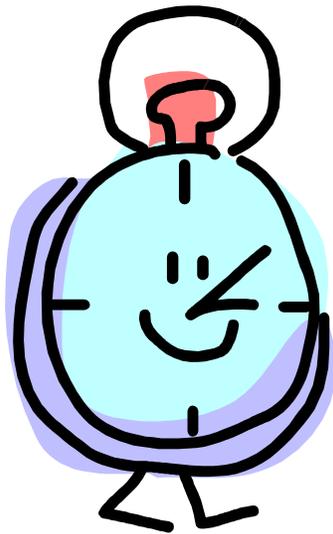


**Time Killers, Deal Killers and  
Other Mines in the Field  
NMREC Course #21020501**



**Time Killers, Deal Killers and Other Mines in the Field**  
**Length of Course: 3 Hours**

**Course Outline**

Objective: The purpose of this course is to teach the New Mexico Real Estate Professional to identify and understand matters that may arise unexpectedly as the title to the property is examined. These matters may cause delays in the closing and can even be the death of a transaction. It will help the real estate professional look for certain red flags so proper information can be collected from the client to avoid last-minute delays.

- I. Introduction
  
- II. Mines in the Field
  - Access
  - Bankruptcy
  - Condemnation
  - Divorces
  - Easements
  - Entities
  - Homeowners Associations
  - Involuntary Liens
  - Joint Ownership
  - Judicial Foreclosure
  - Matters of Probate
  - Property Taxes
  
- III. Open Discussion and Questions.

**Access:**

Definition: Legal access occurs when the property abuts a public roadway or is served by private easements. Physical access may not necessarily be legal access; for example, it may be that access to the property may be only by boat or by dirt bikes and cannot be reached by car. Access is one of the most important attributes that should be investigated prior to purchasing the property.

Examples: Some examples of access problems may involve:

- A lender will require access before approving a loan. In case of foreclosure, the property must be marketable.
- A seller may have had access to the property because he owned all the surrounding property. When a tract is sold without road frontage an easement will be required to obtain access to the property.

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## **Bankruptcy:**

Definition: Bankruptcy proceedings affect the ownership, conveyance and encumbrance of real property as well as the attachment, priority, and enforceability of mortgages, judgments, and liens. Contrary to popular belief, bankruptcy *does not automatically discharge the debtor of all debts, nor does it extinguish all judgments and liens filed against the debtor's property. While the debtor may be personally relieved from liability for properly scheduled pre-bankruptcy debts, pre-petition mortgages, judgments, and other liens continue to encumber the property of the debtor, unless properly invalidated in accordance with specific bankruptcy procedures.*

*A good rule of thumb is: A lien going into bankruptcy is a lien coming out of bankruptcy. Any avoidance of lien by a bankruptcy court must be reviewed by Underwriting Counsel.*

- Chapter 7 governs liquidation or straight bankruptcy cases are the most common of all proceedings. This type of proceeding is available to individuals, partnerships, and corporations with the exception of railroads, insurance companies, and certain savings institutions.
- Chapter 12 is similar in nature to Chapter 11 with respect to the debtor submitting a plan for restructuring his debt. However, Chapter 12 applies only to family farmer with regular annual income.
- Chapter 13 provides debt restructuring relief for individuals with regular income who want to pay their debts, have adequate income to pay such debts, and have a plan for payment of the same that is acceptable to their creditors.

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**Condemnation:**

Definition: Condemnation or eminent domain proceedings can occur through the power of the government to take private property for public use without the owner’s consent. The ALTA policies exclude from coverage any loss arising from “rights of eminent domain.”

Where condemnation or eminent domain proceedings are pending – i.e., for purposes of creating or widening roads or streets – an exception will be made for such proceedings, provided notice of such proceedings is recorded in the public records or the parties have actual knowledge.

Where there exists, a prior taking, an examination of the public records should disclose either:

1. An Order of Taking granting possession to the government provided the requisite deposit of the estimated value of the property being taken has been paid within the statutory period, at which time a Receipt of Deposit will be recorded and title will vest in the government; or
2. A Final Judgment condemning the property, based upon the filing of a petition for eminent domain in the district court records of the appropriate county, such judgment setting forth the statutory period in which the government must make deposit in an amount equal to the determined compensation for the taking as set forth in said judgment.

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**Divorces:**

When dealing with a couple who are selling property because they are getting a divorce, both parties will be required to sign all the documents. Until the final divorce decree is filed, they are still married, regardless of the agreement they have made between themselves regarding the disposition of the property.

If the divorce decree is final and the couple is selling the property per the terms of the divorce, both the final divorce decree and any property settlement agreements must be reviewed prior to closing. If the divorce occurred in another county, a copy of that divorce decree and any property settlement agreements will need to be provided for review prior to closing.

