupancy have been in continuous, open, notorious and adverse possession of Blackacre as against the world for the preceding 15 years.” Does this instrument purport to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: Yes. The affidavit indicates that Thomas's interest has been terminated by adverse possession for the statutory period.

Authorities: MCL 565.101 and 565.102.

Comment: Although an instrument may not be one purporting to divest a person of an interest within the meaning of the Marketable Record Title Act, the instrument should not necessarily be disregarded by a title examiner. Thus in Problem A the deed recorded in 1999 is not one purporting to divest Frank Thomas and therefore does not preclude him from having or acquiring a marketable record title. On the other hand, a person cannot have marketable title if the land is in the hostile possession of another. The 1999 deed may give notice of the hostile possession or of some other interest or claim. The deed would also be an instrument purporting to create an interest in the grantee within the terms of Section 2 of the Act. Accordingly, a prudent title examiner would not ignore it. Concerning matters of record purporting to divest, see *Murray v Buikema*, 54 Mich App 382, 221 NW2d 193 (1974).

STANDARD 1.5

HOSTILE POSSESSION OF ANOTHER

STANDARD: NO PERSON CAN HAVE A MARKETABLE RECORD TITLE TO ANY INTEREST IN LAND, WITHIN THE MEANING OF THE MARKETABLE RECORD TITLE ACT, IF THE LAND IS IN THE HOSTILE POSSESSION OF ANOTHER PERSON.

Problem A: Frank Thomas was the last grantee in the chain of title to Blackacre by deed recorded in 1960. In 1998, Ralph Allan entered into and remained in hostile possession of Blackacre. There is nothing else of record. In 2003, does Thomas have a marketable record title within the meaning of the Marketable Record Title Act?

Answer: No.

Problem B: Frank Thomas was the last grantee in the chain of title to Blackacre by deed recorded in 1960. In 1961, a deed executed by a stranger to the title and conveying Blackacre to Ralph Allan was recorded. There is nothing else of record. In 2003, Allan was in actual possession of Blackacre, hostile to Thomas. In 2003, does either Thomas or Allan have a marketable record title within the meaning of the Marketable Record Title Act?

Answer: Allan has marketable record title. Thomas does not have marketable record title because Allan has hostile possession.

Problem C: Same facts as in Problem B, except that Thomas was in actual possession of Blackacre, hostile to Allan. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Thomas has marketable record title. He has an unbroken chain of title extending back at least 40 years. The deed from the stranger to Allan is not an instrument purporting to divest Thomas of the interest created in him by the deed recorded in 1960. Allan does not have marketable record title because Thomas has hostile possession.

Problem D: Same facts as in Problem B, except that in 2003 Blackacre is unoccupied. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Yes. Thomas and Allan each have marketable record title. Thomas and Allan each has an “unbroken chain of title” extending back at least 40 years, there is nothing purporting to divest either of them, and there is no one in hostile possession. See Standard 1.7 regarding conflicting marketable record titles.

Problem E: Same facts as in Problem B, except that in 2003 Adam Johnson is in hostile possession of Blackacre. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer No.

Problem F: Same facts as in Problem B, except that in 2003 Adam Johnson is in possession of Blackacre, hostile to Allan, and there is a recorded lease from Thomas to Johnson, dated and recorded in 1995, purporting to lease Blackacre to Johnson for 12 years. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Thomas has marketable record title (subject to the lease), because the possession of Johnson is subordinate to the title of Thomas and therefore is not hostile to him. Because Johnson’s possession is hostile to Allan, Allan does not have marketable record title.

Authorities: MCL 565.101 and 565.102. *Cook v Grand River Hydroelectric Power Co.*, 131 Mich App 821, 346 NW2d 881 (1984); *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985).

Comment: The Committee expresses no opinion as to what specific acts may constitute hostile possession.

STANDARD 1.6

EFFECT OF THE MARKETABLE RECORD TITLE ACT ON PRIOR INTERESTS

STANDARD: A PERSON WHO HAS MARKETABLE RECORD TITLE HOLDS TITLE FREE OF:

ANY INTEREST, CLAIM OR CHARGE, THE EXISTENCE OF WHICH DEPENDS IN WHOLE OR IN PART UPON ANY ACT, TRANSACTION, EVENT OR OMISSION WHICH PRECEDES AT LEAST A 40-YEAR CHAIN OF RECORD TITLE (AT LEAST A 20-YEAR CHAIN OF RECORD TITLE FOR CERTAIN MINERAL INTERESTS); IF:

