STATUTES OF LIMITATION AFFECTING RECORDED EASEMENTS
by Jacob Frost, ATG Law Clerk

Buying real estate can often be a risky venture, particularly when others might hold a relatively old adverse easement interest in the buyer’s newly purchased property. To help alleviate buyers’ concerns and clear title, the Wisconsin legislature passed two different statutes of limitation dealing with easements: Wisconsin Statutory Sections 893.15 and 893.33(6). In addition, Section 706.09 allows a real estate purchaser an affirmative defense against an action to enforcement an easement. See Turner v Taylor, 268 Wis 2d 628, 641, 673 NW2d 716, 723 (Wis App Ct 2003). Understanding both the relationship between, and applicability of, the two statutes of limitation and the statutorily provided affirmative defense to an adverse interest aids the lawyer in giving informed advice to a client regarding potential easements affecting title. ATG requires that members search 60 years back to find any and all easements recorded within that time, which is the same as the Wisconsin Abstracting Standards’ guideline. Searching the record 60 years back for easements ensures that, regardless of which statute of limitations applies in a given situation, the buyer is aware of which easements are valid and which have been extinguished by the statute of limitations.

Why it is important to continue requiring members to search 60 years back is apparent by examining both how the two different statutes of limitations relate to each other, and the relatively narrow applicability of the affirmative defense to the enforcement of an easement provided by Section 706.09. Section 893.33(6) requires an action to enforce a recorded easement to be filed within 40 years from the date of its latest recording, only when that easement was last recorded on or after July 1, 1980. Wis Stat § 893.33(8). Thus, actions to enforce easements recorded in 1980 or later cannot be barred under Section 893.33(6) until July 1, 2020 or after. However, Section 893.33(8) provides that Section 893.15(5) (1977) bars all actions to enforce easements recorded prior to July 1, 1980, as long as the easement also had not been recorded within the last 60 years. Section 893.15(5) states that:

Actions to enforce easements, or covenants restricting the use of real estate set forth in any instrument of public record shall not be barred by this section for a period of 60 years after the date of recording such instrument, and the timely recording of instruments expressly referring to such easements or covenants or of notices pursuant to this section shall extend such time for 60-year periods from such recording.

Section 893.33(8) references Section 893.15(5), providing that “[i]f 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.” For example, if an easement had been last recorded in 1979, the forty-year statute of limitations of Section 893.22(6), would apply because the 40-year period, starting in 1980, would terminate in 2020 – 19 years before the 60-year period of Section 893.15(5) would terminate in 2039. However, if an easement had been last recorded in 1959, the 60-year limitation of 893.15(5) would apply because the 60-year period terminates in 2019 – one year before the 40-year period’s termination starting in 1980 and ending forty years later in 2020. Therefore, whether one statute applies over the other depends on the date the easement was last recorded.

Note that the limitations under Sections 893.33(6) and 893.15(5) apply only to recorded easements. Any prescriptive easement falls under the 30-year time limitation set forth in Section 893.22(2). See Schauer v Baker, 270 Wis 2d 714, 678 NW2d 258 (Wis App Ct 2004); see also Figluizzi v Caracajou Shooting Club of Lake Koskonom, 184 Wis 2d 572, 516 NW2d 410 (Wis 1994). For an easement to be considered recorded, an “instrument of public record” must be filed with the county “expressly referring to such easements” or notices thereof. § 893.15(5); see also § 893.33(6). The limitation period starts to run upon the date the referencing instrument or notice is recorded. Id.

Section 706.09 allows a purchaser who had no affirmative or express notice of the existence of a “prior adverse interest” that would affect the purchaser’s receipt of clear title to raise a successful affirmative defense to an action seeking declaration of assertion of that adverse interest when that adverse interest had not been recorded 30 years prior to the purchase. While easements are not expressly mentioned in Section 706.09, the Turner court held that easements are logically included in the category of “prior adverse interests,” considering that the purpose of the statute is “title curative.” Turner, 268 Wis 2d at 635, 673 NW2d at 721. To clarify, the statute has two prongs that must be satisfied by the defendant-purchaser.

The purchaser must not have had any affirmative or express notice of the existence of the easement prior to or at the time of purchase. Such notice could be actual or constructive, “arising from use or occupancy of the real estate by any person at the time such purchaser’s interest therein arises.” Such occupancy must be “actual, visible, open, and notorious.” § 706.09(2)(a). The statute states further that, “no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate
would...reasonably have disclosed such prior outstanding interest” to the purchaser.” § 706.09(2)(a).

