MILLER STARR REGALIA

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“Good” Bad Faith vs “Bad” Bad Faith: Equitable Principles and the Doctrines of Adverse Possession and Prescription

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Adverse possession is the acquisition of title to another’s real property by continuous possession and use of the property for the prescribed period of five years. A party seeking title to real property by adverse possession under a claim of right is, by definition, a trespasser or intruder without any bona fide belief that he or she has legal title to the property. For the occupation to be “hostile and adverse,” the claimants’ possession under a claim of right must be wrongful as to the true owners’ title and without recognition of the true owners’ rights.

One court has colorfully stated that the adverse user “must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.” A claimant may perfect title by adverse possession even through his or her claim to ownership of the property is not asserted in good faith and the claimant knows that he or she does not own title to the property. Similar principles apply in the context of prescriptive easements, where the prescriptive use must be open, notorious and without regard to the rights of the underlying owner.

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