(A) THE MINIMUM 40-YEAR CHAIN (MINIMUM 20-YEAR CHAIN FOR CERTAIN MINERAL INTERESTS) INCLUDES NO REFERENCE TO THE INTEREST, CLAIM OR CHARGE, AND NO NOTICE OF CLAIM BASED THEREON HAS BEEN FILED PURSUANT TO SECTIONS 3 AND 5 OF THE ACT; AND

(B) THE INTEREST IS NOT EXCEPTED FROM THE APPLICATION OF THE ACT BY SECTION 4;

BUT THE TITLE IS SUBJECT TO:

ANY INTEREST, CLAIM OR CHARGE WHICH ARISES FROM, OR IS REFERRED TO IN, ANY INSTRUMENT WITHIN THE MINIMUM 40-YEAR CHAIN OF RECORD TITLE (MINIMUM 20-YEAR CHAIN FOR CERTAIN MINERAL INTERESTS).

Problem A: Blackacre was conveyed to John Pond by deed recorded in 1955. The deed stated that Pond or his heirs had the right to re-enter Blackacre in the event of a breach of certain conditions stated in the deed. Pond conveyed Blackacre to Frank Thomas by deed recorded in 1960, but the deed did not state or refer to the right of entry. None of the instruments in the chain of title since 1960 contains a reference to the right of entry. No notice of claim has been recorded.

Thomas is in possession of Blackacre. In 2003, does Thomas hold title to Blackacre free of the right of entry?

Answer: Yes. Thomas holds the title free of the right of entry because it does not appear in any instrument in his 40-year chain of record title.

Problem B: Blackacre was conveyed to John Pond by deed recorded in 1955. The deed stated that Blackacre was conveyed “so long as” it was used for a specified purpose, but if it ceased to be so used, Blackacre would revert to Pond and his heirs. Pond conveyed Blackacre to Paula Bell by deed recorded in 1960. The deed specifically referred to the possibility of reverter. Paula Bell conveyed Blackacre to Frank Thomas by deed recorded in 1980. The deed did not refer to the possibility of reverter. No other instrument affecting Blackacre has been recorded since 1980. Thomas is in possession of Blackacre. In 2003, does Thomas hold title to Blackacre free of the possibility of reverter?

Answer: No. Although Thomas holds marketable record title to Blackacre, he does not hold the title free of the possibility of reverter because it is referred to in the 1960 deed, which is the deed commencing Thomas’s 40-year chain of record title.

Authorities: MCL 565.101 through 565.105.

Comment A: The effect, if any, of MCL 554.61 *et seq.*, relating to the duration of rights of entry and possibilities of reverter, has not been considered in the preparation of this Standard. See, Standards 9.10 and 9.13.

Comment B: Under the facts of Problems B, one of the instruments in the unbroken chain of title of Thomas specifically refers to a possibility of reverter. The Committee expresses no opinion as to whether a general reference, such as “restrictions of record” or “restrictions and easements of record, if any” is effective to preserve the interests.

Comment C: The Marketable Record Title Act is not effective to bar the following interests:

- (a) The right of a lessor, or the lessor’s successor in interest, to possession upon the expiration of a lease;

- (b) The right of a lessee, or the lessee's successor in interest, in and to a lease;
- (c) The interest of a mortgagor or mortgagee until the instrument establishing the interest has become due and payable, "except where such instrument has no due date expressed, where such instrument has been executed by a railroad, railroad bridge, tunnel or union depot company, or any public utility or public service company";
- (d) Any easement, or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of use;
- (e) Any easement, or interest in the nature of an easement, or rights appurtenant to the easement granted, excepted or reserved by the recorded instrument creating it, including any rights for future use, if the existence of the easement, or interest in the nature of an easement, is evidenced "by the location beneath, upon or above any part of the land described in such instrument of any pipe, valves, road, wire, cable, conduit, dock, sewer, tract, pole, tower or other physical facility," whether or not the existence of the facility is observable; and
- (f) Any interest owned by the United States, or by the state of Michigan or any department, commission or political subdivision thereof.

MCL 565.104.

Comment D: The required period of an unbroken chain of record title is 20 years with respect to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner. MCL 565.101.