The easement must not have been recorded or “of record” within 30 years prior to the defendant’s purchase. For instance, if the easement was recorded, or some reference to the easement was made in a subsequent recorded deed, within 30 years of the time the purchaser’s interest first arose, Section 706.09 provides no defense. Moreover, Section 706.09 provides no defense if, for example, the easement was recorded over 30 years ago, prior to July 1, 1980, but not more than 60 years ago, and the easement holder uses the easement daily for ingress and egress. Therefore, Section 706.09 would serve as an affirmative defense to an easement not recorded in the 30 years prior to the purchase of the property only when the purchaser is a *bona fide* purchaser. See, *Turner*, 268 Wis 2d at 630, 673 NW2d at 718.

The *Turner* case was an action filed in 2003 to enforce an easement last recorded in 1959. There, the *Turner* court interpreted the reference in Section 706.09(1)(k) to “prior adverse interests” to incorporate easements. The Turners purchased a parcel of land in 1994, and there was no mention in the deed of any easements or other interests burdening the land. *Id.* at 631, 719. The Turners brought suit in 2000 to extinguish the Taylors’ easement. The court found that while the Turners could file suit to enforce the easement under Section 893.33(6) because the interest had been recorded within 60 years, the Taylors could raise the *bona fide* purchaser defense under Section 706.09(1)(k), because the easement had not been recorded within 30 years of the purchase. The court remanded the case for factual determinations on the issue of whether the Taylors had actual or constructive notice of the existence of the easement to satisfy the second prong of the affirmative defense provided under Section 706.09(2)(a). Note that Section 706.09 does not provide a purchaser with a cause of action to extinguish an easement holder’s purported rights. Instead, Section 706.09 only allows a purchaser an affirmative defense to an action brought by the easement holder seeking to enforce those alleged rights.

In conclusion, ATG’s requirement that members search the record 60 years prior to closing is a sound practice, considering that Wisconsin’s 40-year statute of limitations governing recorded easements will not, for practical purposes, take effect until July 2020, and until then, the 60-year statute of limitations governs. While Section 706.09(1)(k) allows a real estate purchaser to assert a *bona fide* purchaser affirmative defense against a claim when the easement asserted was not recorded in the last 30 years, the notice element of the defense is somewhat difficult to prove for the success of the defense. Therefore, compliance with the 60-year statute of limitations is currently the best way to try to minimize the likelihood of surprises for your client after closing.

**NEWS IN THE WISCONSIN OFFICE**

This fall, the dynamics of the ATG Wisconsin Office have changed: We welcome **Guy Brittain** to our team as the Wisconsin Business Development Manager, responsible for new member sales throughout the state. Guy comes to ATG with 12 years of sales experience for a variety of small, medium, and large companies. He successfully worked for CRC INC and Becton Dickinson in the Midwest. We look forward to introducing Guy to our members. If you know a lawyer who may be interested in joining ATG, contact Guy at 800.788.8989 or 920.650.2571. **Sara Geenen**, Legal Assistant, is entering the University of Wisconsin Law School as a full-time student and will continue to work for ATG on a part-time basis. Sara can be reached at 800.788.8989 or 608.358.9246. **Leslie Hejnal**, the Wisconsin office Administrative Assistant, is a sophomore at the University of Wisconsin and goes to a part-time schedule. Leslie can be reached at 800.788.8989.

**New E-mail Addresses for Wisconsin Staff**

We no longer use chorus.net e-mail addresses. Our new e-mail addresses are as follows:

- Anne Blood: ablood@atgf.com
- Guy Brittain: gbritt@atgf.com
- Sara Geenen: sgeenen@atgf.com
- Leslie Hejnal: lhejnal@atgf.com

**NOTE:** It has come to our attention that some people are incorrectly trying to call us at 608.256.8989. You can reach the ATG Wisconsin office at 800.788.8989 or 608.827.5228.

**ATG ILLINI TAILGATE WITH US**

Wisconsin members are invited to join Illinois members and ATG staff at ATG’s tailgate Saturday, October 16, 2004, in Champaign, Illinois. Now we do understand that the Fighting Illini cannot compare to our Badgers. But this is an opportunity to keep an eye on the Badgers’ bowl hopes by watching Michigan take on Illinois, while networking with your Illinois counterparts over great food catered by Famous Dave’s. Interested? Go to the member section of www.atgf.com and click the Illini Tailgate link for more information.