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**Easements:**

Definition: An easement is a right acquired by one party to use the land of another party for special purpose. Any type of easement can cause a time delay in closing depending on the circumstances.

Examples: Some examples of easement problems include:

- Unrecorded pipeline easements
- Property owners not allowed to place permanent structures on the easement (**an encroachment**)
- Blanket easements which give a right to lay pipeline or place utility service lines anywhere across a described piece of property

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## **Entities:**

Definition: An entity is a fictitious person with a life distinct from the persons who own and operate it. The entity exists separate and apart from its creators. A legal entity may hold and convey title. Examples of entities are partnerships, limited liability companies and corporations. Entity problems may arise as several questions are asked:

- Is this a legal entity?
- What is the type of entity?
- Who is authorized to sign on behalf of the entity?
- Is the entity in good standing?

One particular entity which needs focus is a church. In order to be considered marketable, title to church property should be vested either in the trustees of the church (unincorporated churches), a corporation (incorporated churches), or in a bishop or other applicable church official (corporation sole churches). Some considerations to be addressed in dealing with churches include:

- Most unincorporated religious organizations are either Ecclesiastical or Congregational in structure
  - Ecclesiastical: When title is held by a religious organization that is subordinate to a general church organization which includes one or more levels of superior governing bodies, the controlling organization will have adopted a written constitution or similar enactment which address the owning, mortgaging and disposition of property. Title may be vested in trustees and any action by the trustees must be supported by an authorizing resolution of the church membership. If title is held in the name of a bishop, an affidavit should be obtained that the individual signing on behalf of the bishop is in fact the person holding that office at the time.
  - Congregational: Property is held by a wholly independent church. Trustees are usually authorized to act upon the majority vote of the members present at a duly called meeting. The church by-laws or other regulations for meetings should be reviewed and a copy of the resolution authorizing the transaction should be reviewed.

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## **Homeowners Association Fees and Condominium Unit Owners Association Fees:**

Often homeowners believe that if they do not make use of the common elements or neighborhood amenities, they do not have to pay the assessments. Some believe that if they disagree with something the association is doing, or not doing, or if they have been damaged somehow by the association, that this too alleviates their obligation to pay assessments. They are mistaken, as the non-use of common elements is not a defense to the obligation to pay maintenance assessments.

Frequently, the obligation to pay assessments is usually drafted into a set of Restrictive Covenants (often called "Declaration", "Master Deed" or even "Deed Restrictions") which is filed of record prior to the beginning of a residential development. The obligation to pay assessments is independent of whether a particular owner uses the common facilities or amenities.

### **47-16-12. Sale of lots; disclosure certificate.**

A. Unless exempt pursuant to Subsection F of this section, prior to closing, a lot owner shall furnish to a purchaser copies of:

- (1) the declaration of the association, other than the plats and plans;
- (2) the bylaws of the association;
- (3) any covenants, conditions and restrictions applicable to the lot;
- (4) the rules of the association; and
- (5) a disclosure certificate from the association.

B. Within ten business days after receipt of a written request from a lot owner or the lot owner's representative, the association shall furnish a disclosure certificate containing the information necessary to enable the lot owner to comply with the provisions of this section. A lot owner providing a disclosure certificate pursuant to Subsection A of this section shall not be liable to the purchaser for any erroneous information provided by the association and included in the disclosure certificate.

C. A purchaser shall not be liable for any unpaid assessment or fee greater than the amount, prorated to the date of closing, set forth in the disclosure certificate prepared by the association.

D. A lot owner shall not be liable to a purchaser for the failure or delay of the association to provide the disclosure certificate in a timely manner.

E. The information contained in the disclosure certificate shall be current as of the date on which the disclosure certificate is furnished to the lot owner by the association.

F. A disclosure certificate shall not be required in the case of a disposition:

- (1) pursuant to court order;
- (2) by a government or governmental agency;
- (3) by foreclosure or deed in lieu of foreclosure; or
- (4) that may be canceled at any time and for any reason by the purchaser without penalty.

G. The statements contained in the disclosure certificate pursuant to Paragraphs (2) and (3) of Subsection M of Section 47-16-2 NMSA 1978 shall only be valid for sixty days from their creation. Beginning sixty-one days after the creation of the disclosure certificate, the lot owner may request that the association update any changes to statements contained in the disclosure certificate pursuant to Paragraphs (2) and (3) of Subsection M of Section 47-16-2 NMSA 1978. Upon a lot owner's request for changes to statements contained in the disclosure certificate pursuant to this subsection, the association shall provide the updated information within three business days of the lot owner's request and may impose a reasonable fee not to exceed fifty dollars (\$50.00). The updated information shall only be valid for sixty days from the update.

H. Notwithstanding any local ordinance or ordinance enacted by a home rule municipality, an association may impose reasonable charges not to exceed three hundred dollars (\$300) for preparation of a disclosure certificate as required by the Homeowner Association Act, to be collected at the time of closing; provided that the transaction closes.