STANDARD 1.7

CONFLICTING MARKETABLE RECORD TITLES

STANDARD: IF TWO OR MORE MARKETABLE RECORD TITLES EXIST UNDER THE MARKETABLE RECORD TITLE ACT, CONFLICT BETWEEN THEM MAY BE RESOLVED BY THE OPERATION OF SECTION 3 OF THE ACT. UNDER SECTION 3, THE HOLDER OF A MARKETABLE RECORD TITLE HOLDS FREE ONLY OF CLAIMS THE EXISTENCE OF WHICH CANNOT BE DISCOVERED BY AN EXAMINATION OF THE RECORDS COVERING THE PERIOD RELIED UPON TO MAKE UP THE UNBROKEN CHAIN OF TITLE OF RECORD.

Problem A: Blackacre was conveyed to Frank Thomas by deed recorded in 1945. A deed from a stranger to the title conveying Blackacre to Ralph Allan was recorded in 1955. Allan conveyed Blackacre to Iva Grant by a deed recorded in 1975. Iva Grant conveyed Blackacre to Theodore Worth by a deed recorded in 1976. There is nothing else of record since 1945. Blackacre is not occupied. In 2003, does Worth have marketable record title free of the claim of Thomas?

Answer: Yes. Worth has an unbroken chain of title of record, there is nothing of record purporting to divest him of the interest and there is no one in hostile possession. Although the deed from the stranger to Allan does not purport to divest the interest of Thomas, it is nevertheless an instrument which purports to create an interest in Allan and may therefore constitute the basis for the creation of a new marketable record title upon the expiration of 40 years after the date of its recording.

Thomas's deed is an instrument recorded more than 40 years in the past which purports to create an interest in him; the deed to Allan from a stranger to the title does not purport to divest Thomas and there is no one in hostile possession.

Under Section 3 of the Act, these titles are held "free and clear of any interests...the existence of which depends...upon any transaction... that occurred *prior to such 40 year period*..." Thomas must include

the 1945 deed in order to make up his unbroken chain of title of record, because that is the recorded instrument commencing his chain of record title under the Act. The Act benefits Thomas's title by causing it to be free and clear of any claim based on a transaction that occurred before the commencement of his chain of title. However, Thomas's title cannot be held free of claims arising from instruments recorded after the instrument commencing his chain of title. Because the instruments comprising Worth's title would be discovered by an examination of the records covering the period of time upon which Thomas must rely, Thomas's title is not held free of Worth's interest. On the other hand, because Worth's 40-year chain of record title commenced in 1955, he and his successors in interest are entitled to hold the title free and clear of the claim of Thomas, because Thomas's title depends upon the 1945 deed, which evidences a transaction that occurred before Worth's 40-year chain of record title. The existence of Thomas's claim cannot be ascertained by an examination of the records covering the period upon which Worth and his successors would rely to make up the unbroken chain of title of record, because the deed in favor of Thomas was recorded prior to the commencement of Worth's 40-year chain of record title.

Problem B: Same facts as in Problem A, except that a deed from Frank Thomas conveying Blackacre to Burt Tillson was recorded in 1970. In 2003, does either Worth or Tillson have a marketable record title to Blackacre?

Answer: No. Neither party is entitled to the benefit of Section 3 of the Act as against the other. Worth is not entitled to the benefit of Section 3 as against Tillson even though Tillson's title depends in part upon the deed to Thomas in 1945, because the deed from Thomas to Tillson was recorded during the 40-year period relied upon by Worth. The Act bars only those claims the existence of which cannot be ascertained by examination of the records covering the 40-year period being relied upon. Although Tillson has a marketable record title within the meaning of the Act, he is not entitled to the benefit of Section 3 of the Act as against Worth's interest, because the deeds in Worth's chain of title were recorded within the 40-year period relied upon by Tillson. The competing claims must be resolved in accordance with other principles.

Problem C: Same facts as in Problem A, except that a deed from Frank Thomas conveying Blackacre to Burt Tillson was recorded in 1994. In 2003, does either Worth or Tillson have a marketable record title to Blackacre?

Answer: No. Neither party is entitled to the benefit of Section 3 of the Act as against the other. Although the deed to Tillson was recorded more than 40 years after the deed to Thomas, the deed was recorded within Worth's 40-year chain of record title.

Authorities: Problems A, B and C: MCL 565.102 and 565.103.

Comment A: Under MCL 565.101, the requisite period of an unbroken chain of title of record is 20 years with respect to a mineral interest in any land if the mineral interest is owned by a person other than the owner of the surface of the land. As used in the Act, "mineral interest" does not include interests in oil, gas, sand, gravel, limestone, clay or marl.

Comment B: A title, though a marketable record title under the Act, may be extinguished by adverse possession.

