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## Section 4. Transferring (*conveying*) and Recording an Interest in Property

### 1. The Land Contract

- a. **Definition:** A contract for the sale of real property.
- b. **Statute of Frauds:** Contracts for the sale of real property must be in writing to satisfy the statute of frauds, and the writing must:
  - i. (1) Be *signed by the party against whom enforcement is sought*
  - ii. (2) *Describe the land*
    1. If the amount of land recited in the land contract is more than the actual size of the parcel?
      - a. The buyer is entitled to specific performance with a pro rata reduction in the purchase price
  - iii. (3) *Recite consideration*
- c. Exception for **Part Performance**: *If 2 of the following 3 requirements are met*, then the doctrine of part performance is satisfied and the contract will still be enforceable despite the lack of a writing:
  1. Buyer has *taken physical possession of the property*; and/or
  2. Buyer has *paid all or part of the purchase price*; and/or
  3. Buyer has made *substantial improvements* to the property.
- d. **The Closing Date**
  - i. **Rule:** Generally, the date of the closing (where the deed and purchase price are exchanged by the parties) is set forth in the contract. A reasonable delay in closing is not grounds for avoiding the contract, unless the contract states that “**time is of the essence**”. Even if the contract does not state that time is of the essence, the party causing the delay will still be liable for any damages resulting from the party’s failure to render timely performance.

### 2. Real Estate Brokers

- a. **Definition:** A real estate broker is a person retained by a seller to sell property or by a buyer to buy property.
- b. **Statute of Frauds:** The agreement between the broker and the seller or buyer must be in writing to be enforceable.
- c. **Payment:** Brokers generally work on commission and take payment in the form of a percentage of the purchase price for the property. If the broker is acting on behalf of the buyer, the broker is entitled to a commission if the broker was responsible for finding the property the buyer ultimately purchased. If the broker is working for the seller, the broker will be entitled to a commission even if the sale is not consummated, as long as the broker found a buyer who was ready, willing, and able to purchase the property.

### 3. Risk of Loss

#### a. Doctrine of Equitable Conversion

- i. **Rule:** Once the land sale contract is signed, the buyer is the owner of the land subject to the condition that he pay the purchase price at the closing. Thus, the *buyer will bear the risk of loss if the property is destroyed between signing of the contract and the closing*, unless the contract says otherwise.

### 4. Implied Promises in The Contract

#### a. Seller must Provide Marketable Title at the Closing

- i. **Rule:** By the date of the closing, the *seller must ensure that title is free from reasonable doubt* (i.e. the threat of litigation).

#### ii. **Examples of Issues that Render Title Unmarketable:**

##### 1. (1) **Adverse Possession**

- a. **Rule:** If even part of the title rests on adverse possession, it is unmarketable.

- i. **Note:** Adverse possession will not render title unmarketable though if the adverse possessor had gone to court to quiet title before the closing.

##### 2. (2) **Encumbrances**

- a. **Rule:** *Servitudes and mortgages will render title unmarketable*, unless the buyer has waived them

- i. **Note:** Seller always has the right to satisfy an outstanding mortgage or lien at the closing, with the proceeds of the sale.

##### 3. (3) **Zoning Violations**

- a. **Rule:** If the property is in violation of a zoning ordinance, title will be unmarketable.



- b. **Note:** Remember grantor promised *to provide marketable* title in the land contract but this duty is extinguished once the deed is executed and delivered.

iii. **General Warranty Deed**

1. **Rule:** In a general warranty deed the grantor warrants against all defects in title including those attributable to himself and his predecessors. The deed generally contains the following covenants:
- a. The following three covenants are considered **PRESENT covenants**, and are breached, if ever, at the moment of the conveyance. In most jurisdictions this means that only the direct grantee of the grantor can sue for a violation of these covenants:
- i. **Covenant of Seisin**
    1. Grantor promises that grantor owns the estate grantor is promising to convey.
  - ii. **Covenant of Right To Convey**
    1. Grantor promises that grantor has the power to make this transfer (i.e. grantor has no temporary restraints or disabilities on grantor's capacity to sell the property).
  - iii. **Covenant against Encumbrances**
    1. Grantor promises that there are no servitudes or liens on the property.
- b. The following three covenants are considered **FUTURE covenants**, and are breached, if, ever, when the grantee's interest in the land is challenged. These warranties are actionable by the direct grantee of the grantor, as well as remote grantees.
- i. **Covenant of Quiet Enjoyment**
    1. Grantor promises that grantee will not be disturbed in possession by a 3rd party's lawful claim of title
  - ii. **Covenant of Warranty**
    1. Grantor promises to defend grantee should there be any lawful claims of title asserted by others
  - iii. **Covenant of Further Assurances**
    1. Grantor promises to do whatever future acts are reasonably necessary to perfect the title if it later turns out to be imperfect

iv. **Statutory Warranty Deed (recognized in some jurisdictions)**

1. **Rule:** Grantor makes the following two promises on behalf of himself (he makes no representations concerning his predecessors in interest though):
- a. (1) Grantor promises that *he hasn't conveyed the estate to anyone else besides the grantee; and*
  - b. (2) *The estate is free from encumbrances made by the grantor.*

6. **Title Insurance**

- a. **Definition:** Title insurance provides purchasers of real estate with protections against issues relating to defects with the title to the property (e.g. claims made by persons claiming ownership of the property, an easement on the property, etc.) that the buyer discovers after closing.
- b. **Protection for Mortgage Companies:** As a condition to receiving a mortgage, most mortgagees require that the buyer (i.e. the mortgagor) also purchase title insurance that covers the mortgagee against any defects with the title to the property.

7. **Persons Authorized to Execute Real Estate Documents**

- a. **Basic Rule:** The statute of frauds requires documents relating to the transfer of an interest in real property to be executed in writing, including deeds and real estate contracts. Under the statute of frauds, deeds must be signed by the grantor and real estate contracts must be signed by the party against whom the contract is being enforced.
- b. **Rule for Agents:** An agent of the grantor may sign the deed or contract (and other related instruments), and an agent for the grantee may sign the contract (and other related instruments), so long as the agent has been given express authority in a signed writing.
- c. **Note for Corporations and Partnerships:** A corporation's articles of incorporation or bylaws and a partnership's partnership agreement will specify which persons within the corporation or partnership are authorized to sign documents relating to real estate transfers (purchases and sales).