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## **Involuntary Liens:**

Definition: An involuntary lien is one in which the party does not “voluntary” for debt, in contrast to a voluntary lien in which the party voluntarily signs a document to exhibit his willingness to repay the debt, such as a Mortgage or Deed of Trust. Involuntary liens include federal tax liens, state tax liens, warrants of levy and lien, transcripts of judgment and child support liens.

Problem: There is a federal tax lien filed of record. Who needs to be contacted to determine the status of the lien?

Explanation: Once a federal tax lien is filed of record in the county recorder’s office, it becomes a lien on each piece of property owned by the lien debtor. This lien will stay with the property until released. A federal tax lien is valid for ten years and thirty days after the date of assessment. If however, a federal tax lien notice is refiled before the expiration of ten years and thirty days, the federal tax lien is effective for an additional ten years and thirty days.

Problem: There is a state tax lien filed of record. Who needs to be contacted to determine the status of the lien?

Explanation: Once a state tax lien is filed of record in the county recorder’s office, it becomes a lien on each piece of property owned by the lien debtor. This lien will stay with the property until released. A state tax lien is valid for ten years.

Problem: There is a warrant of levy and lien filed of record. Who needs to be contacted to determine the status of the lien?

Explanation: Once a warrant of levy and lien is filed of record in the county recorder's office, it becomes a lien on each piece of property owned by the lien debtor. This lien will stay with the property until released. At this point, there does not appear to be any limitation period on this type of lien.

Problem: There is a transcript of judgment filed of record. Who needs to be contacted to determine the status of the judgment?

Explanation: Once a transcript of judgment is filed of record in the county recorder's office, it becomes a lien on each piece of property owned by the judgment debtor. This lien will stay with the property until released. Any action to enforce a transcript of judgment must be brought within 14 years from the date the judgment was rendered.

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**Joint Ownership:**

Until a title is researched, many times the actual owners of the property are not known. Even after title is searched, hours can be spent locating heirs, counseling with heirs, explaining problems, and repeating the problems time and time again.

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**Judicial Foreclosure:**

Definition: In the judicial foreclosure process, the creditor sues the debtor for repayment or other satisfaction of the debt, and this results in a judgment being entered against the debtor. In this way, judicial foreclosures are similar to any other sale to enforce a money judgment. The court decrees the property shall be sold to satisfy the judgment, and the resulting sale by proper official (in New Mexico, Special Master) terminates the interest of the debtor. If the proceeds of the sale are not sufficient to satisfy the debt, the creditor can proceed to obtain a *deficiency judgment*, a personal money judgment against the debtor in the unsatisfied amount.

In order to insure title derived from judicial sales, the insurer must be satisfied that all applicable procedural requirements have been met. The process includes: naming all of the necessary debtors and junior lien creditors as defendants (including the United States, if it holds a junior lien); proper notice and service process on all necessary parties; compliance with Soldiers' and Sailors' Civil Relief Act; reinstatement period (in which debtor may reinstate the debt by making up all defaulted payments plus costs); trial; judgment; notice of sale, sale; Redemption period and Special Master's Deed.

It is particularly important to take note of the Redemption period on the mortgage that was the subject of foreclosure. In New Mexico, most mortgages have a redemption period of "one month in lieu of nine month." If the redemption period has not expired an exception must be made when insuring any subsequent sale.

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**Matters of Probate:**

Definitions: Probate comprises the procedural acts necessary to establish the validity of a will. An individual dies intestate when he dies without leaving a valid will. An individual dies testate when he dies leaving a properly executed will that is duly administered to probate by a Court of Law.

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**Property Taxes:**

Definition: All property is subject to valuation for property taxation purposes under New Mexico Law if it has a taxable situs in the state.

Property has a taxable situs in the state if:

- it is real property and is located in the state
- it is an interest in real property and the real property is located in the state
- it is personal property and is physically present in the state on the date when it is required to be valued for property taxation purposes.

In New Mexico, the following property is not subject to taxation:

- Property of the United States, the state and all counties, towns, cities and school districts and other municipal corporations, public libraries, community ditches and all laterals thereof.
- Church property used for religious purposes.
- Property used for educational or charitable purposes.
- Cemeteries not used or held for private or corporate profit.
- Bonds of the state of New Mexico, and of the counties, municipalities and districts thereof.

New Mexico has two main tax exemptions: Head of Household and Veteran’s Exemption. It is up to the owner to apply for these exemptions and the law does not excuse the owner from any obligations for his failure to report the property as required by the regulations.

Taxes in the of \$10.00 or more are payable to the County Treasurer in two equal installments due on November 10 of the year in which the tax bill was prepared and mailed and on April 10 of the following year.

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